

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.2749/Mum/2023
(Assessment Year :2013-14)**

**ITA No.2750/Mum/2023
(Assessment Year :2014-15)**

**ITA No.3613/Mum/2023
(Assessment Year :2016-17)**

&

**ITA No.4342/Mum/2023
(Assessment Year :2017-18)**

DCIT, Central Circle-3(3) Mumbai Room No.1923, 19 th Floor Air India Building Mumbai – 400 021	Vs.	M/s. Avaada Ventures Pvt. Ltd. 406, 4 th Floor, Hubtown Solaris Building N S Phadke Road Andheri East Mumbai – 400 069
PAN/GIR No.AAKCS9700L		
(Appellant)	..	(Respondent)

**CO No.7/Mum/2024
(Arising out of ITA No.2749/Mum/2023)
(Assessment Year :2013-14)**

&

**CO No.6/Mum/2024
(Arising out of ITA No.2750/Mum/2023)
(Assessment Year :2014-15)**

M/s. Avaada Ventures Pvt. Ltd. 406, 4 th Floor, Hubtown Solaris Building N S Phadke Road Andheri East Mumbai – 400 069	Vs.	DCIT, Central Circle-3(3) Mumbai Room No.1923, 19 th Floor Air India Building Mumbai – 400 021
PAN/GIR No.AAKCS9700L		
(Appellant)	..	(Respondent)

Assessee by	Shri Mani Jain & Shri Prateek Jain
Revenue by	Shri Ajay Chandra
Date of Hearing	19/03/2024
Date of Pronouncement	05/04/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the Revenue against separate impugned orders passed by CIT (A)- 51 Mumbai dated 19/05/2023, 27/07/2023 & 25/09/2023 respectively for the quantum of assessment passed u/s.143(3) r.w.s. 153A for A.Y. 2013-14, 2014-15, 2016-17 and 2017-18 and Cross Objection has been filed by the assessee in the A.Y.2013-14 and 2014-15.

2. In so far as Revenue's appeal for the A.Ys. 2013-14 & 2014-15, the common grounds which have been raised, reads as under:-

1 On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the statement recorded u/s. 132(4) does not constitute incriminating material even though the statement is based on the substantial evidence of transactions appearing in the books of account of assessee duly corroborated by the statements of various persons.

2 "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in not considering the decision of Hon'ble Supreme Court in the case of P.R. Metrani v. CIT[2006] 287 ITR 209/157 Taxman 325 (SC) wherein the Hon'ble Supreme Court held that the books of account, documents, money, bullion,

jewellery or other valuable article or thing and any statements recorded of the persons searched may be used as evidence for any proceedings under the Act."

3 "On the facts and in the circumstances of the case, the Id. CIT(A) has erred in holding that the ledger account and other documents found during the search proceedings do not constitute incriminating material."

3. Since the facts and issues are involved in both the years are exactly same including the finding of the Id. AO and Id. CIT (A), therefore, both these appeals are taken simultaneously. In the cross objection, assessee has raised the issue on merits of the additions, as Id. CIT (A) has quashed the assessment and deleted the addition on the ground that the additions made by the Id. AO are beyond the scope of section 153A as they are not based on any incriminating material found during the course of search and both the assessment years were unabated assessments, i.e. the assessments in these cases had attained finality prior to the date of search.

4. The brief facts and background of the case in so far as the grounds raised by the department are that for the A.Y. 2013-14, original return u/s.139(1) was filed on 27/09/2013 declaring total income of Rs.26,42,530/-. The said return was selected for scrutiny and after examining the books of accounts and entries in the balance sheet and the profit and loss account, assessment order u/s.143(3) was passed on 02/11/2015 assessing the total income at Rs.26,73,210/-. Similarly, for the A.Y.2014-15, original return u/s. 139(1) was filed on 19/09/2014 declaring total income of Rs.25,21,610/-. The said return was also selected

for scrutiny and order u/s. 143(3) was passed on 29/08/2016 and total income of Rs.26,30,611/-. Thereafter, a search and seizure action u/s. 132 was carried out in Welspun group of companies on 30/06/2017 which included search in the case of the assessee also. On the date of search, assessment for the A.Y. 2013-14 and 2014-15 had attained finality and accordingly, in view of *proviso* to Section 153A, the assessment for A.Y. 2013-14 and 2014-15 has to be reckoned as unabated assessment.

5. Accordingly, notice u/s.153A was issued on 01/08/2014 and in response to which assessee filed its return of income which was on the same income which was assessed u/s. 143(3).

6. The assessee, i.e., Avaada Ventures Pvt. Ltd. is a private limited company engaged in the field of media and advertising and publicity agents and also taken contracts for various kinds of advertisements on various platforms. Ld. AO noted that M/s. Candor Power Pvt. Ltd merged with M/s. Avaada Power Pvt. Ltd. and now known as M/s. Avaada Ventures Pvt. Ltd. is a group company of Vineet Mittal group of companies. This company has made investments in share capital in Welspun Energy Pvt. Ltd. (WEPL) The ld. AO first proceeded to analyse the various subsidiary companies of the Welspun group and how from different layers the investment had come and then he examined the source of investment in WEPL in the hands of the assessee and he noted that assessee has received funds from Kolkata based companies in A.Y.2013-14 and 2014-15 in the following manner:-

2013-14			
Sr. No.	Name	Nature	Amount(in Rs.)
1	Marina Commercial Pvt. Ltd.	Share Capital	37,55,00,000
2	Rashidhan Infrastructure Pvt. Ltd.	Share Capital	2,54,00,000
	Total		39,79,50,000

2014-15			
Sr. No.	Name	Nature	Amount(in Rs.)
1	Marina Commercial Pvt. Ltd.	Share Capital	5,83,00,000
	Total		5,83,00,000

7. The ld. AO has also analysed various percentage of shareholding in M/s. WEPL by various companies and different layers of subsidiaries and investor companies. Thereafter, in his order he has referred to certain enquiries on the premises of Kolkata based company, the details of such companies have been elaborated at page 8 which included the above two companies, that is, Marina Commercial Pvt. Ltd. and Rashidhan Infrastructure Pvt. Ltd, from whom assessee has received share capital. In the field enquiries before search it was found that the Inspector has submitted a report wherein at the time of enquiry,

it was informed that these companies had been amalgamated and were not existent on these addresses. He also noted that the Directors in six Kolkata based companies including M/s. Nimbus Dealers Pvt. Ltd., M/s Marina Commercial Private Limited; M/s Rashidhan Infrastructure Private Limited and others were mostly common with common address. He also listed the name of the Directors and various companies in the order and their addresses to demonstrate they are same. Thereafter, he has referred to various pre-search enquiries and post-search enquiries conducted on these companies and various statements of the persons which have been reproduced in detail from pages 16-77 of the assessment order.

7.1 In response to the show-cause notice, the assessee submitted the entire details of the share applicant companies, their returns of income, bank statements, financial statements etc. and submitted that they were regularly assessed to tax even under scrutiny proceedings u/s 143(3). The assessee also gave details of nature of activities of these companies and the source of the funds. However, the ld. AO has discarded the assessee's submissions and held that even though ITRs, financial

statements, bank statements have been given, but such a meager profits and turnover of these entities does not instill confidence about their credentials. He also observed that the ultimate source of funds were again from share capital received from shell entities, which were dubious because during the enquiries they were found to be nonexistent on their given address and non compliance of notice u/s. 133(6) by these companies. Thereafter, he had discussed on how these hawala entities operate and referred to various decisions of the Hon'ble Supreme Court including CIT vs. Durga Prasad More reported in 82 ITR 540 and Sumati Dayal vs. CIT reported in 214 ITR 801.

7.2 After discussing various judgments, he held that these are all bogus transaction received from shell companies and accordingly, he has added the share application money received from these companies u/s.68 and accordingly, addition of Rs.39,79,50,000/- was made in A.Y.2013-14 and Rs.5,83,00,000/- for A.Y.2014-15. Apart from that he had also added commission for taking accommodation entry @1% and further added Rs.39,79,500/- in A.Y.2013-14 and Rs.5,83,000/- in A.Y.2014-15.

8. Before the ld. CIT (A), assessee raised legal issue that the ld. AO has passed assessment order u/s.153A and has made addition in absence of any incriminating material found in the course of search. Further during the course of search which continued for four days, no incriminating material whatsoever was found on the share application money or any documents that assessee has taken any accommodation entry. The entire assessment has been passed on the basis of pre-search information and post-search enquiry which was unconnected with the assessee company. Before the ld. CIT (A) assessee has also summarized various findings of the ld. AO wherein certain statements and field enquiries and inspector reports etc. have been referred which was conducted before the search and post search and nothing was connected with share application received by the assessee was found during the course of the search. The same has been tabulated in the following manner:-

Sr No.	Nature of finding	Remarks
1.	Inspector report dated 25.08.2017	Post search enquiries conducted by investigation wing without any reference to any incriminating material

2.	Statement of Saroj Swaika and Renu Swaika u/s 131 dated 30.06.2017 at DDIT(Inv.) office	Third party statement not recorded at the premises of the appellant without any reference to any incriminating material
3	Inspector report dated 30.6.2017	Field Inquiries conducted by the investigation wing without any reference to any incriminating material
4	Statement of Shri Mrudul Kumar Gehlot u/s 131 dated 01. 07. 2017	Statement of employee at the premises of the appellant without any reference to any incriminating material
4	Statement of Shri S.G.Mehta u/s 132(4) dated 30.06.2017 at his office premises	Third party statement not recorded at the premises of the appellant without any reference to any incriminating material
5	Statement of Shri Vineet Mittal u/s 132(4) dated 03.07.2017 and 131 dated 29.07.2017	Statement of promoter at the promises of the appellant without any reference to any incriminating material
6	Statement of Dinesh Dhandhanian u/s 131 dated 19.11.2014 at ADIT(Inv.) office	Pre search enquiries conducted by investigation wing, Kolkata
7.	Statement of Naresh Chhaparia u/s 131 dated 15.09.2014 at ADIT(Inv.) office	Pre search enquiries conducted by investigation wing, Kolkata

8.	Statement of Rajesh Bhuthoha u/s 131 dated 14.11.2014 at ADIT(Inv.) office	Pre search enquiries conducted by investigation wing, Kolkata
9.	Enquiries on various entities registered at Delhi& Mumbai	Post Search enquiries conducted by Investigation wing on third parties
10	Statement recorded of Shri Rajesh Kumar Bhutoria u/s 131 dated 24.08.2017 at DDIT(Inv.) office. Kolkata	Post search statement taken of third party by investigation wing.
11	Statement recorded of Shri Narcsch Kumar Chhapaha u/s 131 dated 24.08.2017 at DDIT(Inv.) office, Kolkata	Post search statement taken of third party by investigation wing.

8.1 Thus, it was contended that the entire finding of the ld. AO is based on:-

a Reliance on statement of promoter and employees of the assessee group without any reference to any incriminating material.

b Reliance on statement of third parties recorded at the DDIT office prior to the search action on the assessee.

c. Reliance on the statement of third parties recorded at the DDIT office during and post the search action conducted at the premises of the assessee.

d. Reliance on the report of the inspector conducted post search action on the assessee.

9. In the entire assessment order, not a single reference of any incriminating material found at the premises of the assessee has been made. Even in the statement recorded, as referred by the ld. AO, was made much prior to the date of commencement of the search in the case of the assessee. In so far as the statement of promoter and employees at the premises of the assessee there is no whisper or any admission regarding the receipt of any accommodation entry and no co-relation with any material found during the search. Even in the statement of Shri Vineet Mittal, Promoter of the group recorded u/s. 132(4), nowhere, he has admitted or stated about any cash credit received in the books of the assessee company as bogus or non-genuine. The entire submissions of the assessee including on merits have been incorporated in the appellate order right from pages 5-77 of the appellate order.

10. The assessee's submissions were forwarded to the ld. AO specifically to rebut the submissions, whether there was any incriminating material found during the course of search in the case of the assessee or. In the remand report of the ld. AO dated 05/07/2022, ld. AO stated that the expression "incriminating evidence" has not been defined in the Income Tax Act.

Incriminating material can be in any form of evidence either document or the entry in the books of accounts, assets, statement given on oath etc., During the course of search on 30/06/2017, various incriminating documents / information was found which reveals that assessee has received accommodation entries. However, no such reference of incriminating documents have been given except for one copy of ledger account of M/s. Marina Commercial Pvt. Ltd about share application money of Rs.57,50,000/- alongwith share application form of Rs.5,30,00,000/- . Ld. AO has then referred to Inspector's report and the finding carried out pre-search and how the business activity has been carried out by these companies. The ld. AO has also analysed the bank statement of shareholders and investors and their purported links to hawala entry operators. The entire content of the remand report has been incorporated in the appellate order from pages 78-85 alongwith remand report dated 26/07/2022 containing one seized material which was in the form of ledger account in the books of the assessee. Thereafter, assessee filed its rejoinder submissions which too have been incorporated and dealt with by the ld. CIT (A) from pages 86-107.

11. The ld. CIT (A) first of all took note of the judgment of the Hon'ble Supreme Court in the case of **Abhisar Buildwell Pvt.ltd reported in 454 ITR 212** and after incorporating the relevant extract laying down the principles in the case of search assessment u/s.153A and analysed the assessment order as well as remand report of the ld. AO. Ld. CIT (A) had discussed each

and every allegation and observations and statements referred by the AO in the assessment order and in the remand report and has given his following finding:-

9.5 Now the question which arises here is regarding the finding of the incriminating material during the course of search based on which the additions have been made by the AO. Based on the submission filed by the assessee, the matter was remanded to AO for her comments on the said issue. Accordingly. AO has issued the remand report dated 05.07.2022 26.07.2022 and 17.01.2023

9.6 In the impugned report, AO has contended that during the search proceedings various incriminating material in the form of documents, statements and information were found/ recorded which revealed that the assessee has received accommodation entries based on which addition has been made. The findings of the AO in the assessment order and remand report based on which the addition has been made can be summarized as under

1 Reliance on statement of promoter and employees of the appellant group.

2 Reliance on statement of third parties recorded at the DDIT office prior to the search action on the appellant.

3. Reliance on the statement of third parties recorded at the DDIT office during and post the search action conducted at the premises of the appellant

4. Reliance on the report of the inspector conducted post search action on the appellant

5. Reliance on the documents seized during the search proceedings

9.7 Before coming to the findings of the AO, it is necessary to consider as to what constitutes an incriminating material. Though the said term has not been defined in the Act, incriminating material may also comprise of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would prima facie show that the real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in ordinary course of business. Until such conditions are satisfied, it cannot be held that every seized material or document found in the course of search as incriminating in nature. In other words, any and every seized material which comes in AO's possession cannot be construed as incriminating material straightaway. Hence, if a search is conducted to investigate certain allegations which are found to be correct during search and based on the various documents collected during the search action, specific information or finding is generated on account of inquiries conducted during search process which has a bearing on the determination of total income of an assessee, the AO would be within his power to proceed under section 153A of the Act against such person on the basis of such finding which would also constitute incriminating material. Hence, if during the course of search action, elaborate and thorough investigations are carried out to verify/examine modus operandi of an illegal scheme orchestrated by certain persons and during such investigations, based on ascertainment of various facts, examination of seized books, recording of statements and analysis of documents of a number of entities in coordination with each other, certain information is generated that (i) the scheme violates the provisions of Income Tax Act and that (ii) such scheme has assisted various parties who have taken benefit of such scheme in introduction of their unaccounted income in their books in the form of eligible and non-taxable income, thus affecting determination of their total

income, then, this information is clearly covered by section 153A of the Act. The findings of search may also lead to gathering of some information or detection of such books of account or documents. seized or requisitioned which impact the determination of total income of an assessee, meaning thereby that these evidences discovered during the search action corroborate each other and indicate suppression of income, suppression of information about the character of a receipts /suppression of tax by a person, whether searched or not. Loosely, these items are known as "incriminating material /evidence being information which was earlier not known prior to the search action and having come to light during the search action, has the potential of affecting determination of income tax of the persons affected by information. If the information pertains to searched person, he is assessed under section 153A and if the information is in respect of a party not covered by search his case is covered under section 153G of the Act

9.8 It is seen that the AO has heavily relied on the statements recorded during the course of the search of various persons and categorized these statements as incriminating material. However, what is important here to see is that whether these statements are suitably corroborated by supporting evidence and material found during the course of the search as the Hon'ble Courts have held in a number of decisions that statements recorded under 132(4) could be treated as incriminating material only when supported by corroborative evidence.

9.8.1 In this regard, reliance is placed on Delhi High Court in the case of PCIT vs. Anand Jain in ITA No. 23/2021 dated 12.02.2021 wherein the court rejected to consider the statement recorded under 132(4) as incriminating material since it was not supported by any corroborative evidence. The relevant portion is reproduced hereunder-

"The preliminary question under consideration before us is whether a statement under Section 132(4) constitutes incriminating material for carrying out assessment under S. 153(A) of the Act. A reading of the impugned order reveals that the statement of Mr. Jindal recorded under Section 132(4) forms the foundation of the assessment carried out under Section 153A of the Act. That statement alone cannot justify the additions made by the AO. Even if we accept the argument of the Revenue that the failure to cross-examine the witness did not prejudice the assessee, yet, we discern from the record that apart from the statement of Mr Jindal, Revenue has failed to produce any corroborative material to justify the additions. On the contrary we also note that during the course of the search, in the statement made by the assessee, he denied having known Mr. Jindal. Since there was insufficient material to support the additions, the ITAT deleted the same. This finding of fact, based on evidence calls for no interference, as we cannot re-appreciate evidence while exercising jurisdiction under section 260A of the Act."

9.8.4 This is supported by the decision of decision of Delhi High Court in the case of CIT Vs Harjeev Agarwal reported in 241 Taxman 199 has held that statement under section 132(4) in the itself does not constitute incriminating material The relevant finding of the Hon'ble High Court is reproduced as under

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 15888(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 assessee 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.

9.9 The appellant has on the other hand vigorously argued that since no corroborative material was found in its case during the course of the search, the statements relied upon by the AO could not be considered as incriminating material.

9.10 As already stated above the assessment order and remand report, AO has referred to the statements of the promoter and various employees of group companies recorded during the search.

9.11 AO has contended that Mr. Mridul Gehlot who was director in certain companies before its amalgamation with the assessee, has accepted that no actual work was done by him. I find that in the statement of Shri Mridul Gehlot recorded u/s 131 during the course of search he has explained that he was working with the group from 2010 and was entrusted with the administrative work in the capacity of Dy. GM (Admin). Further, he also explained that he was appointed director by the promoter considering his managerial potential. However, he had never stated that the said

company was engaged in non-genuine transaction. Therefore no negative inference can be brought out from his statement

9.12 I also find that statement of another employee Mr. Satish Sharma was recorded u/s 131 during the course of search. He has clearly stated that he was in- charge of keeping the books of the group companies and no doubt on the genuineness of the transaction has been raised by him

9.13 The AO has also submitted the statement of one Mr Amad Despande recorded u/s 131. On perusal of the said statement, I find that no question has been asked regarding the share capital received. Further, he has confirmed regarding his directorship and cross question has been asked by the officer Accordingly, no negative inference can be drawn from the impugned statement

9.14 Also, the assessee has explained that that Mr. Mittal, being the key managerial person of the group companies, is undoubtedly expected to be actively involved in the management of the companies. However, it is obvious that due to wide spread business lines and human limitations, he himself cannot look after the affair of all his group companies on his own and thus deputing certain trustworthy and eligible employees as the director of some of his group companies doesn't seem dubious Such set up is widely prevalent in the large scale corporate group wherein the employees in addition to their regular work, are also made director in group companies for administrative and compliance purpose However, such an arrangement cannot be taken as an adverse arrangement.

9.15 Further, I also find that the statement of Mr. Vineet Mittal, promoter of the assessee company, was also recorded u/s 132(4) of the Act wherein there is no acceptance regarding the non-genuineness of the transaction In fact, on being specifically asked regarding the share application money in Q No. 8 on 03. 07.2017, he stated that he shall submit his response in the due course of 20

days. Accordingly the assessee has duly filed its reply in response to summon dated 27.07.2017 wherein all the documents/evidences related to share application money have been submitted The copy of the said reply has been submitted by the assessee. Further Mr. Mittal in his statement has categorically stated that the employees were appointed as directors based on the Merits. No doubt whatsoever has been raised by the AO on the documents submitted by the assessee.

9.16 Accordingly. I find that no incriminating fact has been brought out from the statements recorded by the promoter and employees of the assessee group during the course of search which is corroborated by other incriminating material/evidence gathered during the course of the search Moreover, it is also seen that only the statement of the promoter has been recorded u/s 132(4), while the statement of the employees have been recorded u/s 131 of the Act.

9.17 Secondly, the AO has relied upon certain statements recorded of entry providers who were engaged in the business of providing accommodation entries before the Investigation wing in the year 2014 As per AO, funds were routed through the companies operated by such persons into the companies from whom funds were received to the assessee company. I find that legal position is clear that the incriminating material should be unearthed from the search on the assessee company As apparent from the statements, the same were recorded much earlier to the date of search by the investigation wing independently and had no relation with the assessee I also find that there is no mention of the assessee company or its group by such person in their statements recorded.

9.18 Further, AO has relied upon the statement of third party persons which were recorded consequent to the search action at the assessee company

9.18.1 In this regard, AO has relied upon the statement of one Mr. Saroj Swaika and Mrs Renu Swaika recorded u/s 131 who were ex-directors in some of the companies from which the share capital was received to the assessee group in the assessment order, the AO has produced a table at para no 6.4.2 giving details of directorship of the companies from the share capital has been received. On perusal of the said details, it is noted that the said persons were directors as early as AY 2011-12 which was much earlier to which the share capital were received by the assessee group. Therefore, it is inferred that any comments made by the said persons can be only made applicable to the transaction pertaining to period prior to AY 2011-12 and not after. Further it is also important to note that Mr Swaika in his statement clearly denied of having known to the assessee company (merged companies 16 M/s Juicy International Private Limited & M/s Candor Power private Limited). Further, there is no mention of the assessee group in their statement and therefore, such statement cannot be termed as incriminating material in any case, it is important to note that the above persons were directors in M/s. Nimbus Dealers Pvt Ltd. and M/s Luxury Agencies Pvt. Ltd. However, assessee company has not received any funds from M/s. Nimbus Dealers Pvt. Ltd. and M/s Luxury Agencies Pvt Ltd. Therefore, the question of relevance of such statement in the assessee case doesn't arise.

9.19 Further AO has relied upon the statement recorded u/s 132(4) of the Act of Mr. SG Mehta, CA who was earlier a tax consultant in one of the companies namely M/s Luxury Vinimay Pvt Ltd. In the said statement, when Mr. Mehta was asked about share premium received from Mis Luxury Vinimay Pvt. Ltd, he said that there is no rational behind charging premium and that he had been informed by Mr. Satish Sharma that it was an accommodation entry.

9.19.1 In this regard, I find that Mr. Mehta has expressed his opinion that premium charged by the said company was on the

higher side and he had been informed by Mr. Satish Sharma that it was an accommodation entry Here it is important to note that on being enquired with respect to the persons/ operators who would have arranged such transaction, he responded that he was not aware of the same and simply claimed that Mr. Satish Sharma and Amod Despandhe knew the facts. On perusal of such statement, it is inferred that Mr. Mehta had no concrete knowledge as to whether the company had received any accommodation entry his statement was merely on basis of word of mouth with no factual information

919.2 The assessee has further pointed out that though the statement of Mr Mehta was recorded 30.06.2017, statement of Shri Satish Sharma was also recorded on 02.07 2017 However, no such cross verification or admission has been made by Shri Satish Sharma in his impugned statement which, according to the assessee, showed that the search officials were also not satisfied with the statement given by Mr. Mehta which was based on hearsay.

9.19.3 I further find that the entire allegation in the statement of Mr Menta is related to share capital received from M/s Luxury Vinimay Pvt. Ltd. However, no such share capital has been received from the said company in the assessee company. Therefore, the question of relevance of such statement in the assessee's case is not established and accordingly, the same cannot be considered as incriminating material for the assessee

9.20 Further, in the assessment order, AO has relied upon the statement of certain entry operators recorded u/s 131 by the Kolkata investigation wing in the post search proceedings whose statement were earlier recorded by investigation wing in year 2014 which have already been discussed in earlier paras

9.20.1 In this regard, I find that the said statement cannot be termed as incriminating material unearthed during the course of

search since the same were recorded in the post search proceedings u/s 131 of the Act by the Kolkata Investigation wing Further. I also find that the statements themselves cannot be treated as incriminating material in the absence of any corroborative evidence found at the time of search This is supported by the decision of decision of Delhi High Court in the case of CIT Vs Harjeev Agarwal reported in 241 Taxman 199 has held that statement under section 132(4) in the itself does not constitute incriminating material. The relevant finding of the Hon'ble High Court is reproduced as under

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 15888(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 assesseees 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 to not form the sole basis for computing undisclosed income of an assessee.

9.20.2 Similar decision has been rendered by Delhi High Court in the case of PCIT Vs Best Infrastructure Private Limited, 397 ITR 82 wherein it was held as under

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Hajeev Aggarwal (supra) Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v CIT (supra) where the admission by the Assessee themselves on critical aspects of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases is non-existent in the present case in the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission"

9.20.5 In such circumstances and as discussed above, I hold that such statement cannot be termed as incriminating material in the case of the assessee

9.21 Further, in the remand report AO has referred to the field enquiry conducted in the post search enquiries, in respect of various companies of the assessee group as well as the shareholder companies. As per the inspector's report the same have been reported to be non-existent.

9211 I find that the said findings are not arising out of the findings of the search action conducted at the premises of the assessee company Rather the same were enquiries conducted at the time of post search enquiries. Further, the said enquiries have not been corroborated with the evidences unearthed during the

search conducted on the assessee Therefore such enquiries cannot be termed as incriminating evidence found at the time of search of the assessee

9.21.2 Further, the assessee has pointed out that all the shareholder companies had been merged much prior to the search action and therefore, their existence at the time of search could not be proved Also the assessee has also pointed out that the said shareholder companies were duly assessed by the department wherein the assessment order passed in their case has also been furnished I find that the shareholder companies were already merged with the assessee and the assessee has submitted the requisite details in respect of the merged companies before the investigation wing as well as AO. Therefore, the inspector's reports themselves cannot be termed as incriminating in nature

9.22 Lastly, the AO has also claimed that during the search proceedings certain seized material were found from the assessee premises in form of ledger accounts of the parties whose share application were received, which were incriminating in nature. The copies of the ledgers forming part of the seized material have been submitted vide letter dated 26 07 2022. In its rejoinder that the assessee has submitted that the documents relied upon by the AO, are part of the accounted books in the form of ledger accounts share application forms, bank statements, etc Page wise explanation for the same has been submitted by the assessee in the rejoinder

9.22.1 I have gone through the copies of the ledgers, share application forms and bank statements forming part of the seized material which have been provided by the AO and explanation for the same furnished by the appellant. It is noted that the relevant seized material are only supporting documents pertaining to the accounted transactions being receipt of share capital in the form of ledgers accounts, cheque receipt vouchers, bank statements share application forms etc., which would support the accounting for

share application money received. The appellant has also pointed out that the details in respect of the share application money along with the supporting documents were also duly provided to the then AO at the time of completion of the original assessment in its case vide letter dated 11.07.2016. Such supporting documents, therefore, do not bring out any incriminating fact that reveals that the share application money received pertained to accommodation entries. Accordingly, such documents cannot be termed as incriminating material unearthed during the course of search. In this regard reliance is placed on the decision of Hon'ble Delhi High Court in the case of the Param Dairy Ltd. in ITA No. 37/2021 dated 15.02.2021 wherein it was held that the seized material containing accounted ledgers cannot be termed as incriminating material. The relevant portion of the order is reproduced hereunder

"5. We have considered the aforesaid contentions and are of the view that no substantial question of law arises, as the matter is squarely covered by Kabul Chawla supra, which has been correctly applied to the facts of the case by the ITAT. The ITAT, in the impugned order has held that in the audited report filed by the assessee along with the report, cash book, ledger, bank book etc. were mentioned, the respondent assessee, was maintain books on TALLY Accounting Software which was seized during the search and was being treated as incriminating material however, regular books of account of the assessee, by no stretch of imagination, could be treated as incriminating material to form basis of framing assessment under Section 153A read with Section 143(3) of the Act

9.22.2 Thus, considering the facts and the decision relied on, it is noted that the ledger accounts and other documents found during the search proceedings, do not amount to incriminating material in the absence of any such incriminating material even the statements recorded u/s 132(4) of the Act during the course of the search cannot be said to be incriminating as these remain uncorroborated by any supporting material/evidence. There is no

material evidence whatsoever brought on record to demonstrate that any cash was routed from the assessee company or that any cash was deposited by the assessee company

9.23 In view of the above discussion I find that the additions made by the AO are not based on any incriminating material which has been found during the course of search. Since the assessment for the relevant assessment year was unabated, as per the decision of the Hon'ble Special Bench of Mumbai ITAT in the case of All Cargo Global Logistics Ltd. [2012] 23 taxmann.com 103 (Mum.) (SB) as also the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 and also the Hon'ble Supreme Court in the case of Abhisar Buildwell P Ltd [2023] 149 taxmann.com 399, completed assessment cannot be interfered while making an assessment u/s 153A of the Act unless such interference is on the basis of incriminating material gathered during the course of the search, which is not the case here. Thus, Ground No. 2 is allowed and the addition made is directed to be deleted.

12. We have heard both the parties at length, perused the relevant finding given in the impugned orders as well as materials referred to before us including the remand report of the ld. AO and rejoinder submissions made by the assessee. The entire issue which has been challenged before us by the revenue, whether there was any incriminating material for the purpose of making the assessment and addition u/s. 68 for the A.Y.2013-14 and 2014-15 or not. The department's case is that the information gathered during pre-search enquiry and post-search enquiry which revealed that; *firstly*, the share application money received by the assessee company were not genuine for the reason that these entities were not available at the addresses

mentioned; *secondly*, there was an Income Tax Inspector's report that these companies were not conducting business on the address mentioned; *thirdly*, the Directors of these companies were common and were dummy Directors; and *lastly*, reference to statements of various persons pre-search enquiry by investigation wing and during search.

12.1 In order to appreciate various finding of the Id. AO, allegation of the Id. AO and the finding of the Id. CIT(A) on the issue of various statements and whether they constitute incriminating material or not, same is being tabulated and can be summarized in the following manner:-

Sr. No.	Nature of Finding	Allegation of AO	Findings of CIT(A) / contention of the assessee
Pre-search inquiries			
1	Statement of Dincsh Dhandhanian u/s 131 dated 19.11.2014 at ADIT (Inv.) office, Kolkata	Pre search enquiries conducted by investigation wing, Kolkata, on certain entry providers. These entry operators were engaged in providing accommodation entries through various entities. It is also alleged that such entities have provided accommodation entries to the shareholders companies of the assessee company from whom share capital has been received by the assessee.	Statements were recorded much prior to search action and have no link with the assessee. There is no mention of the assessee company's name or its shareholders. Therefore, such independent statement cannot be termed as incriminating material unearthed from the search on the assessee company. Statements themselves cannot be treated as incriminating material.

2	Statement of Naresh Chhaparia u/s 131 dated 15.09.2014 at ADIT(Inv.) office, Kolkata	Pre search enquiries conducted by investigation wing, Kolkata, on certain entry providers. These entry operators were engaged in providing accommodation entries through various entities. It is also alleged that such entities have provided accommodation entries to the shareholders companies of the assessee company from whom share capital has been received by the assessee.	<ul style="list-style-type: none"> Statements were recorded much prior to search action and have no link with the assessee. There is no mention of the assessee company's name or its shareholders. Therefore, such independent statement cannot be termed as incriminating material unearthed from the search on the assessee company. Statements themselves cannot be treated as incriminating material.
3	Statement of Rajcsh Bhuthoria u/s 131 dated 14.11.2014 at ADIT(dnv.) office, Kolkata	Pre search enquiries conducted by investigation wing, Kolkata, on certain entry providers. These entry operators were engaged in providing accommodation entries through various entities. It is also alleged that such entities have provided accommodation entries to the shareholders companies of the assessee company from whom share capital has been received by the assessee.	Statements were recorded much prior to search action and have no link with the assessee. There is no mention of the assessee company's name or its shareholders. Therefore, such independent statement cannot be termed as incriminating material unearthed from the search on the assessee company. Statements themselves cannot be treated as incriminating material, if nothing adverse has been stated against the assessee.

Findings / Enquiries during the course of search at the premises of the assessee			
4	Statement of employee Shri Mrudul Kumar Gehlot u/s 131 dated 01.07.2017	Shri Mrudul Kumar Gehlot in his statement has confirmed that he was appointed as director as per the instruction of Shri Vineet and he is not aware about running these companies.	Shri Mridul Gehlot has explained that he was working with the group from 2010 and was entrusted with the administrative work in the capacity of Dy. GM(Admin), He has confirmed that he was appointed as director considering his managerial potential. Shri Vineet Millal, promoter, in his statement has confirmed that Mr. Gehlot was appointed as director as per his merits. Statement recorded of Shri Mrudul Kumar Gehlot never stated that the company was engaged in non-genuine transaction and ii does not makes any reference incriminating material. His statement is further supported by statement of another employee Shri Satish Sharma who has clearly stated that he was in-charge of updating and keeping the books of the said companies since they had subsequently merged with the assessee.
5	Statement of Shri	Mr. Vineet Mittal when	Mr. Mittal in his

	Vineet Millal u/s 132(4) dated 03.07.2017/ and 131 dated 29.07.2017.	confronted with the statements given by other employers, he could not give plausible explanation about various answer given by other employees in their statements.	statement has categorically stated that the employees were appointed as directors based on the Merits. Also, considering the wide spread of the business, appointing trusted employees are director cannot be regarded as an adverse arrangement. No acceptance regarding the non-genuineness of the transaction of share capital. He stated that the relevant supporting documents would be submitted in 20 days which was duly submitted before the Investigation wing on which no doubt was raised by wing. Statement recorded of Shri Vineet Mittal nowhere refers to any incriminating material. Moreover, the alleged incriminating material such as ledger mentioned by AO also have nowhere been confronted to Mr. Mittal during the search.
6	Ledger account pertaining to share application found at the search.	In the assessment order and remand report, AO has termed the ledger accounts as incriminating material	The relevant documents referred by AO are the supporting evidences for the receipt of share application money such as share application

			<p>forms, bank receipt voucher, bank statements, etc. Said documents were already filed with AO in original assessment proceedings.</p> <p>Therefore, such documents can never be considered as incriminating material unearthed during¹, the search which can create a doubt on the veracity of the share capital received.</p> <p>Important to note that the seized documents should be such which should clearly cast a doubt on the transaction, without a second guess. Otherwise, department was free to reopen the case with the findings which it already had prior to search.</p>
Enquiries during the course of search at third parties			
7	Statement of Shri S.G. Mehta u/s 132(4) dated 30.06.2017 at his own office premises	Mr. Mehta in his statement stated that he did not find any rational behind charging high premium from Luxury Vinimay Pvt. Ltd. He also stated that he was informed by Mr. Salish Sharma, employee of the assessee group that the share capital received	Mr. Mehta is not related to the assessee group and was an erstwhile tax consultant to M/s. Luxury Vinimay Pvt. Ltd. Entire allegation in the statement of Mr. Mehta is related to share

		<p>from Luxury Vinimay Pvt. Ltd. was an accommodation entry. He also slated there was a possibility that the other share capital received by the group was also not genuine whose details were available with Mr. Satish Sharma or Mr. Amol Despande.</p>	<p>capital received from M/s. Luxury Vinimay Pvt. Ltd.. However, no share capital has been received from the said company in the assessee.</p> <p>Mr. Mehta has merely expressed his opinion and he has no concrete knowledge regarding the transaction and was based on hearsay. Statement of Mr. Satish Sharma and Mr. Amol Despande was recorded subsequent to Mr. S.G. Mehta statement; however, no cross question was asked to them.</p> <p>Statement recorded of Shri S.G. Mehla does not makes any reference to any incriminating material and such third party statement per se cannot be termed as incriminating material found/recovered from the premises of the appellant.</p>
8	Statement of Saroj Swaika and Renu Swaika u/s 131 dated 30.06.2017 at DDIT(Inv.) office, Kolkata	Saroj Swaika & Renu Swaika were ex-directors in Nimbus Dealers Pvt. Ltd. & Luxury Agencies Pvt. Ltd. Both these person in their statement	The said persons were directors as early as AY2011-12 which was much earlier to which the share capital were received by assessee

		<p>have accepted that they are dummy directors and their role was restricted to mere signing the papers.</p>	<p>group. Mr. Swaika in his statement denied of having known to the assessee company. Important to note that they were ex-directors in M/s. Nimbus Dealers Pvt. Ltd. and M/s. Luxury Agencies Pvt. Ltd. and Assessee Company has not received any funds from these two companies. Therefore, these statements are not relevant in the assessee's case, in any case. Statement recorded of these persons docs not makes any reference to any incriminating material and such third party statement per se cannot be termed as incriminating material found/recovered from the premises of the appellant.</p>
9	<p>Inspector report dated 30.6.2017</p>	<p>The inspector had given a 'Not Found report'. The inspector in its report stated that Shri Vishal Agarwal and Shri Subhradeep Chhaterjee was not found at the address available in records.</p>	<p>The said findings are not arising out of the findings of the search conducted at the premises of the search. The said findings are not corroborated with evidences unearthed during search. In case of Mr. Vishal Agarwal, the enquiries reveal that the person</p>

			<p>found at the address was residing on behalf of Mr. Vishal Agarwal and used to collect mail for him. The premises belonged to Mr. Vishal Agarwal only. Further, with respect to Mr. Chaterjee, the premises was found to be locked and it was not the case of non-existence. Also, the said shareholder companies had already merged and therefore, it was possible that said ex-directors had changed addresses.</p>
Post Search Inquiries			
10	Inspector report dated 25.08.2017 relating to shareholder companies	The enquiries were made by the Inspector at the Kolkata address of the shareholder companies. The Inspector report states that the companies were not existing at the given address/premises.	These Companies had been merged much prior to the search action and therefore, their existence at the time of search was legally not there. The findings/inspector report cannot by itself be termed as incriminating since the same do not arise from the search action at the appellant. The shareholder companies namely M/s Marina Commercial Pvt. Ltd. and M/s. Nimbus Dealers Pvt. Ltd. were assessed u/s 143(3) in earlier period at the

			same address wherein the notices issued by department were duly served and assessed. Therefore, the allegation of department is not correct and contradictory.
11	Statement recorded of Shri Rajesh Kumar Bhutoria and Naresh Kumar Chhaparia u/s 131 dated 24.08.2017 at DDIT(Inv.) office, Kolkata	Statement recorded u/s 131 of the Act Shri Rajesh Kumar Bhutoria Naresh Kumar Chhaparia in their statement have categorically admitted that the entities run by them are for accommodation entries only.	The statements have been recorded post search without any reference to any material found during the search at the assessee. The statement of Naresh Chapparia has been specifically rejected by the Hon'ble Tribunal in the case of Adhumk Gases Ltd (ITA No. 47/Kol/2015) Statement of their party cannot be considered as incriminating material unearthed during the search conducted on the assessee.

13. Now whether these allegations and discussions made by the ld. AO in the assessment order can be said to be incriminating material found in the course of search so as to justify the additions made by the ld. AO within the scope and ambit of Section 153A, especially in the case of unabated assessments which had attained finality before the date of search.

14. There are certain statements which had taken much before the search, i.e., pre-search enquiries and there is reference of pre-search enquiries conducted by Investigation Wing, Kolkata, which has nothing to do with the assessee nor has any such material relating to or pertaining to assessee been referred in the statement, except that they were found to be dubious because of various reasons. From the perusal of these statements as recorded in the assessment order, first of all, these statements were recorded much prior to the date of search action and nowhere there is mention about the assessee's company or its shareholders and therefore, qua the assessee, it cannot be reckoned as incriminating material unearthed from the search from the assessee company. In so far as enquiries during the course of search in the premises of the assessee there is a reference to the statement of an employee and statement of Shri Vineet Mittal, but from bare reading of these statements nowhere there is any acceptance or admission about the non-genuineness of the transaction of the share capital. He has only stated that he would file all the relevant supporting documents within 20 days which was in fact he did submitted before the Investigation Wing. Even in his statement there is no such incriminating material or any pre-search enquiry information has been confronted to him, based on which he has given any statement which can be inferred remotely as incriminating leading to some kind of inference that the credits which had come up in the form of share application money are bogus or non-genuine. Thus

statement also does not lead to inference of any incriminating material.

14.1 One very important fact which has also been highlighted by the ld. DR and also by the ld. AO in his remand report that there was a ledger account pertaining to share application which was found at the time of search which can be treated as incriminating material. First of all this, is the part of ledger account forming part of regular books of accounts of the assessee and it is only supporting document that assessee has received share application money in the books duly supported by the share application forms, bank receipts, vouchers and bank statements which was already subject to scrutiny during the original assessment proceedings u/s 143(3) and was also produced before the ld. AO at that time. Further, these are part of regular books of accounts which had been duly disclosed and scrutinized in the first round of assessment proceedings u/s.143(3). Hence, books of accounts which have already been scrutinized cannot be treated as incriminating material found during the course of search *albeit* it just gives the details of entries incorporated in the balance sheet.

15. Now coming to the certain statements and enquiries during the course of search at third parties, from the perusal of the finding given by the ld. CIT (A) as incorporated above, as per his findings and analysis of every statement, nothing can be said to incriminate the assessee about the share application money or

any reference to incriminating material which can be said to be corroborated by these statements.

16. Thus, enquiries during the search also with the third parties, no adverse inference can be drawn that the share application money received by the assessee in the A.Y.2013-14 and 2014-15 which was part of records at the time of original assessment proceedings can be reckoned as incriminating.

17. Another important fact which has been brought on record by the ld. Counsel of the assessee that the entire premise of the ld. AO is that these two companies from whom assessee had received share application money were not found at the given addresses, **clarified that office of these companies had shifted to Mumbai and later on became part of the group company of the assessee and these companies were assessed by the same AO who has passed impugned assessment order. If same AO had jurisdiction on these two companies at the time when assessment was made in the case of the assessee then there is no relevance of these companies were not found on the addresses. Thus, the Income Tax Inspector report and pre-search enquiries has no relevance or can remotely be considered as incriminating against the assessee.**

18. Now, it is a well settled law that where the assessments had attained finality before the date of search and are not abated assessments in terms of **proviso** to Section 153A, the ld. AO can acquire jurisdiction to make the assessment or addition if there

is any incriminating material found during the course of search. It is axiomatic that the ld. AO can assume jurisdiction to assess or re-asses total income only when any incriminating material is found / unearthed during search and then he can take into account those incriminating material unearthed during the course of search and other material available with the ld. AO including the income declared in the return of income. Thus, existence of incriminating material which is found in the course of search is a very foundation of acquiring jurisdiction u/s 153A in the case of unabated / completed assessment. This principle laid down by the Hon'ble Bombay High Court and Hon'ble Delhi High Court and various other High Courts have been reaffirmed by the Hon'ble Supreme Court in the case of **Abhisar Buildwell Pvt.ltd reported in 454 ITR 212** wherein Lordships have concluded and stated as under:-

“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.***

19. If we apply aforesaid principle upheld by the Hon'ble Supreme Court, then for assuming jurisdiction to assess or re-assess the total income u/s. 153A, there has to be some kind of incriminating material found during the course of search. In case, there is no incriminating material, then ld. AO cannot

assess or re-assess taking into consideration the other material in respect of completed / unabated assessments and ld. AO cannot make any addition in absence of any incriminating material found in the course of search u/s.132.

20. Here, in this case if there was any such information or material which was found much prior to the date of search, then the ld. AO should have reopened the assessment after exercising the powers u/s.147 / 148 subject to the fulfillment of the conditions and limitations provided u/s.147/ 148 and these powers are specifically saved u/s.153. Instead of resorting to action u/s. 147 / 148, ld. AO has proceeded to use pre-search enquiry and information within the scope of Section 153A which cannot be referred as incriminating material found in the course of search. As stated above in the course of search, in so far as statement of the promoter also there is nothing incriminating and the only material which has been found with the ledger account of certain share application money which cannot be held to be incriminating and this has been held so by the Hon'ble **Delhi High Court in the case of Param Dairy Ltd. in ITA No.37 of 2021 dated 15/02/2021**, wherein it has been held that audit report, cash book, ledger book, bank book and the books of accounts maintained regularly by the assessee if it has been seized and found during the course of search cannot be treated as incriminating material because regular books of accounts by no stretch of imagination could be treated as incriminating material form basis of framing assessment u/s. 153A. Here in this case same very books of account and ledger

have been subject matter of scrutiny in assessment proceedings u/s 143(3) much prior to the date of search as noted above. Thus, on the facts and circumstances of the case and the principle of law as laid down by the Hon'ble Apex Court which has been followed by the Id. CIT (A) as incorporated above is upheld. Accordingly, grounds raised by the Revenue are dismissed.

21. Since we upheld the order of the Id. CIT (A), the issue on merits has raised by the assessee in the cross objection for both the assessment years have become purely academic and same is dismissed as infructuous.

A.Y.2016-17

22. In this year The Revenue has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made u/s 68 of the income tax Act, 1961 even though the assessee could not prove the genuineness of the transaction and creditworthiness of the M/s. Integral Distributors LLP (Earlier Integral Distributors Pvt. Ltd.)"?*

2. *"On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made u/s 69C of the income tax Act, 1961 on account of undisclosed commission paid in cash being 1% of bogus unsecured loan taken from M/s. Integral Distributors LLP?"*

3. *"On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance made u/s. 14A of the Income Tax Act, 1961 to the book profit of the assessee without appreciating the provisions of clause (f) of explanation 1 to section 115JB(2) of the Income Tax Act, 1961 and the decision of*

the Hon'ble ITAT Mumbai 'F' Bench in the case of Deputy Commissioner of Income Tax, Central Circle-18 & 19, Mumbai vs. Viraj Profiles Ltd. in ITA No. 4439/ (Mum.) of 2013."

23. The brief facts are that assessee had filed return of income u/s.139(1) on 28/09/2016 declaring total income of Rs.1,06,12,840/-. A search and seizure action u/s.132 was carried out in the case of the assessee on 30/06/2016 and the at the time of search, the time limit for issuing notice u/s.143(2) was still available and therefore, assessment proceedings got abated. During the course of assessment proceedings, ld. AO noted that assessee has taken loan from M/s. Integral Distributors Pvt. Ltd. and upto A.Y.2015-16 it has filed the return of income from Kolkata and field inquiry was carried out in respect of the above company on the address, 51/4, Strand Road, Kolkata of the said company that the premises was an old building and no company in the name of M/s. Integral Distributors Pvt. Ltd. was existing at the above premises. Further, he noted that this company had very meager turn over. Thus, it was inferred that, this company did not carry out any substantial business. He further, noted that the shareholder of these companies was M/s. Olive Vincom Pvt. Ltd. and M/s. Doyen Vintrade Pvt.Ltd. and both these companies were filing return of income from the same addresses at Kolkata i.e. 51/4, Strand Road, Kolkata and these two shareholders were also non-existing. He further observed that assessee did not furnish any response to show-cause notice and accordingly, assessee has failed to establish the creditworthiness of assessee M/s. Integral

Distributors LLP for advancing such a huge loan. Accordingly, he upheld the addition u/s.68 for Rs.28 Crores.

24. During the course of the appellate proceedings, the assessee filed detailed submissions as well as additional evidences running into 296 pages which related to M/s. Integral Distributors Pvt. Ltd. Thus, additional evidences were forwarded to the Assessing Officer to examine and to give his report. The comment of the ld. AO has been dealt and incorporated in the appellate order. The relevant extract of ld. AO's comment in the remand report is as under:-

"4.1 The AO has made the following additions to the income declared in the return of income filed against notice issued under section 153A of the Act:

a. Disallowance under section 14A- Rs. 8,49,459/-

b. Difference in 26AS- unreconciled amount Rs. 4,01,299

c. Unexplained cash credit u/s 68-Rs. 28,00,00,000/-

During the assessment the documents which were produced before the AO are:

Ledger confirmation from the M/s Integral Distributors LLP, and table containing name and PAN of the unsecured loan providers during AY 2016-17.

4.2 The following documents were submitted by the assessee as additional evidence in support of the claim

a. Copy of ITR and financials of Integral Distributors.

b. Copy of bank statement of M/s Integral Distributors LLP reflecting the transaction with the appellant.

c. Copy of documents showing source in the hands of M/s Integral Distributors LLP.

d. Copy of supporting evidence in respect of source of credits in the hands of details showing source in the hands of M/s Integral Distributors LLP.

e. Copy of details of usage of funds by the appellant along with the copy of agreement entered into between the appellant and M/s Welspun Energy Pvt.Ltd. made u/s 68 of the Income-tax Act in the assessment order. The document and issue wise comments are presented below:

a. The returned total income of the Lender is Rs.NIL for AY 2016-17. The bank of funds from various entities Fusequently transferred to Sirius Media Pvt. Ltd. (the erstwhile entity that existed before amalgamation) There are no fixed assets in the balance sheet apart from Capital work-in-progress of Rs. 18,74,938/-. The investments in unlisted equities are worth Rs. 37,26,49,088/-

h. On page 76 of the paper book submitted, source of the funds received by M/ Integral Distributors LLP, has been shown to be from sale of unquoted shares of certain private limited companies to 10 different companies. But, the schedule Capital Gains of the ITR of the Lender does not show any details of the transfer of unquoted shares. Further, the documents in support of the compliances of the

Companies Act, with respect to transfer of shares have not been submitted. c. The assessee has also submitted documents such as ITR, financials and bank account statements of these 10 companies to show the source of the lender M/s Integral Distributors LLP

4.4 The entity wise details, as given in page 76 of the paper book submitted, were studied and it was found that these companies have inter-related directorships making some of them related parties. For example- Sanjib K Shaw is director in Helpful Commodities Pvt. Ltd., Moonstar Commodities Pvt. Ltd., Overtop Tradelink Pvt. Ltd., Everrise Commotrade Pvt.Ltd. and Bhumilaxmi

Distributors Pvt. Ltd. Some of the entities mentioned in the table have also been struck off as per the data available on MCA website

4.5 The other evidence provided by the assessee is the bank account statement and financial statement of the above-mentioned entities. The bank statements clearly show that the funds were received from other parties and then transferred through banking channel to the lender. Certain observations derived from the account statements are as follows-

a. There are some common companies whose names appear multiple times in the bank account statements provided, such as, Allmost Tradelink Pvt. Limited, BhumiLaxmi Distributors Pvt. Ltd, Finelink Suppliers Pvt. Ltd, Subhlabh Fiscal Services Private Limited, Everrise Commotrade Pvt. Ltd., Moonstar Commodities Pvt. Limited etc. The first and second are at present struck off by RoC Kolkata. Whether the funds were received in lieu of sale of shares cannot be confirmed from these documents.

b. The shares bought by these companies were sold within the same financial year, st par with purchase value. Hence, there is no declaration of STCL/STCO in the ITR.

c. The common features of these entities can be summarised as follows:

Their entire Investments lie in unquoted shares of private limited companies from which no income has been earned. The shares have been sold at cost of acquisition. Hence, no Information is available under capital gains schedule.

Some of them have overlapping Directorships.

They have bulky balance sheets in contrast to their P&L accounts.

Their reserves and surplus are more than 20-30 times their share capital, which shows that they have raised share capital on substantial premium.

4.6 The assessee in its additional evidence has also submitted the utilization proof of the funds received from the lender. Most of the funds i.e. Rs. 21,00,00,000/- have been used to extend a loan to another company Welspun Energy Private Limited.

5. Conclusion:

The documents submitted have shown the source of funds at the hands of the lender M/s Integral Distributors LLP. However, the source of source cannot be conclusively justified in the light of the above observations. The creditworthiness and genuineness of the "source of source" companies is also doubtful. The sale of share has not been supported with proper contracts and compliances with Company law. The additional evidence is not contributing towards substantiating the creditworthiness of the lender, which remains doubtful."

24.1 The ld. CIT (A) noted that assessee was given show-cause notice at the very fag end of the assessment proceedings and had just two days to reply to the said notice. Accordingly, he held that there was a reasonable cause by the assessee to file the additional evidences and accordingly, same were admitted by him. On merits, ld.CIT(A) after analyzing the documents and material furnished during the course of appellate proceedings which was also forwarded to the ld. AO, and after considering the the remand report of the ld. AO and rejoinder submissions had observed and held as under:-

14.20 *Now coming to the facts of the case, it is observed that the appellant has submitted the confirmation, ITR, financials, bank statement of the lender to support the transaction. It is observed that the identity is proved by the ITR and the fact that the said party was assessed by the same AO. It is also noted that the assessment was also completed in the case of the lender u/s 143(3) and no addition for any unexplained cash credits has been made. Further, the genuineness of the transaction can also be*

safely concluded since the entire transaction has been done through the banking channels, duly recorded in the books of accounts of the assessee and duly reflected in the financial statements of the assessee. Also, the assessee has also explained that the said loan has been taken for the commercial purpose of investment in Welspun group for energy business and the same was repaid in subsequent period before the search action. Further, the creditworthiness or financial strength of the lender is proved from the bank statement of the lender wherein it is observed that it had sufficient balance in its accounts to enable it to advance the unsecured loans. Also, the lender had sufficient own funds of Rs.91 Crore right from AY 2012-13 out of which the loan of Rs.28 Crore has been advanced to the assessee. The assessee has also pointed out that the source in the hands of the lender was also assessed by the AO wherein the funds were verified by the then AO and accepted as genuine in AY 2012-13 itself.

14.21 In the assessment order, AO has stated that the lender and its shareholders were not found at the address at Kolkata. In the appellate proceedings, the assessee has explained that the address of the lender was changed to Mumbai and therefore, the verification at the old address was incorrect. Also, the appellant has pointed out that the said party was already assessed u/s 143(3) by the AO at Kolkata at the very same address wherein the notices were served and the assessment was completed. It is also pointed out that the lender was also assessed post search by the very same AO at Mumbai wherein the notices were duly served. I find that the above facts pointed out by the assessee clearly show that the lender was existing. Therefore, the said allegation of the AO cannot be accepted. With respect to low income, the appellant has explained that the said lender had made major investment in the unquoted shares whose income would arise over the period of time. Also, the lender had own funds since AY 2012-13 which were also assessed by the then AO and this further establishes its creditworthiness.

14.22 In view of the above, I find that the assessee has proved the identity, creditworthiness and genuineness of the lender by producing the relevant documents.

14.23 Further, in the assessment order, AO has alleged that the lender M/s. Integral Distributor Pvt. Ltd. and its shareholders are a paper company. The appellant has pointed out that while making the said allegation, no evidence to prove the same has been brought on record which was found during the search or otherwise. I agree with the submission of the assessee since the AO has failed to bring on record any evidence to support the said contention.

14.24 Further, in the appellate proceedings, the assessee has also attempted to prove the source of the source in respect of the lender to show that the source in the hands of the lender is also genuine. In the said submission, the assessee has submitted that the immediate source in the hands of the lender is funds received from sale of unquoted shares to various parties. In support of the same, the assessee has submitted the ITR, financials, bank statement and confirmation of the parties who have paid consideration to the lender for purchase of unquoted shares.

14.25 In the remand report, AO has alleged that the assessee has not been able to substantiate the source of the source. The various contentions of the AO have already been mentioned in above paras. The assessee has explained that the allegations of the AO are unfounded and incorrect and the judicial precedents make it clear that the assessee is not required in the first place to substantiate the "source of the source" in the case of the loan transaction for the relevant assessment year. However, according to the assessee, while not being legally bound to do so, it has still explained the source of the source as well.

14.26 I have gone through the remand report and the rejoinder of the assessee. AO has mentioned that the shares have been purchased and sold in the same year and no capital gain have been earned on the same and so no capital gain has been shown in the ITR. I find that the decision of purchase and sale is a prerogative of the assessee and the same cannot be rejected merely on the ground that no capital gain has been earned on the same. I find that the transaction of sale by the lender has been confirmed by the third parties. I also find that the lender was assessed by the same AO and no addition regarding the said transaction has been made by the AO in the hands of the lender

entity. Accordingly, I do not find that any substance in the allegation of the AO.

14.27 Further, AO has also pointed out that the parties to whom the lender has sold the unquoted shares are inter related and share common addresses. It has also been pointed out that the said entities have received funds from certain entities who have been struck off from ROC records. I find that the said allegation nowhere shows that the transaction entered by the lender is not genuine. The common address of the purchase parties doesn't lead to any negative inference. Similarly, the appellant has explained that the parties from whom funds have been received by the purchase parties have been struck off by ROC much after the funds have been received by the lender. Such action of the ROC cannot lead to an inference that the transaction is not genuine. Accordingly, I do not find any substance in the above allegation of the AO.

14.28 In view of the above, I find that AO has not been able to bring on record any concrete evidence to disprove the source of the source of the unsecured loans.

14.29 As already stated above, the assessee has discharged its onus to prove the source in its hands and no doubt has been raised by the AO in the remand report on the said evidences. Further, I also find that except relying upon the enquiry made by the investigation wing, no independent enquiry has been conducted by the AO and no concrete evidence has been brought on record by the AO to show that the unsecured loans received of Rs. 28 crore were not genuine.

14.30 In view of the above, I hold that the unsecured loan received by the assessee cannot be said to be not genuine and so the addition of Rs. 28 crore made u/s 68 of the Act is directed to be deleted. **Accordingly, grounds no. 1 and 2 are allowed.**

25. Before us, ld. Counsel for the assessee submitted that this company, M/s. Integral Distributors LLP was assessed with the same Assessing Officer who has passed assessment order and he

has also filed copy of the assessment order before us for the A.Y. 2018-19, passed by the same Assessing officer on the same date. Further, he submitted that the assessee had furnished confirmation, ITR, Financials, bank statement of the lender to support the transaction. Another important fact was that in the case of the lender, assessment u/s. 143(3) was made for A.Y. 2016-17 and no addition has been made or any adverse inference has been drawn in the case of the lender company. Once the transaction has been done through banking channels which is incorporated in the books of accounts, and all the documents has been furnished including the source of funds in the hands of the lender company and also accepted u/s 143(3), then no addition should be made.

26. On the other hand, ld. DR relying upon the observation of the ld. AO and the remand report and submitted that the creditworthiness of the lender company has not been established at all. Apart from that, ld. AO has pointed out that how the funds were moved through some company and entire source of funds in the hands of the lender company has not been established. Accordingly, the creditworthiness and genuineness of the source of the source of the company is doubtful.

27. We have heard rival submissions and perused the relevant finding given in the impugned order. One very important fact is that in the case of the lender company assessment has been completed u/s.143(3) and no adverse inference has been drawn about the source of the loan given to the assessee company or it

has been found to be a fictitious entity. To prove the genuineness of the transaction, the entire bank statements and financial statements of the lender company have been provided and it was also submitted that loan was taken for the purpose of investment to be made in the Welspun group for energy business and same was repaid subsequently. The bank statement of the lender company reflects huge sufficient balance in the account for giving the advancement of unsecured loans. This company in the balance sheet has declared own funds of Rs.91 Crores for A.Y.2012-13 out of which loan of Rs.28 Crores was passed to assessee. Further, the source of the comments of the letter was also assessee by the AO wherein AO has verified the funds and accepted to be genuine in the order passed u/s.143(3) for A.Y.2012-13. Once the ability of funds have been accepted of Rs.91 Crores in A.Y.2012-13, then it cannot be held that lender company did not have sufficient funds when the loan was given and moreover even for A.Y.2016-17, assessment has been made u/s. 143(3) in the case of lender company and even the present AO has also passed the assessment order in A.Y.2018-19, which goes to prove that it is not a paper company. These facts has not been rebutted before us and in so far as allegation of the ld. AO that lender and shareholders were not found at the address of the Kolkata becomes irrelevant when assessment has been done from the same address and also brought on record that address of the lender company had already shifted to Mumbai which is also evident from the order of the present AO in the case of the lender company wherein he has passed assessment order on

31/12/2019 i.e. the same date of order which has been passed in the case of the assessee. Thus, ld. AO was very well aware that this company's address has been changed and therefore, stating that this company was not found in Kolkata at the time of enquiry has no relevance. Then how did he pass the assessment in case of this company without drawing any adverse inference in that case. Apart from that, even in the earlier years, notices u/s. 143(2) and other statutory invoices for the purpose of assessment u/s.143(3) was issued and served u/s.143(3) was issued and served on the same address earlier then how can it be inferred that this company was non-existing.

28. We further find that ld. CIT (A) has also examined the immediate source of funds in the hands of the lender company which was received from sale of unquoted shares of various companies and in support of which, ITR, financial statements and bank statements and confirmation of the parties were submitted, including consideration paid by the lender company for the purchase of unquoted shares and sale were also filed before the ld. AO during the remand proceedings which has been duly examined by the ld. CIT(A). Nowhere, AO has inquired about the source and veracity of the source of the funds of the lender company, albeit it has been accepted in the order passed u/s 143(3). Thus, it cannot be held that source of the source has not been proved by the assessee. Accordingly, the aforesaid finding of the ld. CIT (A) is affirmed.

29. In the result, appeal of the Revenue is dismissed.

A.Y.2017-18

30. In A.Y.2017-18, Revenue has taken the following grounds:-

1. "i. On facts and in circumstances of the case, the Id. CIT(A) has erred in restricting disallowance made under section 14A to the extent of tax exempt income earned during the year by overlooking the clarification of legislative intent provided by the CBDT vide Circular No. 5/2014 dated 11.02.2014 and to this effect even an amendment was made by Finance Act, 2022 by way of insertion of Explanation to Section 14A".

2 ii. "On the facts and in the circumstances of the case, the Hon'ble ITAT is correct in law, in directing to delete the disallowance made u/s 14A of the Income Tax Act, 1961 to the book profit of the assessee without appreciating the provisions of clause (f) of explanation 1 to section 115JB(2) of the Income Tax Act, 1961 and the decision of the Hon'ble ITAT Mumbai 'F' Bench in the case of Deputy Commissioner of Income-tax, Central Circle-18 & 19, Mumbai vs. Viraj Profiles Ltd. in ITA No. 4439/ (Mum.) of 2013".

31. The only issue involved is that Id. AO has made disallowance u/s.14A r.w.r.8D of Rs.1,60,37,492/-. It is an admitted fact that assessee has not earned any exempt income during the year under consideration and Id. AO has wrongly mentioned that assessee had earned dividend income. The Id. CIT (A) had deleted the disallowance after observing as under:-

"11.2 I have gone through the submission of the assessee and contention of the AO. The assessee has submitted that for the purpose of computing disallowance u/s 14A, the amount of disallowance shall be restricted to the amount of exempt income earned by the assessee. This is as per the ratio of the decisions laid out by the Hon'ble Courts in the case of **CIT vs. Ballarpur Industries Limited vide ITA No. 51 of 2016** and **Hon'ble Mumbai Tribunal in the case of Assistant Commissioner of**

Income-tax v. Bajaj Capital Ventures (P.) Ltd reported in [2022] 140 taxmann.com 1 (Mumbai - Trib.). In the submission, the assessee has contended that it has not received any dividend income during the year. I observe on going through the financials that no dividend income has been reported by the assessee. Also, I find that the amount of dividend income of Rs.73,77,315/- as mentioned by the AO in the assessment order is identical to the figure mentioned in the assessment order for AY 2016-17. Accordingly, AO is directed to verify the amount of the dividend income actually earned during the year, which according to the appellant is NIL, and restrict the disallowance to the correct dividend income earned by the assessee as per the financials.”

32. The ld. CIT(A) after relying upon the judgment of the Hon'ble Bombay High Court in the case of M/s. Nirved Traders Pvt. Ltd. (ITA No.149 of 2017), that once there is no exempt income earned, no disallowance u/s.14A can be made. Apart from that ld. CIT (A) has referred to various judgments of the High Courts and held that ld. AO cannot make disallowance u/s.14A when there is no exempt income. Thus, once it is an admitted fact that there is no exempt income earned by the assessee, then no disallowance u/s.14A can be made. This issue stands covered by the decision of the Hon'ble Jurisdictional High Court in the case of M/s. Nirved Traders Pvt. Ltd. (supra) and catena of other judgments of Hon'ble High Courts including Hon'ble Madras High Court in the case of Chettinad Logistics P. Ltd. reported in 95 taxmann.com 250. Further, Hon'ble Delhi High Court in the case of **Era Infrastructure (India) Ltd reported in (2022) 141 taxmann.com 289** held that

amendment brought in Section 14A w.e.f. 01/04/2022 is not retrospective. Accordingly, the order of the ld. CIT(A) is confirmed. Similarly, disallowance u/s.14A while computing book profit u/s.115JB also is covered by the various decisions and including the Special Bench in the case of Vireet Investments P Ltd reported in 82 Taxmann.com 415 and Hon'ble Delhi High Court in the case of Bhushan Steel Ltd in ITA No 593/2015, accordingly, no disallowance can be made u/s.14A while computing book profit u/s.115JB. Accordingly, appeal of the Revenue is dismissed.

33. In the result, all the appeals of the Revenue are dismissed as well as Cross Objections of the assessee are dismissed as infructuous.

Order pronounced on 05th April, 2024.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai; Dated 05/04/2024
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

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

//True Copy//

ITA No. 2749/Mum/2023 & others
M/s. Avaada Ventures Pvt. Ltd

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai