

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
(Virtual hearing)

ITA No.356/Ind/2023
Assessment Year: 2012-13

M/s Decent Industries Private Ltd, 5 th floor, Corporate Park, DB City Area Hills, Opp. M.P. Nagar Zone I, Bhopal	<u>बनाम/</u> Vs.	ITO-1(2), Bhopal
(Assessee/Appellant)		(Revenue/Respondent)
PAN: AAECA6271G		
Assessee by	Ms. Shilpa Gupta & Shri N.K. Gupta	
Revenue by	Shri V.K. Singh, CIT-DR	
Date of Hearing	04.06.2024	
Date of Pronouncement	20.08.2024	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 25.08.2023 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of assessment-order dated 30.12.2019 passed by learned ITO-1(2), Bhopal ["AO"] u/s 147/143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2012-13, the assessee has filed this appeal.

2. The background facts leading to present appeal are such that the assessee-company, earlier known as 'M/s Bhaskar Denim Ltd.' and subsequently changed to 'M/s Decent Industries Pvt. Ltd.' as mentioned in the title, filed original return of AY 2012-13 on 30.09.2012 declaring a total income of Rs. 80,100/- which was duly assessed. Subsequently, the AO received information from Investigation Wing, Kolkata of Income-tax Department ["Investigation Wing"] that the assessee had allotted preference shares having face value of Rs. 10/- per share at an issue price of Rs. 1,000/- (inclusive of premium of Rs. 990/- per share) to two 'Kolkata-based shell companies' named M/s Ajay Software Pvt. Ltd. ["A"] and M/s Jay Hind Financial Advisors Ltd. ["J"] on 31.03.2012 and received proceeds of Rs. 66,91,70,000/- in financial year 2011-12 relevant to AY 2012-13 under consideration. The details of shares allotted are as under:

S.No.	Name of the allottee and PAN	No. of shares allotted	Nominal amount per share (Rs.)	Premium amount per share (Rs.)	Total amount including premium (Rs.)
1	M/s Ajay Software P. Ltd (AAGCA4914J)	2,21,070	10/-	990/-	22,10,70,000/-
2	M/s Jai Hind Financial Advisors P Ltd (AABCJ9501B)	4,48,100	10/-	990/-	44,81,00,000/-
	Total				66,91,70,000/-

The report of Investigation Wing was based on a survey action u/s 133A carried out in the case of one 'Shri Anand Sharma, Kolkata' (entry operator) on 02.07.2013 pursuant to which the statements of Shri Anand Sharma were recorded on 02.07.2013/06.02.2014. The AO observed that Shri Anand

Sharma was engaged in providing accommodation entries in the form of share capital, etc. by a channel of companies operated/controlled by him. The AO also observed that the companies "A" and "J" received amounts from other 'Kolkata-based shell companies' operated/controlled by Shri Anand Sharma and those amounts were thereafter transferred to assessee for subscription to capital. It was further observed that many of the companies operated/controlled by Shri Anand Sharma were struck off by Ministry of Corporate Affairs (MCA). From this, it was inferred that the moneys provided to assessee on account of subscription to share-capital was basically introduction of assessee's own 'undisclosed money'. The AO further observed that the transactions of aforesaid share-capital were not verifiable from ITR of assessee. Accordingly, the AO formed a reason to believe that the income of Rs. 66,91,70,000/- chargeable to tax had escaped assessment. Therefore, proceedings u/s 147 were undertaken against assessee through notice dated 30.03.2019 u/s 148. In response to notice, the assessee re-filed ITR on 22.04.2019 repeating the original income of Rs. 80,100/-. Thereafter, the AO issued notices u/s 143(2)/142(1) from time to time which were duly complied by assessee. Finally, the AO completed assessment vide order dated 30.12.2019 u/s 147/143(3) assessing total income at Rs. 66,93,07,996/- after making two additions, viz. (i) addition of Rs. 66,91,70,000/- on account of unexplained share capital u/s 68 and (ii) addition of Rs. 57,896/- on account of disallowance of expenses u/s 14A. Aggrieved, the assessee carried matter in first-appeal and made detailed

submissions but did not get any success. Still aggrieved, the assessee has come in next appeal before us.

3. The grounds raised by assessee are as under:

- "1. The re-opening of the assessment u/s 148 is bad in law and hence the assessment may please be annulled.*
- 2. The Ld. CIT(A) NFAC has erred in upholding the addition of Rs.66,91,70,000/- u/s 68 being the share premium received.*
- 3. It was proved before the Ld. CIT(A) NFAC and the Ld. AO that the transaction is genuine and the amounts have been received through the banking channel. The addition cannot be made merely on the basis of the ADI's report in the case of some other companies and not in the case of subscriber of shares.*
- 4. The assessee has proved that the subscriber companies had a substantial capital and reserves. The additions have been made on surmises and conjectures and deserves to be deleted.*
- 5. The addition of Rs. 66,91,70,000/- may please be deleted.*
- 6. The Ld. CIT(A) NFAC has erred in upholding the addition of Rs. 57,896/- made u/s 14A. The addition may please be deleted."*

Ground No. 1:

4. This is a legal ground in which the assessee has challenged the re-opening of assessment u/s 148 and prayed for annulling the assessment made by AO.

5. Ld. AR for assessee has filed a Written-Synopsis and advanced the same submission as mentioned therein before us during hearing. The thrust of Ld. AR is such that the AO has merely adopted the report shared by Investigation Wing and initiated re-assessment proceeding against assessee without application of his own mind. Relying upon **Meenakshi Overseas (P) Ltd. 395 ITR 677 (Delhi), Shodiman Investment Pvt. Ltd. 422 ITR 337**

(Bombay), NuPower Renewables (P) Ltd. 104 taxmann.com 307
(Bombay), Singnature Hotels (P) Ltd. 338 ITR 51 (Delhi) and *Fair Investment Ltd. 357 ITR 146 (Delhi)*, Ld. AR prayed that the re-opening in such a manner is invalid liable to annulled.

6. Per contra, Ld. DR submitted that the AO received information from Investigation Wing that the assessee was beneficiary of share application money of Rs. 66,91,70,000/- received from companies named "A" and "J". Thus, the AO had a creditable information from Investigation Wing. He submitted that the AO cannot create information on his own, he will always receive information from some agency may be an outside agency or internal Investigation Wing of department. He submitted that the information received from Investigation Wing is a reliance source for the AO. Further, the application of AO's mind is clearly visible from the reasons recorded as also the vehement mentions by AO in preliminary Paras 1 and 2 of assessment-order wherein the AO has narrated his analysis of the information received. Further, the AO has followed due procedure of law to re-open assessee's case and the assessee has nowhere raised any objection during assessment-proceeding or first appellate proceeding. Therefore, there is no illegality in AO's action in undertaking proceedings u/s 147.

7. We have considered rival contentions of both sides and perused the orders of lower-authorities as well as the material held on record to which our attention has been drawn. After a careful consideration, we find that the Ld. DR for revenue has sufficient strength in contending that the AO has not

only received credible information from Investigation Wing but also applied his own mind to the information which is discernible from reasons recorded as also prefaced in Para 1 and 2 of assessment-order. It is an accepted judicial view that at the time of formation of belief, the AO is only required to look into the existence of a valid reason and apply a reasonable mind in order to form a *prima facie* belief of escapement of income. In present case, these parameters are satisfied. Ld. AR for assessee could not substantiate as to how in present case it can be said that the AO has not applied his mind to the information shared by Investigation Wing. As a matter of fact, we may also mention that the assessee has not raised any objection against AO's action during entire assessment-proceeding or even during first-appeal proceeding before CIT(A). Therefore, in the facts of case, we do not find any merit in assessee's ground. The decisions cited by Ld. AR are not applicable to assessee's facts. Consequently, the assessee's ground is rejected.

Ground No. 2 to 5:

8. In these grounds, the assessee has challenged the addition of Rs. 66,91,70,000/- made by AO and upheld by CIT(A) on account of unexplained share capital u/s 68.

9. During assessment-proceeding, when the AO show-caused assessee to explain the justification of issuance of shares having face value of Rs. 10/- at a premium of Rs. 990/-, the assessee filed reply dated 24.12.2019 which is re-produced by AO in Para 3.1-3.2 of assessment-order as under:

"3.1 The assessee vide another notice dated 29.11.2019 has been asked to explain the justification of said security premium collected on issue of preference shares to above two companies and also to justify the valuation of shares with face value of Rs.10/- each at premium @ Rs. 990/-. No reply was received and therefore a show cause notice under section 144 was issued to submit the reply. The assessee submitted the reply vide letter dated 24.12.2019 which is placed on record. The assessee replied as under:-

"(i) The company has enhanced its capital base and issue preference share of Rs. 10/- each at a premium of Rs. 990/- per share.

(ii) Regarding justification of said security premium collected on issue of preference shares, we would like to submit that company has issued such shares on the same premium company has collected just year before the previous year and that was the basis of collecting premium this year.

(iii) It is worthy mention that company has issued to above said capital to the same parties (M/s Ajay Software P Ltd and M/s Jai Hind Financial Services P Ltd) during the year under consideration to whom issued in the year before the previous year under consideration.

(iv) Your goodself may verify the same from the audited financial statement of the Company attached herewith where the security premium on issue of shares at Rs. 990/- per share in just year before the previous year by the company as per Annexure 1.

(v) Further, we would like to submit that both the companies assessed to tax and latest assessment order is enclosed for your ready reference and kind perusal."

3.2 Above reply of the assessee is carefully examined. It is noticed that the assessee has attached following documents with its written submission dated 24.12.2019 filed through e-proceedings:-

(i) Notice of AGM dated 29.09.2012 along with copy of Director's report, Auditors' report, Financial Statements for the FY 2011-12 with notes to financial statement for the year ended 31.03.2012.

(ii) Copy of assessment orders under section 143(3) in case of M/s Jai Hind Financial Advisors P Ltd and M/s Ajay Software P Ltd for the AY 2017-18 passed by respective Assessing Officers of Kolkata.

It is thus evident that the audited financial statement of the company for immediate preceding FY is not found enclosed."

However, the AO rejected assessee's submission vide Para 3.3 to 8 of assessment-order, treated the receipt of Rs. 66,91,70,000/- by assessee as unexplained and made addition.

10. During first-appeal, the CIT(A) approved AO's action by following order:

"5. DECISION:

I have gone through and duly considered the submission made by the appellant, assessment order of the AO and other facts of the case available on the record.

5.1. Ground No. 1 pertains to the issue of addition of Rs.66,91,70,000/- on account of share premium u/s 68 of the Act and the same is adjudicated as under:-

*5.2. In this case, during the year under consideration, it is evident that the appellant has received an amount of Rs.66,91,70,000/- as share premium. The appellant was required to substantiate the amount received in his books of account by way of furnishing the details of such persons, genuineness of transaction, creditworthiness of person etc. **The appellant established the identity of investors and genuineness of transactions. However, the appellant failed to establish creditworthiness of investors.***

5.3. As per information available, M/s Bhaskar Denim Ltd, d, now renamed as M/s Decent Industries Pvt Ltd. allotted preference shares at premium to two Kolkata based shell companies on 31.03.2012 amounting to Rs. 66,91,70,000/-, Shares value of Rs.10/- each were issued at premium of Rs. 990/- to two companies viz. M/s Ajay Software P Ltd and M/s Jai Hind Financial Advisors P. Ltd. In this regard, Investigation Directorate of the Department, Kolkata had examined the cases of entry providers and found that the assessee company had allotted preference shares to M/s Ajay Software P Ltd and M/s Jai Hind Financial Advisors P Ltd at a premium of Rs. 990/- per share.

From bank accounts of above two companies it is also observed that during the FY 2011-12, these companies have received amount from various Kolkata based shell companies and such amounts were immediately transferred to the assessee company. In these bank accounts, money was received from Kolkata based shell companies which are controlled by various entry operators. It is also noticed that many of these companies have been struck off by the MCA. This clearly shows that money provided by such companies to above two companies on account of purchase of share was actually routing of undisclosed income of the assessee company which is the beneficiary

company. Thus, it is evident that the undisclosed income of the assessee company was routed through various shell companies to M/s Ajay Software P Ltd and M/s Jai Hind Financial Advisors P Ltd in the guise of sale of investments and then finally transferred to the assessee company in the garb of share premium.

During the appellate proceedings, the notices were issued to the two investor companies to prove their creditworthiness. However, both the companies failed to prove their creditworthiness with supporting documentary evidences.

5.4. It is also undisputed fact that an amount of Rs.66,91,70,000/- was credited in appellant's book of account on account of receiving of share premium. Therefore provision of Section 68 of the Act clearly attracts in this case. For the sake of reference, Section 68 of Income Tax Act is re-produced below:-

"Cash credits.

68. *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 in the opinion of the Assessing Officer satisfactory, the sum so credited may be charged to income-tax as the year: thereof or the explanation offered by him is not, Officer, satisfactory, the sum so credited may income of the assessee of that previous year.*

Provided *that where the sum so credited consists of loan or borrowing or any such amount, by whatever name called, any explanation offered by such assessee shall be deemed to be not satisfactory, unless,-*

(a) the person in whose name such credit is recorded in the books of such assessee also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further *that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee- company shall be deemed to be not satisfactory, unless-*

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found satisfactory:

Provided also *that nothing contained in the first proviso or second proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."*

5.5. There are several judicial precedents which hold that initial onus is on the appellant to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the shareholders under Section cited below:-.

(a) Hon. Delhi High Court in the case of CIT vs. Oasis Hospitalities Pvt. Ltd. 333 ITR 119 (Delhi) (2011) held that:-

“The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 60. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise”.

It has been held that merely proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established.

(b) Hon'ble Supreme Court in the case of CIT Vs P. Mohankala (2007) 161 Taxman 169/291 ITR 278 held that:-

“A bare reading of section 68 of the Income-tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee, (ii) such credit has to be a sum of money during the previous year; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The expression “the assessee offers no explanation” means the assessee offers no proper, reasonable and acceptable explanation as regards the sum found credited in the books maintained by the assessee. The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature”.

(c) Hon'ble Supreme Court in the cases of Kale Khan Mohammad Hanif v CIT [1963] 50 ITR 1 (SC), Roshan Di Hatti v CIT [1977] 107 ITR (SC) held that:-

“the onus of proving the source of a sum of money found to have been received by an assessee, is on him. Where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source”.

5.6. It has been recently held by the Hon'ble Supreme Court in the case of PCIT Vs. NRA Iron & Steel Pvt. Ltd. wherein the addition in respect of identical issue has been confirmed by Apex Court and held that the onus to establish credit worthiness of the investors companies is on the appellant. The appellant is under legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO and mere filing to primary evidence is not sufficient.

5.7. In view of above judicial precedents laid by the Hon'ble High Court and Supreme Court, it is evident that “the initial onus is upon the assessee to

establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of the transaction". In this case, it is evident from assessment-order that the appellant has not furnished satisfactory documentary evidences regarding nature and source of credit entries of Rs.66,91,70,000/- received by way of share premium. Further, it is apparent that the appellant during the assessment as well as in the appellate proceedings failed to furnish documentary evidences/proper explanation in support of his contention. So in view of aforesaid facts, I am not in a position to take a divergent view from the finding of the AO. Hence, the action taken by the AO appears to be in order. Accordingly, I uphold the addition made of Rs.66,91,70,000/- on account of unexplained cash credits by way of share premium. Accordingly, Ground No. 1 is dismissed."

11. Before us, Ld. AR for assessee made following contentions to assail the orders of lower-authorities:

- (i) The AO has made addition solely on the basis of statement of Shri Anand Sharma. The assessee has received moneys from "A" and "J" and does not know who is 'Anand Sharma'. The AO has no material or basis except the statements of 'Anand Sharma', to show that the assessee has received accommodation entries in the form of share capital.
- (ii) Even in his statements, Shri Anand Sharma has nowhere disclosed the name of assessee. The AO has noted a wrong finding in Para 4(ii) of assessment-order that Shri Anand Sharma stated that he has given bogus/accommodation share application money to assessee i.e. Bhaskar Denim Limited (renamed as Decent Industries Pvt. Ltd.). Further, nowhere in statements, Shri Anand Sharma has disclosed the names of "A" or "J" as companies operated/controlled by him for providing accommodation entries. Thus, from the statements which

are the only basis for making addition in assessee's hands, it cannot be found that any accommodation by "A" and "J" was provided to assessee.

- (iii) The AO has made addition without making any enquiry or investigation from "A" and "J" to discover the truth and authenticity of transactions. In fact, in Para 4(iii) of assessment-order, the AO has himself noted that before Investigation Wing, "A" and "J" stated in their written-submissions that they liquidated their old investments held in earlier years and the proceeds was utilised for making investment in assessee-company. Thus, there is a clear-cut explanation by "A" and "J" made to authorities in favour of assessee during independent examination.
- (iv) That, all three ingredients of section 68 of the Act, viz. identity of "A" & "J", genuineness of transactions and creditworthiness of "A" & "J", have been duly established by furnishing a large number of statutory and non-statutory documents. In Para 5.2 of appeal-order, the CIT(A) has already accepted the satisfaction of first two ingredients i.e. the identity of "A" & "J" and genuineness of transactions. Although the CIT(A) has expressed doubt about third ingredient of creditworthiness but the documents brought by assessee on record are enough evidences to establish creditworthiness also. No defect or infirmity has been found by lower-authorities in any of the documentary evidences. Ld. AR has narrated the details of documents filed in Para 2.8 to 2.19

of Written-Synopsis giving references of Page numbers of Paper-Book where the respective documents are placed as under:

Documents to establish identity:

- a) Names and addresses of "A" and "J" **(Page No. 73 of Paper-Book)**.
- b) Audited financial statements and Income-tax returns of "A" and "J" for AY 2012-13 under consideration **(Page No. 139 to 171 / 295 to 327 of Paper-Book)**.
- c) Latest assessment-orders of "A" and "J" for AY 2017-18. These are scrutiny assessment-orders passed u/s 143(3) by ITO-Ward-9(1)/9(3), Kolkata. **(Page No. 58 to 63 of Paper-Book)**.

Documents to establish genuineness:

- d) Form 2 (Return of Allotment) alongwith Board Resolution filed with the Ministry of Corporate Affairs and acknowledgement thereof **(Page no. 69 to 74 / 115 of Paper-Book)**.
- e) The assessee has received moneys through banking channel. Bank Statement of assessee and Copy of Bank Book as extracted from books of account of assessee **(Page no.75 to 83 of Paper-Book)**.
- f) Ledger account of "A" and "J" in the books of assessee **(Page no. 112 to 114 of Paper-Book)**.

Documents to establish creditworthiness:

- g) Bank statements of "A" and "J" showing debit and credit entries for AY 2012-13 under consideration **(Page no. 116 to 138 of Paper-Book)**.
 - h) Audited financial statements and Income-tax returns of "A" and "J" for AY 2012-13 under consideration **(Page No. 139 to 171 / 295 to 327 of Paper-Book)**. The Balance-Sheets of "A" and "J" as on 31.03.2012 show shareholders' funds to the tune of Rs. 46,94,46,306/- and Rs. 58,39,49,987/- respectively with corresponding figures of Rs. 46,94,42,355/- and Rs. 58,39,24,450/- as on 31.03.2011. Both companies have current liabilities, tangible assets, investments and current assets.
 - i) Latest assessment-orders of "A" and "J" for AY 2017-18. These are scrutiny assessment-orders passed u/s 143(3) by ITO-Ward-9(1)/9(3), Kolkata. **(Page No. 58 to 63 of Paper-Book)**.
- (v) That, the companies "A" and "J" have been assessed by Income-tax Department and copies of their latest scrutiny assessment-orders of

AY 2017-18 passed u/s 143(3) by ITO-Ward-9(1)/9(3), Kolkata are on record as mentioned in above list of documents. Ld. AR submitted that the department has scrutinized both "A" and "J" and found those companies and the financial figures of those companies as genuine. Further, the copies of audited financial statements and income-tax returns of those companies for AY 2012-13 under consideration are also filed in Paper-Book at Page 139 to 171 / 295 to 327. Thus, once the companies "A" and "J" are found having sufficient share capital, etc. and the investments made by them in assessee-company are duly recorded in their audited accounts and well-informed to department also in the returns filed, the AO is grossly wrong in doubting the same.

- (vi) Once the assessee has discharged primary onus by adducing ample evidence as noted above, the burden shifts upon AO. Reliance in this regard is placed on ***Orissa Corporation (P) Ltd. 159 ITR 78 (SC), Rohini Builders 127 Taxman 523 (Gujrat), Lovely Exports (P) Ltd. 216 ITR 195, Oasis Hospitalities (P) Ltd. 333 ITR 119 (Delhi) and Fair Finvest Ltd. 357 ITR 146 (Delhi).***
- (vii) The assessee-company has issued identical shares at identical premium in preceding AY 2011-12. This point was categorically submitted to AO in Point No. (ii) of the letter dated 24.12.2019 reproduced in Para 3.1 of assessment-order. Ld. AR drew us to Page 251 of Paper-Book where the audited Balance-Sheet of assessee filed to

department for preceding AY 2011-12 is placed. In Schedule-1, there is "issued and paid-up capital" of Rs. 38,30,800/- from 3,83,080 preference shares of Rs. 10/- each and in Schedule-2, there is a security premium of Rs. 37,92,49,200/- as on 31.03.2011. The corresponding figures as on 31.03.2010 were 0 (zero). Thus, the assessee issued 3,83,080 preference shares of Rs. 10/- each at a premium of Rs. 990/- per share (Rs. 37,92,49,200 ÷ 3,83,080). Ld. AR submitted that the premium of Rs. 990/- received by assessee in preceding AY has been accepted by department without any objection. Therefore, the AO is wrong in raising objection in current year. Without prejudice, Ld. AR submitted that neither the assessee is obligated to explain fair value for section 68 nor the AO has authority to question fair value for invoking section 68. In this regard, Ld. AR relied upon ***Chiripal Poly Films Ltd. 104 taxmann.com 172 (Mumbai ITAT)***. Ld. AR also contended that it was a mutual decision between assessee and "A" & "J" to receive/pay premium, how the AO is concerned with their mutual decision? Ld. AR relied upon decision of Hon'ble Jurisdictional High Court in ***Chain House International (P) Ltd. 98 taxmann.com 47 (MP)*** holding thus:

"52. Issuing the share at a premium was a commercial decision. It is the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe the shares at such a premium or not. This was a mutual decision between both the companies. In day to day market, unless and until, the rates is fixed by any Govt. Authority or unless there is any restriction on the amount of share premium under any law, the price of the shares is decided on the mutual understanding of the parties concerned.

53. Once the genuineness, creditworthiness and identity are established, the revenue should not justifiably claim to put itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of ascertaining how much is a reasonable premium having regard to the circumstances of the case.

54. There is no dispute about the receipt of funds through banking channel nor there is any dispute about the identity, creditworthiness and genuineness of the investors and, therefore, the same has been established beyond any doubt and there should not have been any question or dispute about premium paid by the investors therefore, unless there is a limitation put by the law on the amount of premium, the transaction should not be questioned merely because the assessing authority thinks that the investor could have managed by paying a lesser amount as Share Premium as a prudent businessman. The test of prudence by substituting its own view in place of the businessman's has not been approved by the Supreme Court in the decisions of CIT V/s. Walchand & Co. Pr. Ltd. [(1967) 65 ITR 381] and J.K. Woollen Manufacturers V/s. CIT [(1969) 72 ITR 612]."

12. Having submitted thus, Ld. AR also pointed out a legal lacuna in the action of lower-authorities. It is submitted that the assessee has received subscription from "A" & "J" through banking channel which were duly recorded in books of "A" & "J". The companies "A" & "J" are 'source' for assessee and the assessee has filed ample evidences to prove the identity, genuineness and creditworthiness as required by section 68 qua "A" & "J" i.e. the 'source'. Thereafter, there remains no further burden upon assessee in terms of section 68. The CIT(A) has, however, relied upon Proviso to section 68 to uphold the addition made by AO. The said proviso prescribes thus:

"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found satisfactory:"

This Proviso has itself come in statute from AY 2013-14 and therefore not applicable to AY 2012-13 under consideration. Before introduction of this Proviso, which is the case of assessee, there was no requirement to prove "source of source". It is further held by Hon'ble Courts, **M/s Gagandeep Infrastructure Pvt. Ltd. 394 ITR 680 (Bom)** to quote one such decision, that the new proviso is prospective and not retrospective in application. When it is so, the lower-authorities are legally wrong in making/upholding addition on the allegations with respect to the "source of source" i.e. the source/companies from which "A" & "J" received moneys for making investment in assessee. Therefore, the action of lower-authorities is based on a non-existent law and clearly illegal.

13. Per contra, Ld. DR for revenue strongly supported the orders of lower-authorities. For this firstly, he drew us through various paras of assessment-order to show that the AO has made complete analysis before making addition as under:

- (i) In Para 4, the AO has noted that a survey u/s 133A was conducted by Investigation Wing on 02.07.2013 upon Shri Anand Sharma and subsequently statements of Shri Anand Sharma were also recorded u/s 131 on 06.01.2014. It emerged from the confessions and admissions of Shri Anand Sharma in sworn statements that he is an accommodation provider. In reply to Q.No. 6 and 8, Shri Anand

Sharma admitted that he was involved in formation of Jama-Kharchi companies and providing accommodation to others for commission. The AO has also noted that the companies "A" and "J" informed to Investigation Wing that they liquidated their old investments and the sale proceed was utilized for purchasing shares of assessee but this explanation is not true in view of statements of Shri Anand Sharma. The AO has extracted the key figures of financial statements of "A" and "J" and found that those companies do not have any net worth or real assets; there are no fixed assets or very little fixed assets are owned by companies; the turnover is very negligible; there is no office building, shop, etc., no rent has been paid; the companies do not have significant income, major source of income is not from operations of business but from interest, commission, etc.; therefore the companies do not real economic existence and they exist only on papers.

- (ii) In para 5, the AO has extracted the details of investments made by "A" and "J" in other companies and observed that all those companies were shell companies controlled by Shri Anand Sharma. The AO has also re-produced the statements of Shri Anand Sharma.
- (iii) In para 6, the AO has observed that the bank statements of "A" and "J" reflect that they received funds from other companies just before transfer to assessee. Thus, entire modus operandi was adopted to pump undisclosed income of the assessee. The AO also observed that the assessee has claimed to have collected identical share premium in

preceding year but such fact cannot be a basis to discharge the burden to prove genuineness of transactions in current year. Further, the assessee has failed to furnish the detailed basis for share premium of Rs. 990/- collected.

- (iv) In Para 6.1, the AO has made following observations qua the assessment-orders of "A" and "J" filed by assessee for AY 2017-18:

"6.1 In support of its contention the assessee has also enclosed the copies of assessment orders under section 143(3) for the AY 2017-18 in respect of M/s Ajay Software P Ltd and M/s Jai Hind Financial Advisors P. Ltd. passed by the respective AOs of Kolkata. It is noticed that M/s Ajay Software P Ltd e-filed its return of income for the AY 2017-18 declaring nil income, after adjusting brought forward loss of Rs. 1927/- under section 143(3). The AO computed the income of Rs. 1927/-. The assessment proceedings were completed on limited issues. Similarly, the assessment proceedings in case of M/s Jai Hind Financial Advisors P Ltd were completed on total income of Rs. 48,035/- as against the returned Income of Rs. 6035/- for the AY 2017-18. This case was also selected on limited Issues including low income in comparison to high loan/advance/investment. Thus, the above assessment orders do not justify the share premium of Rs. 990/- per are received during the FY 2011-12 relevant to A Y 2012-13. From the Assessment orders it is also noticed that there is no regular business activity by these paper companies."

Further, the AO observed that the assessee had issued shares of Rs. 10/- each at a premium of Rs. 990/- without justifying such high premium.

- (v) Thereafter, in Para 7, the AO has taken into account the decisions of Hon'ble Apex Court in ***Durga Prasad More 214 ITR 801, Sumati Dayal 80 Taxmann 89, McDowell Vs. CTO*** and Hon'ble Delhi High Court in ***NR Portfolio 2014 42 Taxmann.com 339*** and finally, vide Para 8, made addition.

14. The Ld. DR relied heavily upon *PCIT Vs. BST Infra (2024) 161 Taxmann.com 668 (Calcutta)*, *PCIT Vs. Swati Bajaj (2022) 139 taxmann.com 352 (Calcutta)* and *Bal Gopal Merchants (P) Ltd. Vs. PCIT (2024) 162 Taxmann.com 465 (Calcutta)*.

15. In rejoinder, Ld. AR re-iterated that the assessee is neither concerned nor had any knowledge of either Anand Sharma or other companies in which "A" and "J" made investments. The assessee has received moneys from "A" and "J" and both of these companies are very much active as per MCA records and also regularly assessed by Income-tax Department itself. The companies "A" and "J" sold their investments and invested sale-proceed in assessee. He submitted that the audited accounts of "A" and "J" are also available on record and once it is found that those companies liquidated their investments and made investment in assessee-company through banking channel, there is a direct source for making investment in assessee. The theory of less income or no income or less fixed assets is not relevant. He submitted that the AO has made addition on the basis of mere surmises and conjectures without having any iota of tangible material to establish that the transactions are not genuine.

16. We have considered rival contentions of both sides and perused the orders of lower-authorities as well as the material held on record to which our attention has been drawn. The issue involved here is the addition of Rs. 66,91,70,000/- made by AO u/s 68 in respect of share application money received by the assessee from "A" and "J". After a careful consideration, we

find certain vital points. The *first and foremost* point is that the AO has made addition on the basis of statement recorded in the survey proceeding carried out by Investigation Wing on Shri Anand Sharma on 02.07.2013. Shri Anand Sharma has clearly admitted in statements that he is engaged in providing accommodation by way of share application money, loans, etc., hence there cannot be any dispute to that extent. But the AO has reproduced statements of Shri Anand Sharma on Page 12-15 of assessment-order. A perusal of statements clearly shows that Shri Anand Sharma has nowhere stated that any accommodation was provided to assessee. Further, Shri Anand Sharma has nowhere stated that the companies "A" & "J" from whom the assessee received share application money were the companies controlled/operated by him. Therefore, the addition made by AO is on the basis of mere assumption of accommodation provided by Shri Anand Sharma to assessee. *Secondly*, the AO has himself noted an important fact in Para 4(iii) of assessment-order that when Investigation Wing asked "A" & "J" about sources of their investments in assessee, they stated in their written submissions that they have liquidated their old investments held in earlier years and the proceeds of sale have been utilized for purchasing shares of assessee. This finding noted by AO himself in assessment-order clearly shows that "A" and "J" have admitted not only the investment made in assessee but also the source utilized by them for making investment. *Thirdly*, the assessee has adduced sufficient evidences as enumerated in foregoing para to show that all three ingredients of section 68 viz. identity,

genuineness and creditworthiness are duly proved. Ld. CIT(A) has already accepted in his order that the first two ingredients of identity and genuineness are proved. So far as the third ingredient of creditworthiness is concerned, the assessee has filed audited Balance-Sheets, Income-tax Returns and Bank Statements of "A" & "J". The Balance-Sheets shows sufficient shareholders' funds available. The companies "A" & "J" sold their investments held in other companies and from sale-proceeds, invested moneys in assessee. The bank statements of "A" & "J" are held on record which shows sufficient balances available therein for making investments in assessee. The assessee has also filed even latest scrutiny assessment-orders of AY 2017-18 of "A" and "J" which are re-produced below for an immediate reference:

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 9(1), KOLKATA

To, AJAY SOFTWARE PRIVATE LIMITED 23, VIVEKANAND ROAD, 3RD FLOOR KOLKATA 700007, West Bengal India	
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PAN: AAGCA4914J	AY: 2017-18	Order No: ITBA/AST/S/143(3)/2019-20/1018964787(1)	Dated: 16/10/2019
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Name of the assessee	AJAY SOFTWARE PRIVATE LIMITED
Address of the assessee	23, VIVEKANAND ROAD, 3RD FLOOR, KOLKATA 700007, West Bengal, India
Status	COMPANY
Range/Circle/Ward	WARD 9(1), KOLKATA
Resident/Resident but not Ordinary resident/ Non-resident	Resident
Date of Hearing	30/01/2019, 11/02/2019
Section/Sub-section under which assessment is made	143(3)
Date of Order	16/10/2019

ASSESSMENT ORDER

The e – return of income for the Assessment Year: 2017 – 18 was filed on 31.10.2017 declaring a total income of Rs. Nil only (after adjusting brought forward loss to the tune of Rs. 1,927/-). This case was selected through CASS for scrutiny of the following point on a limited basis:

1. Expenses incurred for earning exempt income.
2. Investments / advances / loans.

1.2 Notice u/s. 143 (2) of the Income Tax Act was issued upon the assessee on 09.08.2018 and duly served on line. Thereafter, notice u/s. 142 (1) of the Act along with requisition was issued on 28.01.2019. Further, clarifications/explanations were called for by issuing online notice.

1.3 In response to the above mentioned notices, the assessee company e – filed copies of the Audited Accounts of the assessee company for the relevant period. It also e – filed its computation of Income for the relevant period, details of its and bank accounts, along with the details of its directors, and share holders. Further, the assessee company vide its e – filed letter dated 11.09.2019, stated that, “...No expenses have been incurred for earning exempt income by the assessee company during the year....”.

1.4 All such details as provided by the assessee company were also duly examined and placed on record. Keeping the above in view, the order was passed.

Note: If digitally signed, the date of digital signature may be taken as date of document.
AAYAKAR BHAWAN, P-7, CHOWRINGHEE SQUARE, KOLKATA, West Bengal, 700069
Email: KOLKATA.IT09.1@INCOMETAX.GOV.IN, Office Phone:332/213-6231

* The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

AAGCA4914J- AJAY SOFTWARE PRIVATE LIMITED
A.Y. 2017-18
ITBA/AST/S/143(3)/2019-20/1018964787(1)

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2. It is seen from the return of income of the assessee company for the A. Y.: 2017 - 18, that it had claimed a brought forward loss amounting to Rs. 82,936/-. Further, the instant case was assessed u/s. 147 / 143 (3) of the I. T. Act, 1961, vide order dated 31.12.2018, wherein such brought forward loss of the assessee company was nullified. As such, the amount of brought forward loss to the tune of Rs. 1,927/- adjusted by the assessee company with its income (as per computation of income furnished by the assessee company), is disallowed.

Addition: Rs. 1,927/-

In view of the above discussions, the total income of the assessee is computed as below:

Computation of Total Income

Income as per Return : Rs. 00.00

Add: i) Disallowance of adjusted

Brought forward loss

(As discussed in Para 2) : Rs. 1,927.00

ASSESSED INCOME : Rs. 1,927.00

or, Rs. 1,930/- (Rounded Off)

Assessed as above u/s. 143 (3) of the I. T. Act, 1961. Tax liability thereon is computed separately in this order. Allowed credit of taxes paid under the provisions of the I. T. Act, 1961, as per 26 AS / OLTAS. The Income Tax Computation Form generated online in ITBA module, enclosed herewith is an integral part of this order. Issued demand notice and copy of order to the assessee.

PRANAB KUMAR BISWAS
WARD 9(1), KOLKATA

Copy to:

Assessee

PRANAB KUMAR BISWAS
WARD 9(1), KOLKATA

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 9(3), KOLKATA

To, JAI HIND FINANCIAL ADVISORS PRIVATE LIMITED 12, SIR HARI RAM GOENKA STREET, SIR HARI RAM GOENKA STREET 1ST FLOOR KOLKATA 700007, West Bengal India	
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PAN: AABCJ9501B	AY: 2017-18	Order No: ITBA/AST/S/143(3)/2019-20/1020255246(1)	Dated: 12/11/2019
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Name of the assessee	JAI HIND FINANCIAL ADVISORS PRIVATE LIMITED
Address of the assessee	12, SIR HARI RAM GOENKA STREET, SIR HARI RAM GOENKA STREET 1ST FLOOR, KOLKATA 700007, West Bengal, India
Status	COMPANY
Range/Circle/Ward	WARD 9(3), KOLKATA
Resident/Resident but not Ordinary resident/ Non-resident	Resident
Date of Hearing	03/09/2018, 24/01/2019, 25/07/2019
Section/Sub-section under which assessment is made	143(3)
Date of Order	12/11/2019

ASSESSMENT ORDER

The assessee-company filed its E-Return of income on 31-10-17 showing total income of Rs 6035/-. The return was processed accordingly. Subsequently the case was selected for scrutiny through CASS on the basis of reasons that 1) Expenses debited to P&L account for earning exempt income as per schedule BP of ITR is significantly lower as compare to investment made to earn exempt income 2) Low income in comparison to high loan/ advance/investment in shares appearing in balance sheet. Notices u/s 143(2) and 142(1) served on the assessee. In response to the notice assessee submitted balance sheet, P&L account, bank statement and other relating documents.

In response to the notices assessee submitted a write off containing balance sheet, P&L account, depreciation chart, and bank statement maintained in SBI, directors details, computation of total income. He stated that they had all the investment made by the

Note: If digitally signed, the date of digital signature may be taken as date of document.
AAYAKAR BHAWAN, P-7, CHOWRINGHEE SQUARE, KOLKATA, West Bengal, 700069
Email: KOLKATA.ITO9.3@INCOMETAX.GOV.IN,

* The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

company in unlisted shares, on which no expenditure need to be incurred. In fact investment in shares generally does not require incur in any expenditure. There is no exempt income earned by the company. Therefore, earning exempt income does not arise. There is no change in investment during the year under consideration, so section 56 of the Company Act 2013, rule 11 of the company rule 2014 and provision given in model articles of association given in Table F of schedule 1 is not applicable in this case. Assessee's balance sheet has been analyzed and share capital as on 01-04-2017 is remained constant tallying with last year balance sheet. Reserve and surplus is not remarkably changed. There is meager change due to reflection of P&L account, and non-current investment is unchanged with the last year balance sheet i.e. is Rs. 583390000 as on 01-04-2016 and same amount was as at 31-03-2017. But assessee's P&L account shows that revenue from operation was Rs. 51,990/- and other income was Rs. 50043/- and assessee debited purchase of stock in trade of Rs. 40,015/- against which assessee debited other expenses of Rs. 42,700/- is not allowable as expenditure because assessee could not furnish any particulars of sell and purchase etc.

Show-cause notice was served on the assessee but no such reply given by the assessee as per the show-cause notice as well as the notice u/s 142(1). Therefore, Rs. 42,700/- is consider for disallowance.

For noncompliance penalty proceedings u/s 272A(1)(D) has been initiated.

COMPUTATION OF TOTAL INCOME:

Gross total Income as per Return : Rs. 6,035/-
Add as discussed above : Rs. 42,700/-
Assessed Income : Rs. 48,035/-

Assessed u/s.143(3) of the Income Tax Act, 1961

And Issued copy of the order, demand notice to the assessee.

TINKARI RAY
WARD 9(3), KOLKATA

Copy to:
Assessee

No defect has been found by AO in any of the documents adduced by assessee. Thus, after seeing all these documents filed by assessee, there can hardly be any dispute qua the creditworthiness also. *Fourthly*, the AO is not having any documentary or corroborative evidence to show that the assessee has received accommodation entry by way of share application money. *Fifthly*, the assessee has also issued identical shares at identical price of Rs. 1,000/- per share (inclusive of premium of Rs. 990/- per share) in immediate preceding AY 2011-12 which the department has accepted. *Sixthly*, there is a strong legal point raised by assessee/Ld. AR that the assessee has established all three ingredients with respect to the "source", namely "A" & "J", from which the impugned share application money was received by assessee. The CIT(A) and AO have, however, attempted to require the assessee to satisfy the requirement of Proviso to section 68 i.e. to explain 'source of source' although the said Proviso itself was not there in section 68 at that time. Undisputably, the Proviso came into being from AY 2013-14 and the Courts have also held against retrospective application of Proviso, therefore it was not applicable to AY 2012-13 under consideration. When it is so, there is a strong merit in assessee's submission that the addition made/upheld by AO/CIT(A) on the strength of Proviso to section 68 is very much illegal. Ld. DR for assessee has though relied upon statements of Shri Anand Sharma and the observations made by AO in various paras of assessment-order (as narrated by us in foregoing paras of this order) but, however, could not controvert these vital points as noted by us.

17. At this stage, we gainfully refer the decision of **ITAT, Jaipur 'B' Bench in The ITO, Ward-4(2), Jaipur Vs. M/s Skyways Industrial Estate Company (P) Ltd., ITA No. 691/JP/2017, dated 21.02.2020** (order is authored by Judicial Member forming part of this Bench) in one identical case where the AO made an addition of Rs. 3,98,00,000/- in the very same AY 2012-13 in the hands of an assessee named "M/s Skyways Industrial Estate Company (P) Ltd." u/s 68 on account of unexplained share capital received from M/s. Abhishek Advisory Pvt. Ltd. by referring to same survey action carried out by Investigation Wing on 'Shri Anand Sharma' on 02.07.2013. The basic facts, as would be seen from paras of ITAT's order re-produced below, are similar to present assessee:

"This appeal by the Revenue is directed against the order of Id. CIT(A), Ajmer dated 27-06-2017 for the Assessment Year 2012-13. The Revenue has raised the following ground:-

"Whether in the facts and circumstances of the case and in law the Id. CIT(A) is right in deleting the addition of Rs. 3,98,00,000/- made u/s 68 of the I.T. Act, 1961 without appreciating the fact that the assessee has introduced cash amounting to Rs. 3,98,00,000/- in the form of share capital through the racket of entry provider operating in Kolkata, information of which was provided by the Investigation Wing, Kolkata."

2.1 *The assessee is a company and engaged in the business of real estate and developers. During the year under consideration, the assessee received share capital of Rs. 3,98,00,000/- from M/s. Abhishek Advisory Pvt. Ltd. The AO questioned the genuineness of the receipt of the said amount on account of share capital at a premium of Rs.790/- per share of Rs. 10/- each. The AO proposed to make the addition u/s 68 of the Act on the basis that search and survey action was carried out in the case of one Shri Anand Sharma, Kolkata on 02-07-2013 whereby various incriminating documents were seized and impounded. The said search action revealed and proved that Shri Anand Sharma through a web of companies run and operated by him is engaged in providing accommodation entries of various natures like bogus unsecured loans, bogus share application and bogus sales etc. The AO referred to the statement of Shri Anand Sharma recorded by the Investigation Wing, Kolkata, in the search and seizure action carried out on 02-07-2013 and observed that Shri Anand Sharma in his statement admitted to have engaged in providing the accommodation entries for commission. The AO came to the conclusion that M/s. Abhishek Advisory Pvt. Ltd. is one of the companies owned and controlled by Shri Anand Sharma for the purpose of providing accommodation entries. Based on the statement of Shri Anand*

Sharma recorded by the Investigation Wing, Kolkata, the AO made the addition of the said amount of Rs. 3.98 crores and treated the same as unexplained cash credit. The assessee challenged the action of the AO before the Id. CIT(A) and submitted that it had produced all the details before the AO to prove beyond doubt the identity of M/s. Abhishek Advisory Pvt. Ltd., creditworthiness of the said company and genuineness of the transactions. The assessee referred to the documents produced before the AO which included PAN Card of M/s. Abhishek Advisory Pvt. Ltd., copy of Company's Master Data generated from MCA Website showing the status of the company as active, copy of Income Tax Returns for the Assessment Years 2009-10 to 2013-14 as well as the assessment order passed u/s 143(3) in the case of M/s. Abhishek Advisory Pvt. Ltd. by ITO, Ward- 1(1), Kolkata for the Assessment Year 2008-09. Thus the assessee explained that while passing the scrutiny assessment for the Assessment Year 2008-09, the AO examined the source of funds being share capital received by M/s. Abhishek Advisory Pvt. Ltd. from its shareholders and found to be genuine. Once the said company was having the sufficient funds and received the funds on account of share capital then the investments made by the said company in the shares of the assessee cannot be doubted. The assessee has made elaborate submissions before the Id. CIT(A) and also referred to various decisions as well as documentary evidences produced before the AO. The Id. CIT(A) after going through the record and material noted that Shri Anand Sharma, in his statement has not disclosed the name of M/s. Abhishek Advisory Pvt. Ltd. as a company or concern controlled by him for providing accommodation entries. The Id. CIT(A) directed the AO to furnish certain information which includes the copies of statement of Shri Anand Sharma and other seized materials as well as source of list of the companies as referred by the AO in the assessment order being the concerns controlled and manager by Shri Anand Sharma. Since the AO did not respond to these queries raised by the Id. CIT(A), therefore, the Id. CIT(A) proceeded to decide the appeal on the basis of record available before him. Thus the Id. CIT(A) has deleted the addition made by the AO on the ground that the AO has not referred to any seized materials or any other materials which could prove that the assessee has received the accommodation entries in the form of share application money. Aggrieved by the impugned order of the Id. CIT(A), the Revenue filed the present appeal.

2.2 Before us, the Id. DR has submitted that the assessee issued the shares of Rs. 10/- each at a premium of Rs. 790/- per share without justifying the value of its shares to carry such a high premium. The Id. DR has further submitted that the assessee was duly confronted with the search and seizure action in the case of M/s. Abhishek Advisory Pvt. Ltd., by the DCIT (Inv.) and also shown the statement of Shri Anand Sharma in which all the statements were narrated by the Investigation Wing. Thus the assessee was given the opportunity by issuing show cause notice as to why share capital of Rs. 3.98 crores introduced during the year under consideration from the said company may not be treated as non-genuine as the same is only diversion of profit to evade the tax liability. The Id. DR has referred to the statement of Shri Anand Sharma and submitted that he has explained the modus operandi of creating the paper company for the purpose of providing accommodation entries. The Id. DR thus contended that M/s. Abhishek Advisory Pvt. Ltd. was also controlled and managed by Shri Anand Sharma as his brother, the director of the said company. The Id. DR submitted that the list of companies as reproduced by the AO in the assessment order is taken by the Investigation Wing, Kolkata from the system of Shri Anand Sharma, maintained in Tally. Therefore, this clearly shows that M/s. Abhishek Advisory Pvt. Ltd. is one of the companies managed and controlled by Shri Anand Sharma otherwise how the name of the said company is the part of the list maintained by him in his computer. The Id. DR further contended that even the financial statement of these companies were also part of his system which shows that he was managing and controlling all these companies for providing accommodation entries. The Id. DR

has referred to the financial statement of the investor companies and submitted that there is no real estate business carried out by these companies except receiving the money in the shape of share capital and investing the same as providing the accommodation entries in the garb of investment in shares or loans provided to various persons. The Id. DR has further referred to the assessment order and submitted that the AO in order to verify the genuineness of the transactions issued notices [u/s 133\(6\)](#) of the Act to M/s. Abhishek Advisory Pvt. Ltd. but the said letter was received back unserved with the remarks that "no such company on this address." The AO then issued a commission to DDIT (Inv.), Kolkata with the request to conduct an enquiry and give an enquiry report on the issue. The DDIT (Inv.), Kolkata then sent a report dated 25/26-03-2015 which shows that the information was sought to be gathered from Shri Anand Sharma by recording his statement for confirmation of the fact of providing accommodation entries. However, despite summon [u/s 131 \(1\)](#) of the Act to Shri Anand Sharma at the address available with this office, he did not turn up. The AO after taking these steps asked the assessee to produce the director of the investor company for examination. The assessee failed to produce the director the investor company. Thus all these exercises and investigations conducted by the Department as well as by the AO during the assessment proceeding clearly establish that the assessee has failed to prove the identity, creditworthiness and genuineness of the transactions as required [u/s 68](#) of the I.T. Act, 1961. The Id. DR has also referred various documents which have been filed first time before the Tribunal as additional evidence and submitted that these documents are nothing but the returns filed by M/s. Abhishek Advisory Pvt. Ltd. with R.O.C. which discloses the facts relevant to the issue. The Id. DR submitted that the said company is now owned by three group companies of the assessee namely (1) M/s. Skyway Colonizers Pvt. Ltd. (2) Skyway Ispat Pvt. Ltd and (3) Skyway Township Pvt. Ltd. Therefore, this company is one of the group companies of the assessee and the assessee was required to furnish all the requisite details to prove the genuineness of the transactions. The Id. DR further contended that the shares of M/s. Abhishek Advisory Pvt. Ltd. were purchased by the group concerns from the assessee at less than Rs. 2/- per share whereas the assessee issued the shares at huge premium of Rs. 790/- per share. The Id. DR has submitted that the Id. CIT(A) has not appreciated the facts as well as the materials brought on record by the AO which establishes that the assessee has failed to discharge its onus [u/s 68](#) of the Act. The Id. CIT(A) has given his findings based on the submissions of the assessee ignoring the fact that the AO issued notices [u/s 133\(6\)](#) of the Act which were received back unserved and further the AO also issued a commission for conducting an enquiry by the DDIT (Inv.), Kolkata. The Id. DR further submitted that the investor company is not having any income but only a meager amount of Rs. 2,68,625/- was declared as Revenue for the Assessment Year 2012-13 that too under the head "Income from other Sources", substantiate the view of the AO that creditworthiness of the said company is not proved. The Id. DR thus relied on the order of the AO as well as following case laws.

1. [Pr. CIT vs NRA Iron & Steel \(P\) Ltd.](#) (2019) 103 Taxmann.com 48 (SC).
2. [ITO vs APJ Construction Pvt. Ltd \(ITA No. 722/Del/2015\)](#) for the Assessment Year 2005-06 dated 31-12-2019 - Delhi Trib)
3. [Prem Castings \(P\) Ltd. vs CIT](#) (2017) 88 Taxmann.com 189 (All)

2.3 On the other hand, the Id. AR of the assessee submitted that the assessee produced all the relevant documentary evidences to prove the identity and creditworthiness of the investor company as well as the genuineness of the transactions. He has referred to the assessment order passed by the AO for the Assessment Year 2008-09 dated 06-01-2010 and submitted that the AO has verified

the share capital received by the said company and accepted the same. Further, the said company has been regularly filing the return of income and also shown as active as per company Master Data of ROC. The Id.AR of the assessee has also filed the assessment order dated 6-12-2019 for the Assessment Year 2017-18 and submitted that the AO has passed the scrutiny assessment order in the case of Investor Company. The Id.AR of the assessee further submitted that notices issued [u/s 143\(2\)](#) and [142\(1\)](#) of the Act were duly served upon the Investor Company. Therefore, the identity and existence of the said company cannot be disturbed. As per record of ROC, the said company has been regularly filing the return which shows existence of the said company as well as genuineness of the company. The Id.AR of the assessee contended that once the AO has examined the source of funds in the hands of the Investor Company then the investment made in the shares of the assessee company from the said amount available with M/s. Abhishek Advisory Pvt. Ltd. cannot be doubted. The theory of no income or very less income cannot be applied when the said company was enough funds to receive as share capital as well as reserved funds and the investment shown from the said funds and not the income from operation. Once the funds in the hands of the Investor Company are not in dispute and transaction is through banking channel then creditworthiness and genuineness of the transaction is also proved. The Id. AR of the assessee relied on the order of the Id. CIT(A) and submitted that the Id. CIT(A) has specifically asked the AO to clarify certain facts and also furnish the requisite information including the statement of Shri Anand Sharma but despite repeated directions of the Id. CIT(A), the AO did not furnish the requisite information. Further, the AO has relied on the statement of Shri Anand Sharma without any corroborative evidence to show that the assessee has received accommodation entries. The Id.AR of the assessee thus contended that even from the statement of Shri Anand Sharma, it cannot be concluded that the investor company M/s. Abhishek Advisory Pvt. Ltd. was managed and controlled by him and used for providing accommodation entries. Once this company is even not owned by Shri Anand Sharma or any of his associates or relatives at the relevant point of time when the share application money was received by the assessee then the question of providing the accommodation entries by Shri Anand Sharma does not arise. The Id.AR of the assessee vehemently opposed the additional evidence proposed to be filed by the Id. DR and submitted that it is beyond the scope of proceedings before this Tribunal. The Id. DR cannot go beyond the assessment record as well as the assessment order but he can support the order of the AO based on the record available in the assessment order. In support of his contentions, the Id.AR of the assessee relied on following decisions.

1. [Mahindra & Mahindra Ltd vs DCIT](#), (2009) 122 TTJ 0577 / 22 DTR 0362
2. [KWL Pro Exports vs ACIT](#) 110 ITD 059

The Id. AR of the assessee further contended that the notices issued by the AO [u/s 133\(6\)](#) of the Act to M/s. Abhishek Advisory Pvt. Ltd. may be at old address and not at the current address. The Id.AR of the assessee referred to the annual return filed by the said company and submitted that the correct address is available on record but the AO might have issued the notices at wrong address. In support of his contentions, the Id.AR of the assessee relied on the order dated 01-07-2019 of the Coordinate Bench of this Tribunal in the case of M/s. [Izzy Metals Pvt. Ltd. vs ITO](#) (ITA No.75/JP/2018 for the Assessment Year 2012-13). The Id.AR of the assessee thus supported the findings of the Id. CIT(A) and submitted that the addition made by the AO is based on surmises and conjectures and without having any tangible material to show that the transaction is not genuine.

2.4 We have considered the rival submissions as well as the relevant materials available on record. The AO has proceeded to make the addition u/s 68 of the Act in respect of share application money received by the assessee from M/s. Abhishek Advisory Pvt. Ltd. by referring to the search and survey action carried out by the DGIT (Inv.) Kolkata, in para 3.1 as under:-

"3(1). A search and survey action was carried out in the case of Shri Anand Sharma, Kolkata (entry provider) and his Group by the DGIT(Inv.), Kolkata on 02-07-2013 when various incriminating documents were seized and impounded. The search action resulted into collection of evidences and other findings which conclusively proved that Shri Anand Sharma through a web of concerns run and operated by him, is engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application and bogus sales etc."

It is clear that the AO has proceeded on the basis of the statement of Shri Anand Sharma recorded by Investigation Wing, Kolkata during search and survey action carried out on 02-07-2013. There is no dispute that in his statement recorded by the Investigation Wing, Kolkata, Shri Anand Sharma has admitted that he is engaged in providing the accommodation entries in respect of share application money, unsecure loans etc. However, in the entire statement Shri Anand Sharma has not stated that M/s. Abhishek Advisory Pvt. Ltd. is one of the concerns / companies controlled or managed by him in providing such accommodation entries.

Even otherwise when the statement was recorded on 02-07-2013, M/s. Abhishek Advisory Pvt. Ltd. was not a company either owned or controlled by Shri Anand Sharma directly or indirectly. This fact is manifest from the records as produced by the Id. DR as additional evidence that 100% shareholding of the said company M/s. Abhishek Advisory Pvt. Ltd. was acquired by the following group concerns of the assessee company.

- (1) M/s. Skyway Colonizers Pvt. Ltd.*
- (2) Skyway Ispat Pvt. Ltd and*
- (3) Skyway Township Pvt. Ltd.*

This fact is also revealed from the annual return filed by the said company in the office of ROC for the year 2009-10 as on 30-09-2009. Thus when the company was already owned by three group concerns of the assessee company then the statement of Shri Anand Sharma admitting his involvement in providing the accommodation entries is not relevant in the case of investor company M/s. Abhishek Advisory Pvt. Ltd. The entire basis of the addition made by the AO is turned out to be contrary to the actual facts. Once the investor company is a wholly owned company of the group concerns of the assessee itself then there is no reason to have role of Shri Anand Sharma in making the investment by this company in the shares of the assessee company. The very basis of the AO that transaction is bogus being the accommodation entries provided by Shri Anand Sharma through his concern, has no legs to stand upon. Therefore, the proceedings conducted by the AO on the assumption of accommodation entries provided by Shri Anand Sharma stands vitiated by the fact that the investor company was neither owned nor controlled nor managed either directly or indirectly by Shri Anand Sharma as on the date of transaction of investment in shares or on the date of search on. 02-07-2013. Therefore, the case of the Department is solely based on surmises that this company is one of the concerns

managed and controlled by Shri Anand Sharma and his involvement in providing the accommodation entries is only the assumption of incorrect facts. Even otherwise, the assessee in order to discharge its onus u/s 68 of the Act has produced the PAN, Income Tax Return and the assessment order passed by the AO u/s 143(3) of the Act for the Assessment Year 2008-09 dated 6-01-2010. For ready reference, we reproduce the assessment order passed by ITO, Ward- 1(1), Kolkata:

"The assessee company filed its e-return for the assessment year 2008-09 on 30.09.2008 declaring of total income of Rs. Nil. The return was duly processed u/s 143(1) on 12.08.2009. The case was selected for compulsory scrutiny by issuing notice u/s 148. Accordingly, notices u/s 143(2) & 143(1) along with questionnaire were issued and served upon the assessee.

In response to the aforesaid notices, Sri Sanjoy Kr. Fogla, the A/R of the assessee company being duly authorised by the assessee company, appeared for hearing from time to time. The A/R during the course of hearing, explained the return, filed some relevant documents in support of its return and has also produced its books of accounts for examination. The case was discussed and heard.

In this case, the assessee company was incorporated on 01.10.2007 and as on 31.03.2008, it had paid up capital amounting to Rs. 56,97,500/- and share premium reserve amounting to Rs. 10,03,33,500/-. During the course of hearing, inquires were conducted with various shareholders of the assessee company by issuing notices u/s 133(6).

During the year under consideration, the assessee had not carried out any business except investment on the other hand, it has incurred expenses amounting to Rs. 11,725/-. Therefore, the expenses so claimed are not allowed for deduction as the assessee has not carried out any business during the relevant previous year.

Subject to the above discussion, the total income of the assessee company is computed as under:

Total income (loss) - as per return	(-) Rs. 11,725/-
Add: Entire expenses disallowed- as discussed above.	Rs. 11,725/-
Assessed total income	Nil
Tax on above	Nil

Assessed U/s 143(3) of the Income Tax Act, 1961, issued company of order and demand notice to the assessee company.

Sd/-
(Mingur Dorjee)
ITO, Ward- 1(1), Kolkata"

The AO has stated that during the course of hearing, the Id.AR of the said company explained the return filed, relevant documents in support of the return and also produced the books of account for examination. The AO also recorded the date of incorporation as well as the share capital and premium received by the said company to the tune of Rs. 10,63,3,500/-. The AO also conducted the enquiry from various shareholders by issuing notices u/s 133(6) of the Act to verify the transactions of share capital and share premium received by the said company. Only after

satisfaction from the enquiry, the AO accepted the same. Thus even in first year of its incorporation, the said company received the share capital and share premium to the tune of Rs. 10,63,3,500/- and the said amount was also in the books of said company and even at the time of investing this amount of Rs.3.98crores in the shares of assessee company. The transaction of payments of the share application money is through banking channel. We further note that the said company at the time of investment is fully owned by the group concerns as stated above and the directors of the said companies were also Shri Ronak Royal Gupta and Smt. Rajni Gupta who are also the shareholders and directors of the group concerns as well as one of the directors is also the director of the assessee company.

Therefore, the said company was neither owned nor controlled by Shri Anand Sharma. As regards the notices issued by the AO u/s 133(6) of the Act, there is no dispute that earlier the address of the said company was different from the current address as it is apparent from records as well as assessment order for the Assessment Year 2008-09 and other subsequent records available with ROC. Therefore, the possibility of sending the notices by the AO at the old address cannot be ruled out. Once there is a change of address then assessee cannot be blamed for non-delivery of the notice. As regards the Commission issued by the AO, it was only for conducting an enquiry from Shri Anand Sharma and not from the investor company. The DDIT (Inv.), Kolkata has clearly submitted the report without conducting any enquiry by giving the reasons that despite summon issued to Shri Anand Sharma, he did not turn up. Therefore, this was an empty and futile exercise. Once Shri Anand Sharma was not controlling or managing the investor company either directly or indirectly at the relevant time then the so-called enquiry would not have resulted any positive outcome. Further, we note that the AO has not supplied any documentary or incriminating evidences to the assessee. Even the statement of Shri Anand Sharma was not supplied to the assessee but it is stated in the assessment order that the assessee was apprised the facts of the case in brief in respect of search of Shri Anand Sharma. The relevant part of the assessment order in para 4 (iii) is as under:-

"4(iii). It is important to mention here that the assessee was apprised the facts of the case in briefly in respect of search action of Shri Anand Sharma by DGIT (Inv), Kolkatta and also shown the statement of Shri Anand Sharma in which all the evidences were narrated by the Investigation Wing and was asked to give their comments and also asked to show caused as to why the share capital of Rs.3,98,00,000/- introduced during the F.Y. 2011-12 from the group aforesaid companies may not be treated as non- genuine as the same is only diversion of profits to evade the tax liabilities."

This clearly shows that the AO was not having any documentary evidence or corroborative evidence which cannot be considered as incriminating material to show that the assessee has received the accommodation entries in the shape of share capital/ share application money/ premium. Even the Id. CIT(A) has specifically asked the AO to produce the copy of statement of Shri Anand Sharma as well as other seized materials. It appears that since the AO was not having any evidence in his possession, therefore, he did not respond to the said request of the Id. CIT(A). The Id. CIT(A) has discussed all these facts in para 5.3 to 5.11 and has given his findings in para 5.12 which are reproduced as under:-

"5.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen from para 3.1 of the assessment order that a search and survey action was carried out in the case of Shri Anand Sharma and his group by the DDIT Investigation Kolkata on 02.07.2013. According to AO, the search action resulted into collection of

evidences and other finding which conclusively proved that Shri Anand Sharma, through a web of concerns run and operated by him, was engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application and bogus shares etc. But the AO has not discussed the evidences and other findings "which conclusively proved that Shri Anand Sharma through a web of concerns run and operated by him was engaged in providing accommodation entries". Again at para 4.5, the AO has mentioned that various incriminating documents/ material was seized during the course of search and according to AO, during the post search investigation and perusal of seized documents, it was observed that Shri Anand Sharma was engaged in business of providing accommodation entries by providing cheques/POIDD in lieu of cash to a large number of beneficiary companies through various paper and dummy company operated and controlled by him. However, the AO has not brought on record any evidence to show that the appellant company has paid cash for obtaining the accommodation entry in the form of share application money from M/s Abhishek Advisory Pvt. Limited. From page no. 4 to 10 of the assessment order, the AO has quoted the statement of Shri Anand Kumar Sharma recorded during the course of search. In reply to question no. 7 and 8, Shri Anand Sharma has stated as under:

"Q.7 Please state the name of the companies in which you and your family members are associated with?"

Ans. I am a Director in Quality Jewel Box & Display Pvt. Ltd apart from that I am also a director in my other companies. My wife Smt. Sobha Sharma is also another Director in Quality Jewel Box & Display Pvt. Ltd. apart from that I am also a director in many other companies. The details for the above will be furnished subsequently.

Q.8 Please state the name of the companies managed/ controlled by you and also state who are the directors in these companies? be submitted later on .

Ans. As far as my knowledge is concerned, around 500 companies approximately are being controlled by me, the books of accounts of those companies are maintained in the computer in this office. I will also provide separate list of all the other companies controlled by me...."

However, from the assessment order, it is not clear whether Shri Anand Shama had submitted any list of companies controlled by him.

5.4 As the AO has at page 11 of the assessment order has pasted copy of a screen shot wherein list of companies is given and in that list name of M/s Abhishek Advisory Pvt. Ltd. is appearing, therefore, the AO vide letter dated 11.05.2017 was requested to furnish following information:

"1. You are requested to furnish copy of the statement of Shri Anand Sharma and other seized / impounded material on which the AO has relied upon for making the addition of Rs. 3,99,00,000/- u/s 68 in respect of the share application money and share premium received by the appellant from M/s Abhishek Advisory Pvt. Limited.

2. At Page No. 11 of the assessment order, a scanned copy of "list of companies" has been pasted. You are requested to clarify whether the

list is part of the statement of Shri Anand Sharma because at Page No. 10, the AO has mentioned at para 4.(vii) "in view of the above statement dated 02.07.2013, as per reply of Question No. 8 of Shri Anand Sharma, it was accepted by him that he is controlling around 500 companies and M/s Abhishek Advisory Pvt. Ltd. is one of them. We are producing list of company operated by Shri Anand Sharma which was maintaining in a accounting software is as under". If the scanned copy of the list pasted at Page No. 11 is not the part of the statement of Shri Anand Sharma then what is the source of this list."

As no response was received from the AO therefore, again reminder were issued on 29.05.2017.

Along with his letter dated 30.05.2017, the ITO, Ward-4(2), Jaipur has only enclosed statement dated 02.07.2013 of Shri Anand Kumar Sharma recorded during the course of survey operation [u/s 133A](#) and copy of the screenshot pasted at page 12 of the assessment order. However, the AO has not clarified whether the list of companies pasted at page 12 of the assessment order was part of the statement of Shri Anand Sharma and if the list of companies was not part of the statement of Shri Anand Shama then what is the source of that list.

5.5 At page 11, the AO referring to the copy of the screen shot pasted at 2, page no. 11 has mentioned that "as per the above list it is very much clear that M/s Abhishek Advisory Pvt. Ltd. from whom the assessee had taken share application money, which are controlled by Shri Anand Sharma and to accommodation entry has been provided". As already / discussed above, neither in the assessment order nor during the course of appellate proceedings, the AO has given the source of the screen pasted at page 11 of the assessment order.

5.6 At para 4(viii), the AO has stated "In view of above, all the books of account and all the relevant paper of these persons act only as their stooges. All the books of account and all the relevant paper of these companies were found at the business premises. This clearly shows that these companies are run by Sh. Anand Sharma and he controlled all these companies through dummy directors/ principal officers of these companies. This could be established by a careful examination of seized material, including the computer hard discs, PAN drive and tally data, which contain the books of account of these companies. During the course of search daily cash books, balance sheet and cheque books were found wherein details of cash received from different companies/ persons through various middlemen/ agents in lieu of accommodation entries provided to them on different dates have been recorded". However, the AO has not discussed any seized document in which the cash received from the assessee company for obtaining the accommodation entry from M/s Abhishek Advisory Pvt. Ltd. was found recorded.

5.7 At para 5.1, the AO refers the investigation carried out by the Investigation Wing, Kolkata as well as the documents and papers seized during the course of search but he has not discussed anything about the documents and papers seized during the course of search in the case of Shri Anand Sharma and investigation carried out by the Investigation Wing, Kolkata. Again at para 5.(ii), the AO has stated "on examination of the materials provided by the investigation Wing, it has been noticed that assessee had received accommodation entry from the above mentioned fictitious company floated by

Shri Anand Sharma". But the AO has not discussed what was the material provided by the Investigation Wing and examined by him.

5.8 As the notice issued [u/s 133\(6\)](#) to M/s Abhishek Advisory Pvt. Ltd., Kolkata was returned un served, therefore the AO issued commission [u/s 131\(1\)\(d\)](#) to DDIT Investigation, office of the DGIT Investigation Kolkata. According to AO, the commission was issued to record the statement of Shri Anand Sharma for confirmation of the fact of providing accommodation entries as aforementioned so as to ensure that the assessee company can not take shelter before the appellate authority. The DDIT has reported that summons [u/s 131](#) was sent to Shri Anand Sharma at the three addresses available with his office, however Shri Anand Sharma did not turn up. Therefore, the DDIT requested the AO "to do the needful whatever deemed fit in the interest of revenue". Thus, it is clear that the AO inspite of having issued commission [u/s 131\(1\)\(d\)](#), could not get the statement of Shri Anand Sharma recorded, confirming that he had provided any accommodation entry to the appellant company through M/s Abhishek Advisory Pvt. Limited.

5.9 At para 5(iv), the AO has mentioned that "all the evidences available on record clearly establish that the assessee company is one of the beneficiaries who obtained accommodation entry in the form of share application money from the dummy companies floated by Shri Anand Sharma". However, he has not discussed what are the evidences available on record which according to AO clearly establishes that the assessee company is one of the beneficiary who obtained accommodation entry in the form of share application money from the dummy company floated by Shri Anand Sharma.

5.10 During the course of assessment proceedings, the appellant vide its letter dated 21.01.2015 (at para 6) had requested the AO to supply any adverse material and allow the opportunity of cross examination. Para 6 of letter dated 21.01.2015 of the appellant is reproduced here under for ready reference:

"It is also submitted that there is no material to suggest that the share capital contributed to the company is not genuine. No material has been provided which indicates that the said company or its director had stated anything about the company. If there is any such adverse material the same may kindly be supplied to the assessee, and further the opportunity of cross examination may kindly be allowed. The general statements cannot be used against the assessee unless the same is given for the specific company of the assessee and for the investment in shares being made. It is well settled law that no adverse material can be used against the assessee unless the same is being supplied to the assessee and opportunity is being provided to cross examine the same. Your kind attention is invited towards the following decisions in this regard."

However, the AO did not provide any opportunity to the appellant to cross examine the person on whose statement he has relied upon for making the addition [u/s 68](#).

5.11 The appellant has furnished following documentary evidences to prove identity and creditworthiness of the share applicant and genuineness of the transaction:

1. Confirmatory letter of the share applicant.
2. Copy of the acknowledgement of the ITR 4 and 5 (A.Y. 2013-14).
3. Copy of Balance Sheet and P&L account dated 31.03.2016.
4. Bank statement of the share applicant wherein the payments made to the appellant toward share application money are appearing. There is no cash deposit immediately before or after the issue of cheques to the appellant company.
5. Copy of ROC document (Form No. 20B, Form No. 23AC, Form No. 23ACA, Form No. 66, Form No. 23B) and Annual Return for the relevant period (FY 2011-12) and (F.Y. 2015-16).
6. Copy of assessment order dated 06.01.2010 of M/s Abhishek Advisory Pvt. Ltd. for the A.Y. 2008-09 passed u/s 143(3) r.w.s. 148. In the assessment order, the AO has mentioned that M/s Abhishek Advisory Pvt. Ltd. was incorporated on 01.10.2007 and as on 31.03.2008, it had paid up capital of Rs. 55,97,500/- and share premium reserve of Rs. 10,63,33,500/-. The AO did conduct enquiries [u/s 133\(6\)](#) with various shareholders of the assessee company.

5.12. Thus, from the above discussion, it is clear that the appellant has furnished all the documentary evidences to prove identity and creditworthiness of M/s Abhishek Advisory Pvt. Ltd. and genuineness of the transactions. Whereas the AO has made the addition without bringing on record any evidence to show that the appellant had paid cash for obtaining accommodation entry in the form of share application money, from M/s Abhishek Advisory Pvt. Limited. The AO has not discussed any evidence which proves that M/s Abhishek Advisory Pvt. Ltd. was the company controlled and managed by Shri Anand Sharma. The source of the "list of companies" pasted at page 11 of the assessment order has not been clarified by the AO. The AO has not discussed any seized material or the investigation carried out by Investigation Wing Kolkata which proves that the appellant company received accommodation entry in the form of share application money from M/s Abhishek Advisory Pvt. Ltd. by making cash payment to Shri Anand Sharma or his agent/ middle man. Though the AO has relied upon the statement of Shri Anand Sharma but in spite of having been requested specifically by the appellant, the AO did not provide any opportunity to the appellant to cross examine Shri Anand Sharma. In view of the above discussion, I am of the considered opinion that the appellant has furnished each documentary evidence to prove identity and creditworthiness of the share applicant and genuineness of the transactions. Whereas, the AO has failed to bring on record any evidence to show that the appellant had received accommodation entry in the form of share application money from M/s Abhishek Advisory Pvt. Ltd. by paying cash from undisclosed sources of income either to Shri Anand Sharma or to any of his agent/ middle man. Therefore, in view of the various decisions relied upon by the appellant, specifically the decision of Supreme Court in the case of [Andaman Timber Industries vs CCE](#) (order dated 02.09.2015) and decision of ITAT Jaipur Bench in the case of [Jadau Jewellers & Manufacturers Pvt. Ltd. vs ACIT \(175 TTJ \(JP\) 344\)](#), addition of Rs. 3,98,00,000/- made by the AO [u/s 68](#) is hereby deleted."

When the assessee has produced all the relevant documents as narrated by the Id. CIT(A) in para 5.11 above then onus casted [u/s 68](#) of the Act has been duly discharged by the assessee. Once the assessee has discharged his primary onus then

burden is shifted on the AO to bring on record the contrary material or facts to disprove evidence produced by the assessee. The AO except narrating the modus operandi as disclosed by Shri Anand Sharma, has not referred to any documentary evidence or other material to support his view and findings. Therefore, the findings of the AO are merely an assumption and based on conjecture and surmises and not on any tangible material. As regards the decision of Hon'ble Supreme Court in the case of [Pr. CIT vs NRA Iron & Steel \(P\) Ltd](#) (supra) relied on by the Id. DR, the Hon'ble Supreme Court has specifically mentioned the facts of the said case in para 9 as under:-

"9 The judgment 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 creditworthiness of the parties, the source of funds invested and the genuineness of the transactions. The field reports revealed that the shareholders were either non-existent or lacked creditworthiness."

It is clear in the said case that the AO made an independent and detailed enquiry including survey of so-called investor company from Mumbai, Kolkata and Gauhati to verify the creditworthiness of the parties, source of funds and genuineness of the transactions. The field reports reveal that shareholders were either non-existent or lack of creditworthiness. On the contrary, in the case in hand, the investor company is very much in existence and subjected to scrutiny assessment. Even for the Assessment Year 2017-1, the said company has under gone scrutiny assessment. Therefore, the existence of the company is not in dispute as it is established from the record. Secondly, the Hon'ble Supreme Court in the case of [Pr. CIT vs NRA Iron & Steel \(P\) Ltd](#) (supra) in para 13 observed that lower authorities have ignored the detailed enquiry conducted by the AO as well as the findings of the AO as under:-

Para 13. ...The Court/ Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the Investor Companies were found to be non- existent and the onus to establish the identity of the investor companies, was not discharged by the assessee."

In the case in hand, the AO has not brought any material on record as a result of any enquiry. The commission issued to the DIT (Inv), Kolkata has not yielded any result. Thus except on the reliance of the statement of Shri Anand Sharma, the AO was not having either any document in his possession or any other facts detected as an outcome of enquiry. The said statement of Shri Anand Sharma has not made any allegation regarding transaction of investment made by M/s. Abhishek Advisory Pvt. Ltd. Therefore, the documentary evidence produced by the assessee cannot be ignored or rejected. Hence, in view of the above facts and circumstances of the case, we do not find any error or illegality in the order of the Id. CIT(A). Thus the appeal of the Revenue is dismissed."

18. The above decision of ITAT has already been upheld by **Hon'ble Rajasthan High Court** in **Pr. Commissioner of Income tax, Jaipur Vs. M/s Skyways Industrial Estate Company (P) Ltd. DB Income-tax Appeal**

No. 82/2020 Judgement dated 14.02.2022. We re-produce below the Judgement in entirety as under:

"This appeal is filed by the revenue to challenge the judgment of the Income Tax Appellate Tribunal. Following question is presented for our consideration:-

(i) Whether on the facts and circumstances of the case and in law the ITAT was correct in dismissing appeal of the department on the issue of the addition of Rs.3,98,00,000/- made u/s 68 of the IT Act, 1961 without appreciating the fact that the assessee has introduced its unaccounted cash amounting to Rs.3,98,00,000/- in the form of share capital through the racket of entry provider operating in Kolkata, information of which was provided by the Investigation Wing, Kolkata."

The documents on record would suggest that for the assessment year 2012-13 the assessing officer had made addition of a sum of Rs.3.98 crores in the hands of the assessee in terms of Section 68 of the Income Tax Act, 1961 ('the Act' for short). According to the assessing officer, this related to bogus accommodation entries by way of share application money. The assessee carried the matter in appeal. The CIT (Appeals) allowed the appeal and deleted the additions, upon which the revenue preferred further appeal before the Tribunal. Tribunal by impugned judgment dismissed the revenue's appeal making following observations:-

"2.4 We have considered the rival submissions as well as the relevant materials available on record. The AO has proceeded to make the addition u/s 68 of the Act in respect of share application money received ITO, Ward- 4(2), Jaipur vs M/s. Skyways Industrial Estate Company Pvt. Ltd., Jaipur by the assessee from M/s. Abhishek Advisory Pvt. Ltd. by referring to the search and survey action carried out by the DGIT (Inv.) Kolkata, in para 3.1 as under:-

"3(1). A search and survey action was carried out in the case of Shri Anand Sharma, Kolkata (entry provider) and his Group by the DGIT(Inv.), Kolkata on 02-07-2013 when various incriminating documents were seized and impounded. The search action resulted into collection of evidences and other findings which conclusively proved that Shri Anand Sharma through a web of concerns run and operated by him, is engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application and bogus sales etc." It is clear that the AO has proceeded on the basis of the statement of Shri Anand Sharma recorded by Investigation Wing, Kolkata during search and survey action carried out on 02-07-2013. There is no dispute that in his statement recorded by the Investigation Wing, Kolkata, Shri Anand Sharma has admitted that he is engaged in providing the accommodation entries in respect of share application money, unsecure loans etc. However, in the entire statement Shri Anand Sharma has not stated that M/s. Abhishek Advisory Pvt. Ltd. is one of the concerns / companies controlled or managed by him in providing such accommodation entries.

It can thus be seen that CIT (Appeals) and Tribunal have concurrently found no evidence of introduction of assessee's own money through bogus share application entries. The prime reliance of the revenue on the statement made by one Shri Anand Sharma which was recorded by the Investigation Wing,

Kolkata did not incriminate the assessee company. As recorded by the Tribunal the said Shri Anand Sharma has nowhere stated that M/s Abhishek Advisory Pvt. Ltd. is one of the concerned companies controlled or managed by him in providing accommodation entries.

The entire question is thus based on appreciation of the evidence.

No question of law arises.

Income Tax appeal is dismissed.”

19. Thus, the decision of ITAT is squarely applicable to assessee. Further, the Hon'ble Rajasthan High Court has dismissed departmental appeal against ITAT's order taking cognizance of one single important factor that the prime reliance of the revenue on the statement made by Shri Anand Sharma which was recorded by the Investigation Wing, Kolkata did not incriminate the assessee-company and that Shri Anand Sharma has nowhere stated that the investor company (M/s Abhishek Advisory Pvt. Ltd. in that case similar to "A" and "J" in present appeal) was one of the companies controlled or managed by him in providing accommodation entries. The factual position of assessee's case is exactly same. Therefore, the assessee is squarely covered by decision of ITAT/Hon'ble Rajasthan High Court.

20. In view of above discussions and for the reasons mentioned therein, we are of the considered view that the addition made by AO and upheld by CIT(A) is not tenable. Therefore, we delete the impugned addition. These grounds of assessee are thus allowed.

Ground No. 6:

21. In this ground, the assessee has challenged the addition of Rs. 57,896/- made by AO and upheld by CIT(A) on account of disallowance of expenses u/s 14A.

22. The AO has made disallowance by passing following order:

“9. It is noticed that the assessee has made investment in shares. In the P&L account, the assessee has shown dividend income of Rs. 99,65,424/-. The assessee has also claimed legal and professional expenses of Rs. 2,89,934/-. Therefore, 20% of the expenses of Rs. 2,89,934/- i.e. Rs. 57,896/- is being disallowed under section 14A of the Act and added to the total income of the assessee.”

23. During first-appeal, the CIT(A) upheld disallowance by passing following order:

“5.8 Ground No. 2 pertains to the issue of disallowance of deduction u/s 14A of the Act on account of disallowance of expenses of Rs. 57,896/- claimed to earn exempt dividend income. This ground was not pressed by the appellant and hence in absence of any submission/explanation, the action of the AO is upheld. Accordingly, Ground No. 2 is dismissed.”

24. During hearing before us, Ld. AR submitted that the CIT(A) has made an incorrect noting that the ground was not pressed by assessee and there was absence of any submission/explanation. Ld. AR drew us to Page 25-28 of Paper-Book and successfully demonstrated that vide Para 3.1 to 3.18 of letter dated 10.12.2021 filed to CIT(A), the assessee made a detailed submission *qua* this issue. On perusal, we find merit in this submission of assessee.

25. So far as the merit of disallowance is concerned, the AO has made adhoc disallowance of 20% of legal and professional expenses. There are at least two serious fallacies in AO's action due to which the disallowance

made by AO is not tenable. *Firstly*, the adhoc disallowance as made by AO is not recognized by the provision of section 14A or Rule 8D of Income-tax Act/ Income-tax Rules. Therefore, the disallowance is without legal authority. *Secondly*, the AO has made adhoc disallowance @ 20% of legal and professional expenses even without looking into the details of expenses. In pursuance of liberty granted by bench, Ld. AR filed details of legal expenses subsequently on 07.06.2024 with a copy served upon revenue/respondent. The details are scanned and re-produced below:

Bhaskar Denim Ltd.					
Legal Expenses					
Ledger Account					
1-Apr-2011 to 31-Mar-2012					
Date	Particulars	Vch Type	Vch No.	Debit	Page 1 Credit
11-8-2011	To Bhaskar Exxoils Limited, Dewas BEING RS.4400/-OUT OF ADVANCE RS. 5000/-ADJUSTED AGAINST DEPOSIT OF CHALLAN FOR APPEAL FEE FOR ASSESSMENT YEAR 2008-2009	Journal	2	1,100.00	
31-8-2011	To Bhaskar Industries Limited BEING ROC CHARGES PAID TO MR. DHEERAJ KATARIA	Journal	3	5,500.00	
5-9-2011	To Bhaskar Exxoils Limited, Dewas BEING CASH PAID TO SHRI BCP JAIN TOWARDS FILLING OF APPEAL VAT FOR THE YEAR 2008-2009 EXPENSES VIDE BILL NO.152 DATED 23/08/2011	Journal	5	500.00	
31-3-2012	To Writers & Publishers Limited (Debtor) BEING ROC EXPENSES PAID THROUGH WPPL	Journal	7	5,100.00	
	To IDBI C/a No.138103000000055 Cheque LEGAL EXP PAID TO REGISTRAR OF COMPANIES	Payment	116	2,77,734.00	
				2,77,734.00 Cr	
				2,89,934.00	
By	Closing Balance				2,89,934.00
				2,89,934.00	2,89,934.00

These details show that the assessee has incurred legal expenses for filing of appeals or payments to ROC. These expenses, as rightly contended by Ld. AR, cannot be said to have been incurred for the purpose of earning exempted dividend. Thus, we are of the considered view that the disallowance made by AO is neither sustainable in law nor on facts. Accordingly, the same is hereby deleted. This ground is allowed.

26. Resultantly, this appeal is partly allowed.

Order pronounced in open court on 20.08.2024

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 20.8.2024

Dev/Sr. PS

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

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore