

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : B : NEW DELHI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.3432/Del/2023
Assessment Year: 2011-12

DCIT,
Central Circle-15,
New Delhi.

Vs DMG Finance Investment Private
Limited,
Flat No.1, First Floor,
Dakshineshwar,
10 Hailey Road,
New Delhi – 110 001.

PAN: AAACD3459K

(Appellant)

(Respondent)

Assessee by	: Shri Ajay Wadhwa, Advocate & Ms Ragini Handa, Advocate
Revenue by	: Shri Debesh Panda, Special Counsel, Shri Udbhav Gady, Advocate, Shri Ruchir Joshi, Advocate & Shri Vas Dev Verma, Advocate
Date of Hearing	: 18.10.2024
Date of Pronouncement	: .11.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Revenue against the order dated 13.09.2023 of the Commissioner of Income Tax (Appeals)-28, New Delhi (hereinafter referred to as Ld. First Appellate Authority or in short Ld. 'FAA')

in Appeal No.26/10108/2010-11 arising out of the appeal before it against the order dated 30.09.2021 passed u/s 153A/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by the Asstt. Commissioner of Income Tax, Central Circle 15, Delhi (hereinafter referred to as the Ld. AO).

2. In this case, original return u/s 139 of the Act was filed on 28.09.2011 by in M/s Spiral E-Systems Private Limited, which has since merged with present assessee. Subsequently, on the basis of search and seizure operations conducted on 2nd January, 2020 in M/s Sushen Mohan Gupta and other group of cases at different business and residential premises of the group, the case of the assessee was also covered and was centralized with DCIT, Central Circle-15, New Delhi. After issuing notice u/s 153A, the assessee had responded by filing the return for the assessment year 2011-12 on 09.09.2021 declaring a loss of Rs.2,74,57,310/-. Admittedly, during the year under consideration, the assessee was engaged in the business of providing financial and investment services. The case of the Revenue is that during the search conducted in the case of M/s Sushen Mohan Gupta and other group of cases to which the above named assessee company also belongs, incriminating documents in the form of share transfer forms bearing signatures and seals of certain companies were found and seized. Further, the original documents, i.e., application form for equity shares, receipt of shares, confirmation from investor companies, certified true copies of Board Resolutions passed, affidavit for application of shares and for allotment

of shares of M/s Spiral E-Systems Pvt. Ltd., power of attorney, certified true copy of abstract of resolution passed, list of directors, original blank share transfer deeds and original blank share transfer forms, balance sheet, Profit & Loss of investor companies, memorandum and Articles of Association of investor companies, bank statement of investor companies, etc., (hereinafter referred as 'disputed documents') were found. These evidences were said to be found during the search at the corporate office i.e., Narain Manzil, 23, Barakhamba Road, New Delhi and were referred as Annexure A-29 containing 341 pages. On the basis of these, it was observed by the Ld. AO that the assessee company had received share application money aggregating to Rs.3,82,00,000/- during AY 2011-12 and Rs.46,60,400/- during AY 2012-13. Thus, during these two relevant years an aggregate amount of Rs.4,28,60,400/- was received by the assessee company on account of share application money. The ld. AO examined the fact that the share application money of Rs.3,82,00,000/- received by the assessee company during the AY 2011-12 was in the form of 1 lakh equity shares of the face value of Rs.10/- each with a premium of Rs.372/- per share aggregating to Rs.382/- per share were issued by the assessee company to five different companies where allotment made during FY 2012-13. The ld. AO was of the view that these five companies without any economic or financial rationale has sold/transferred their shares which was allotted to them at Rs.382/- per share to M/s DMG Finance & Investment Private Limited, another group company of SMG group during FY 2015-16

relevant to AY 2016-17. The ld. AO relied the statement Shri Sushen Mohan Gupta, brother of the director of the assessee company, i.e., Shri Sushant Mohan Gupta, recorded u/s 132(4) of the Act on 04.01.2020. The ld. AO observed that in this statement Shri Sushen Mohan Gupta was confronted with equity investment made by several entities in M/s Spiral E-Systems Private Limited which was a group company of M/s Sushen Mohan Gupta and his family members and which had since amalgamated with M/s DMG Finance & Investment Pvt. Ltd. He was questioned with regard to the fact as to how the shares purchased by the investor companies amounting to around Rs.4.80 crores were purchased back by the assessee and his other family members and concerns for a meager amount in FY 2013-14. The AO also observed from the list of shareholders of M/s Spiral E-Systems Pvt. Ltd., the applicants for shares for this company were also shareholders who had subscribed to the share capital of M/s American Hotels and Restaurants Pvt. Ltd., which was another group company of Sushen Mohan Gupta group. The AO relied the statement of Shri Sushen Mohan Gupta that cash was brought into the books of M/s American Hotels and Restaurants Pvt. Ltd through the above transaction of share capital subscription. The documents found and seized referred at Annexure A-29 was also confronted to Shri Sushen Mohan Gupta and he had stated that his brother Sushant Mohan Gupta were aware of these transactions. Then, a similar set of documents was also seized from Narain Manzil premises and these documents were referred as Annexure A-32 and pertained to M/s American Hotels and

Restaurants Pvt. Ltd. The Id. AO had drawn an inference that the shareholders/share capital subscribers of M/s Spiral E-Systems Pvt. Ltd., were same as M/s American Hotels and Restaurants Pvt. Ltd., and, thus, concluded that share application/share capital subscription received by M/s Spiral E-Systems Pvt. Ltd., from these subscribers bears the same colour and nature as that of the share capital subscription received by M/s American Hotels and Restaurants Pvt. Ltd. On this premises, the Id. AO had issued notices to the investor companies who had invested in the shares of M/s Spiral E-Systems Pvt. Ltd., but, summons were served and returned with the remarks, 'no address as such or left' and 'office always found closed.' In this back ground the satisfaction note was drawn under the 4th proviso to section 153A(1) of the Act.

3. In the assessment proceedings, on behalf of the assessee, it was contended that the documents seized as Annexure A-29 was not incriminating in nature and there was no evidence of any cash given for share capital subscription. However, the Id. AO considered the record forming part of the Annexure A-29 to be incriminating material on the face of facts that certain blank documents like share transfer deeds/share transfer forms, original blank power of attorney to sell shares of share capital subscribers signed by the directors were found as part of the seized material. The Id. AO had issued notices u/s 133(6) of the Act to the investors seeking certain details which, as per the assessment order, were not complied with completely. The Id. AO

observed that the replies received from the investors do not disclose the following:-

- *Whether any due diligence was carried out by you before investing in shares of M/s Spiral E-Systems Private Limited. If yes, please provide details of the same.*
- *Whether any agreement/MOU was executed for purchase/subscription of shares. Please provide the copy of the same. Also provide copies/ details of communication entered into with M/s Spiral E-Systems Private Limited with respect to purchase of shares, if any*

4. The Id. AO observes in the assessment order that again on 17.09.2021, the assessee was given an opportunity through a note sheet entry for filing the latest addresses of the investor companies and explain the circumstances, but, the latest addresses of the investor companies were not furnished and the following conclusions were drawn:-

“a. On perusal of the ITRs of the investor companies, it was seen that the returned total income of the investor companies is petty, nominal and almost negligible. Thus, prima-facie, the financial position of the investor companies does not support the investment made by them. Hence, the creditworthiness/capacity remains unexplained and un-corroborated.

b. The source of investment made by the investor companies was examined from the bank statements furnished by the assessee company as well as from the incriminating material contained in Annexure A-29 (total 341 pages). The perusal of the corresponding bank statements reveals back-to-back transactions of same amount, i.e. credit and debit of the same amount on the same date(s)/following date(s) with several other deposits and withdrawals. This observation, clubbed with the fact that the sales and income figures of the investor companies are negligible and don't justify such huge fund transfer transactions in their bank accounts, which along with other observations as mentioned above, clearly suggests that these accounts belong to various entry providing companies and the same were utilized to provide accommodation entries to the assessee company (being beneficiary).

c. *The investor companies were asked to provide the details of due diligence done by them before investing in assessee company. However, no reply/specific reply has been received from these investor companies. It may be noted that investor companies have failed to substantiate the fact that how they come into contact with the assessee company. Further, no documentary evidence in this regard such as emails, letters or details of person who has contacted have been provided by the assessee company.*

d. *Most of the investor companies have opted Not to reply of the notices issued to them by this office under Section 133(6) of the Act, which itself establish the fact that this companies have nothing to say about the accommodation entries given by them.*

e. *M/s Madhav Fincap Private Limited, being one out of the six share capital applicants /investor companies, is assessed with undersigned and during the course of assessment of above entities for the AY 2012-13 and subsequent years, it has been established that this company is bogus and is used by entry providers for providing accommodation entries.*

f. *All the investor companies have sold their Equity Share during A.Y. 2016-17 at a price of Rs.10/- (i.e.Ten Rupees only) per share against purchase price of Rs. 382/-per share to M/s DMG Finance and Investments Private Limited which company is a family-controlled concern. There is neither any rationale of such transaction of selling the shares at abysmally low value nor there is any apparent prudence . This further proves that the share capital subscription received during the above assessment year was received from fly by night entry operators and accommodation entry providers and not from any genuine, bonafide or angel investor.*

It is settled and clear that a prudent investor would never invest his fund in such a company when there are unlimited other opportunities available to him in the market. Therefore, the funds received by the assessee company on account of fresh share capital cannot be accepted as genuine transaction of raising capital in normal course of business as all the questions below remained unanswered;

- *Who are the shareholders of the Assessee company and who are the real persons behind and in control of these investor companies?*
- *Why did these share applicants/ share capital subscribers make investments in the Assessee company when they could have made investments of such significant amounts in the known public listed companies instead and earn dividends?*
- *Why an investor would invest with an entity about whose business activities he does not have any knowledge?*

- *Why these share applicants/ share capital subscribers invested their purported hard money in such manner which did not yield any return to them?*
- *Why investments would be made with no return yielding entities when there are unlimited other return yield/ventures available?*
- *As a prudent investor no one would like to invest the funds without security.*
- *Investments in private limited companies are just like giving funds to a family concern. Why an investor would impart his investment to such entities?*
- *As to how and from where the assessee company contacted the share applicants/ share capital subscribers about whom it does not know anything?*
- *Whether these share applicants/ share capital subscribers knew the Assessee or any of its Directors?*
- *Whether any meetings of the Assessee company were attended by these share applicants/ share capital subscribers?*
- *Whether any negotiations took place between the share applicants/ share capital subscribers and the Directors of the Assessee company on the pricing of the shares?*
- *Whether these share applicants/ share capital subscribers were in receipt of any annual accounts, either through e-mail or through any post for all the years till they remained invested?*
- *Why did these share applicants/ share capital subscribers, despite having so much of investment, not ask for any participation in the management of the Assessee company?*
- *Why were there immediate credits and debits in the bank accounts of these share applicants/ share capital subscribers just prior to making further investments?*
- *What was the real nature and business of these share applicants/share capital subscribers?*

- *Why the investor companies sold their entire shareholding, that too in one ago and in a single year, at a negligible price of Rs. 10/- per share when it has purchase the same at a much higher rate.*

- *Why did these share applicants/ share capital subscribers sell their shares at Rs.10/- per share which is just equal to the face value per share?*

The above facts clearly establish that the share applicants/ share capital subscribers, their master-minds, their directors and their auditors are hand-in-glove in the whole scheming of bogus share capital. It is further clear that the share applicants/ share capital subscriber companies are a shell companies on account of the reasons discussed earlier and subsequently. From the ITRs, Balance Sheets & Audit Reports of these such share applicants/ share capital subscriber companies, it is mostly seen that the total incomes of these share applicants/ share capital subscriber companies are extremely meager”

5. Thus, considering the subscribers to the share capital as shell companies doing no business and on the basis of preponderance of probabilities, concluded that the assessee has not discharged its primary onus as to the nature and source of share capital subscription received by it and considering it to be a cash credit entry, made addition u/s 68 of the Act. It will be relevant here to reproduce the conclusions of the ld. AO as follows:-

“From the above discussions, judicial pronouncements as well as the provisions of law, in the present case on hand, it is im-believable as to why the purported investor Companies have invested their crores of rupees in the shares of Assessee Company (a non-listed company) without any due diligence. No security existed for them for their investments and the same were not freely tradable also. Further, creditworthiness of investors is not proved since the source of funds with these purported investors could not be adduced on record by the assessee company or by these purported investors.

As stated earlier, whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to each; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the

object and purpose for which payment/investment was made, etc. These facts are basically and primarily in knowledge of any assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel etc. cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious.

Further even at the cost of repetition, it is noted that during the course of search original blank share transfer deeds/ original blank share transfer forms, original blank power of attorney to sell the shares bought, original blank money receipt, etc were found and seized which were executed by the purported directors of these investor companies. The assessee has not been able to explain as to why such documents were found. No prudent investor would ever execute a blank, undated, share transfer deed OR money receipt in Original at the time of making investment, though an accommodation entry provider would certainly do such things as directed to him by the beneficiary.

In view of the above it is clear that the creditworthiness and genuineness of the transactions have not been established by the Assessee company in this case. It would be correct to state that the onus to prove the genuineness of the transaction and creditworthiness of the investor companies has not been discharged by the assessee company more-so when these investor companies have not been brought forth and the assessee company has failed to furnish any plausible explanation or cogent reasons to prove any close relationship between the directors of the investor companies and the assessee company or the directors of the assessee company.

In view of the above discussion, it is held that investor companies are paper/shell companies which are not doing any business and as such genuineness of transactions and creditworthiness of the investor companies are not proved and have been used for giving accommodation entries to the assessee company. This makes the transaction of these entities with the assessee as bogus, spurious and non- genuine. Therefore, share application money aggregating to Rs. 3,82,00,000/- during the AY 2011-12 and of Rs. 46,60,400/- received during AY 2012-13 by the above named assessee company is treated as cash credit under Section 68 of the Act of the assessee company.

[Addition of Rs. 3,82,00,000/- under Section 68 of the Act for AY 2011-12 received by M/s Spiral E-Systems Private Limited which has since merged into M/s DMG Finance & Investment Pvt. Ltd.]”

6. In appeal before the CIT(A), the assessee got relief and for which the Revenue is in appeal raising the following grounds:-

“Whether on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 3,82,00,000/- made by AO on account of share capital and share premium received from 05 investor companies.

2) Whether on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition without appreciating the addition has made on the basis of seized material and seized material consists of incriminating documents in the form of original blank unexecuted share transfer forms bearing signature and seals of Investor companies, original blank power of attorney to shares of share capital subscribers signed by their directors, original blank receipts, original blank delivery note etc.

3) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not considering and giving the findings in respect of blank share transfer forms, blank delivery notes, blank receipt and blank power of attorney duly signed by the investor companies and found from the premises of assessee company during the course of search, making it clear that the investor companies were just a conduit to bring back unaccounted money in the books of the assessee company in the form of share capital.

4) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the blank share transfer forms, blank delivery notes, blank receipts and blank power of attorney as ‘incriminating documents’ clearly ignoring the fact that such signed blank documents in the possession of assessee company itself prove that investor companies are shell companies irrespective of the fact that such investor companies were not shareholders of assessee company at the time of search.

5) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee, ignoring the fact that investor companies were shell companies that gets proved from the fact that such shares of assessee company were purchased back from such shell investor companies at nominal share price by the group entity of the assessee company in subsequent years.

6) Whether on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred in holding that share capital/premium received was explained ignoring the judgements in the cases of N.R.A. Iron & Steel Pvt. Ltd. dated 05.03.2019, Navodaya Castlers Pvt. Ltd. (Delhi) in ITA No.

320/2012 and Youth Construction Pvt. Ltd. 357 ITR 197 & CIT Vs NR Portfolio Pvt. Ltd. (Delhi) in IT A No. 1018/2011.

7) *Whether on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition ignoring the fact that assessee has failed to prove the identity, genuineness and creditworthiness of 05 investor companies and notices(s) issued by the department to those companies remain un-complied with.*

8) *The appellant craves leave to add, amend any/all the grounds of appeal before or during the course of hearing of the appeal.”*

7. Ld. Counsels appearing for both the sides were heard. On conclusion of extensive hearing the Ld. Spl Counsel was requested to summaries his contentions in the form of written submissions and we consider it worthy to reproduce the same below, though at the cost of making the order a bit lengthy;

*“The essential facts are not in dispute. In terms of the directions issued by the Hon’ble Tribunal on November 6, 2024 upon the mentioning of the instant matter by the Appellant/Revenue, a separate Note on facts is being submitted, which is marked as **Appendix A**.*

1. *In the subject proceedings under Section 153A, the Respondent was assessed to tax as the documents seized during the course of a search conducted from 02.01.2020 to 08.01.2020, marked as **Annexure A-29** of the seized material, were found to be incriminating by the Ld. AO. The assessee having failed to satisfy the Ld. AO in terms of Section 68 of the Income Tax Act, 1961 as to identity, genuineness and creditworthiness so far as the share application money received by Spiral E-Systems Pvt. Ltd., during A.Y. 2011-12, from five investor companies, additions were made (It is not in dispute that Spiral E-Systems had been merged with the assessee, by an order dated 20.12.2017, and hence, the addition was required to be made in the hands of the assessee).*

2. *In appeal, the Ld. CIT (A) did not even examine the contents of the seized documents. The short question he posed to himself was whether they were “...incriminating in nature or were merely statutory records/documents mandatory under the Companies Act...”. Once he confined himself to this question, the answer that followed was there was “nothing*

unusual” as to the seized documents under Annexure A-29 and they were not incriminating:

*“...From the above discussion, quite clearly it comes out that **these documents cannot be said to be indicative of any undisclosed income. There is nothing unusual about these documents found with the company. In fact, these are statutory records which the company is obliged to maintain, particularly, when a share transfer takes place in the name of the investor and, thereafter from the investors to another person...**”*

3. *On this short ground, the appeal was allowed without going into the merits of the addition, as the Ld. CIT (A) was satisfied that the matter fell within the four corners of principles laid down in *Kabul Chawla* as affirmed in paragraph 14(iv) of the judgment of the Hon’ble Supreme Court of India in *Abhisar Buildwell*.*

4. *The Revenue has, accordingly, in this appeal, confined itself solely to the said finding and it has not gone into the merits of the addition made. To the extent the assessee, in the course of making its submissions did so, the Revenue in rejoinder, respectfully reiterated that these aspects ought to be eschewed from consideration by this Hon’ble Tribunal, as it is an aspect on which the Ld. CIT (A) is yet to bestow his consideration. This would be done in the event the Revenue succeeds in this appeal. The controversy at hand is limited to this issue.*

In re: Findings returned by the Ld. CIT (A) in the impugned order are perverse

5. *It is submitted that the impugned order is perverse, inasmuch the Ld. CIT (A), despite being aware of the belief formed in the mind of the Ld. AO from the assessment order, on the basis of the contents of the seized documents, that the monies received from five so called investor companies is not genuine share application money but money from entry operators, has turned a blind eye to the contents of the seized material simply because “...these five shareholders admittedly have sold their shares in F.Y 2015-16 (AY 2016-17) i.e. much prior to the date of search...”*

6. *In light of the factum of sale in AY 2016-17, the Ld. CIT (A) proceeds on a predetermined notion that there can be “nothing unusual” about such*

documents, and they could never be incriminating, and they are instead, according to him, “statutory documents”:

“...these five shareholders admittedly have sold their shares in F.Y 2015-16 (AY 2016-17) i.e. much prior to the date of search and would have completed all the formalities relating to the said sale under the Companies Act. Hence, the documents found have to be considered from point of view of a shareholder who has sold the shares of the company and the records which the company required to maintain in relating to the said sale...”

7. This finding is also based entirely on conjectures and surmises. Not only this, various other findings in the impugned order have also been returned on conjectures and surmises. For instance, after having held that the documents under Annexure A-29 are “...statutory records...” that had to be maintained by Spiral E-Systems as its shares were sold, and the said documents are related to the said sale, the Ld. CIT (A) proceeds to also observe that confirmations from investor companies “...had been obtained for the purposes of income tax and other proceedings...”. This was not even the case of the Ld. AR for the assessee.

8. In ways more than one, as later detailed in this note, the Ld. CIT (A) proceeds to make out a better case for the assessee that even the Ld. AR had himself urged, and thereafter, relying on judgments of this Hon’ble Tribunal, as well as of the Hon’ble High Court of Delhi, cited by the Ld. AR for the assessee, he concludes that “**...in view of the aforesaid**, these documents do not constitute documents which are incriminating in nature...”

9. Perversity is writ large in the face of the impugned order given the predetermined manner in which the Ld. CIT(A) has proceeded, overlooking the fact that these very judgements the assessee had itself cited, envisaged a scrutiny of the contents of the seized documents in order to decide their incriminating character. For instance, in *Sunny Infra projects (supra)*, cited by the assessee, which in turn, relies on the judgement of the Hon’ble High Court of Delhi in *Dayawanti*, inter alia, the Hon’ble High Court of Delhi had clearly held that:

*“...the seized material must have some nexus or relevance to the additions sought to be made and **must be relevant for the belief formed regarding income having escaped assessment...**”*

10. *Dayawanti having received the imprimatur of the Hon’ble Supreme Court of India in Abhisar Buildwell, it is submitted in terms thereof, that:*

a. *Even if a single document out of those seized, is held to be incriminating, the door of Section 153A cannot be shut in the face of the Revenue, as done by the Ld. CIT (A).*

b. *The question of incrimination in the present case ought to be appreciated, in light of the fact that the addition made is in terms of Section 68 of the Income Tax Act, 1961. For purposes of Section 68, once the seized material gives rise to a belief in the mind of the Ld. AO, the initial burden under the provision stands discharged, and it then shifts to the assessee to satisfy the Revenue on identity, genuineness and creditworthiness. A fortiori, incrimination for purposes of Section 68 stands on a different footing vis-à-vis incrimination for purposes of other provisions in the Income Tax Act, 1961 that do not involve a reversal of the burden of proof.*

c. *Incrimination is an inference that has to be drawn by examining the content of the seized documents and juxtaposing it with the picture contemporaneously held out by the assessee, to the Revenue. The perversity in the approach of the Ld. CIT (A) is the presupposition that a unless a document carries a stamp of incrimination on its forehead, its contents need not be examined and the belief created thereby, is wholly irrelevant.*

11. *It is submitted that the belief formed in the mind of the Ld. AO from the seized material under Annexure A29, is very clearly discernible from the assessment order, inasmuch as:*

a. *At page 20 of his order, the Ld. AO points out that while the assessee had at all times contemporaneously held out that it had received a genuine investment from five investor companies, the seized documents give rise to a belief that this is not at all genuine share application money, but money received from entry operators. The Ld. AO specifically points to bank statements seized during the search which reveal several back-to-back transactions of the amount(s) invested by the so-called investor companies in the shares of Spiral E-Systems, i.e. credit followed by debit transactions*

of the same amount on the same date(s)/following date(s), which gave rise to a belief in his mind that the source of investment never emanated from funds belonging to the said investor companies.

(In this context, this Hon'ble Tribunal may bear in mind that no assessment order under Section 143(3) of the Income Tax Act, 1961, in respect of Spiral E-Systems Pvt. Ltd. for A.Y. 2011-12, has been produced before it).

b. *At page 33 of his order, the Ld. AO once again observes on the basis of the seized documents that no prudent investor would provide them, but an accommodation entry provider would certainly do so, at the behest of the ultimate beneficiary.*

c. *This observation has to be read with his remark at page 11 of the assessment order that the documents forming part of the seized material demonstrated that they were merely a smoke screen, and it did indicate that a pre-arranged agreement/understanding existed under which the said documents were provided to the assessee (which was Spiral E-Systems at the relevant time) at the time of remittance of the share application money.*

12. *The Ld. AO has clearly applied his mind to the contents of the seized documents in terms of Sunny Infraprojects (supra) - "...the seized material must have **some nexus or relevance to the additions sought to be made and must be relevant for the belief formed regarding income having escaped assessment...**"Further, at Pages 17-18 of his order, the Ld. AO has observed that similar documents were seized in respect of American Hotels and Restaurants Pvt. Ltd., and since there were common investors/share subscribers in both cases, share subscription money received by Spiral E-Systems bore the same colour and nature as that of share subscription money received by American Hotels. In point of fact, this is one of the reasons why the Revenue sought consolidation of the instant appeal with the appeal it has filed before this Hon'ble Tribunal in the case of American Hotels, which was declined.*

13. *There is also no dispute, as borne out from the Satisfaction Note, that jurisdiction stands assumed by the Ld. AO based on these very seized documents under Annexure A-29. (See p. 107-112 of the paper book filed by the Ld. AR for the assessee).*

14. *The insistence of the Ld. CIT (A) that there is “nothing unusual” as to these documents and they could never at all be incriminating being so called “statutory documents”, even after having noticed the belief formed in the mind of the Ld. AO, on a consideration of the contents of the seized documents that this is not genuine share application money, but money from an entry operator, is thus manifestly perverse, in terms of the legal test for perversity laid down in K. Ravindranathan Nair v. CIT, (2001) 1 SCC 135 by the Hon’ble Supreme Court of India.*

15. *There is no gainsaying that the findings returned by the Ld. CIT (A) are also on conjectures and surmises, and without any cogent material. This is plainly impermissible as per the law declared by Hon’ble Supreme Court in Dhirajlal Girdharlal v. CIT, (1954) 26 ITR 736.*

16. *During the course of the hearing, an observation fell from this Hon’ble Tribunal that the Revenue’s criticism of the impugned order of the Ld. CIT (A) equally well applies to the order of the Ld. AO as well. With utmost respect, it is submitted that the belief created in the mind of the Ld. AO from the seized documents is discernible from the assessment order and the same criticism therefore cannot apply.*

17. *Be that as it may, if this Hon’ble Tribunal is still inclined to hold that the order of the Ld. AO is non-speaking, it is submitted that even then the instant appeal may not be dismissed. This Hon’ble Tribunal may, instead, consider laying down parameters on which the seized material ought to have been examined by the forums below and remand the matter to the Ld. AO, to enable him to apply these parameters to the seized material, and draw the necessary inferences as there is no dispute that satisfaction was reached on the basis of the seized documents under Annexure A-29.*

18. *The Revenue relies on the law laid down in Hukumchand Mills Ltd. v. CIT, (1967) 63 ITR 232, applying which the Hon’ble Supreme Court of India in CIT v. Assam Travels Shipping Service, (1993) 199 ITR 1 has held that this Hon’ble Tribunal is empowered under Section 254(1) of the Income Tax Act, 1961 to remand the matter back to the competent authority:*

“The expression “as it thinks fit” is wide enough to include the power of remand to the authority competent to make the requisite order in accordance with law in such a case even though the Tribunal itself could

not have made the order enhancing the amount of penalty. The power of the Appellate Assistant Commissioner under Section 251(1)(b) includes the power even to enhance the penalty subject to the requirement of sub-section (2) of Section 251 of reasonable opportunity of showing cause against such enhancement being given to the appellant assessee. This could have been done in the assessee's appeal itself filed in the present case. The power of the Tribunal to make an order of remand in such a situation is well settled. [Hukumchand Mills Ltd. v. CIT, (1967) 63 ITR 232: (1967) 1 SCR 463]”

19. *The Revenue invited this Hon’ble Tribunal to independently apply its mind to the seized material and form an opinion as to its contents at the hearing, and submits in terms thereof, that it would be inapposite to give a clean chit to the assessee, in this appeal as the contents of the seized material are plainly incriminating. In urging so it is fortified by the judgement of this Hon’ble Tribunal in Shahid Atiq v. ITO, (2005) 97 ITD 22 which, in turn, draws sustenance from a judgment of the Hon’ble Supreme Court of India in Kapurchand Shrimal v. CIT, (1981) 131 ITR 451 which, in turn, cites with approval Hukumchand (supra).*

20. *It is reiterated that this Hon’ble Tribunal is empowered to rectify the errors/deficiencies/ lacunae in orders passed by the forums below after independently examining/considering all the incriminating material seized in this case, in exercise of its jurisdiction under Section 254(1), as the last fact-finding body in the hierarchy of forums in the Income Tax Act, 1961. This Hon’ble Tribunal may therefore set aside the impugned order and remand the matter to either the Ld. CIT (A) or the Ld. AO, as it considers appropriate, with a direction to evaluate the contents of the seized documents, ascertain their true character, and decide if it has a nexus to the addition sought to be sustained, and the relevance to the belief that income has escaped assessment, in terms of the law laid down in CIT v. Manohar Glass Works, (1998) 232 ITR 302 and Smt. Thakuri Devi v. CWT, (1983) 139 ITR 271.*

21. *The Revenue is also fortified by principles laid down by a Full Bench of the Hon’ble High Court of Bombay in Ahmedabad Electricity Co. Ltd. v. CIT, (1993) 199 ITR 351, which has been subscribed to by this Hon’ble Tribunal in Shahid Atiq (supra) as set out below, and submits that the first ground of appeal is broad enough to cover all these aspects and enable this Hon’ble Tribunal to carry out this exercise, in view of the expression “thereon” in Section 254(1).*

In re: “Unusual” features discernible from the contents of the seized documents

22. *At the final hearing, the Revenue had also invited this Hon’ble Tribunal to independently apply its mind to the seized material to form an opinion regarding its contents, to satisfy its conscience that it would be wholly unwarranted to give a clean chit in this appeal to the assessee, turning a blind eye to the contents of the seized material. The “unusual” features discernible from the seized documents under Annexure A-29, which render the findings of fact rendered by the Ld. CIT (A) in the impugned order wholly unsustainable in law are thus set out below. For the sake of convenience, the finding of the Ld. CIT (A) is set out in respect of the class of seized documents to which the finding pertains, and then the Revenue has set out its comments thereon, in seriatim:*

Application form and the confirmation upon allotment through various documents

23. *The findings of fact the Ld. CIT (A) in respect of the application form and the confirmation upon allotment through various documents that had been seized, are reproduced hereafter:*

“...Application form for equity shares and the receipt of shares are the documents which are filed by the investor to the company for applying for allotment of its shares and confirmation upon allotment of such shares to it respectively. They have necessary in original because the application form is a part of statutory record of the company, confirmation from investors companies are obtained for the purpose of income tax and various other proceedings and its existence in original in fact is very much required. Hence, its existence is also a matter of statutory record...”

“...As already stated, the shareholders have sold their shares and, therefore in order to sale the shares, Share Transfer Form needs to be signed by the shareholders and the said share transfer form are thereafter acted upon and transfer is acted upon by the company in favour of the new shareholders. Hence, the share transfer form have necessarily to be in original, and so also the original share certificates. Many a times, the share transfer forms are not filled up in the case of Private Limited

Company, and particularly, when the shares have been transferred in the favour of a sister concern which is the case here...”

“...Likewise, Memorandum and Article of Association of investor companies, bank statement of investors companies are a set of confirmation documents which are required for Income Tax proceedings. The assessee has already stated that its assessment was made in the past and therefore all the confirmations may have been obtained then for the purpose of the said assessment proceedings.

From the above discussion, quite clearly it comes out that these documents cannot be said to be indicative of any undisclosed income. There is nothing unusual about these documents found with the company. In fact, these are statutory records which the company is obliged to maintain, particularly, when a share transfer place in the name of the investor, and thereafter from the investors to another person...”

24. *The cross references of these documents from Annexure A-29, are as under:*

Application forms:

- a) *Ladliji – Pg. 22 of Paper Book (Seized Material) Vol-I filed by the AR*
- b) *Madhav Fincap–Pg. 75-76of Paper Book (Seized Material) Vol-I filed by the AR*
- c) *Top-Tech Cables – Pg. 4 of Paper Book (Seized Material) Vol-II filed by the AR*
- d) *Pine View Investments – Pg. 59 of Paper Book (Seized Material) Vol-II filed by the AR*
- e) *Arrow Equity – Pg. 154 of Paper Book (Seized Material) Vol-II filed by the AR*

Confirmation upon allotment:

- a) *Ladliji – Pg. 25 of Paper Book (Seized Material) Vol-I filed by the AR*
- b) *Madhav Fincap–Pg. 79 of Paper Book (Seized Material) Vol-I filed by the AR*

Share Transfer forms:

- a) *Ladliji – Pg. 20/21, 43/44, 45/46 of Paper Book (Seized Material) Vol-I filed by the AR*
- b) *Madhav Fincap–Pg. 73/74 of Paper Book (Seized Material) Vol-I filed by the AR*
- c) *Top-Tech Cables – Pg. 2/3 of Paper Book (Seized Material) Vol-II filed by the AR*
- d) *Pine View Investments – Pg. 57/58, 68/69, 70/71 of Paper Book (Seized Material) Vol-II filed by the AR*
- e) *Arrow Equity – Pg. 152/153 of Paper Book (Seized Material) Vol-II filed by the AR*

Memorandum and Articles of Association:

- a) *Ladliji – Pg. 50-70 of Paper Book (Seized Material) Vol-I filed by the AR*
- b) *Top-Tech Cables – Pg. 41-55 of Paper Book (Seized Material) Vol-II filed by the AR*
- c) *Pine View Investments – Pg. 102-141 of Paper Book (Seized Material) Vol-II filed by the AR*
- d) *Arrow Equity – Pg. 194-239 of Paper Book (Seized Material) Vol-II filed by the AR*

25. *Comments of the Revenue:*

a. *First and foremost, the Ld. CIT (A) has sought to make out a better case for the assessee than what the Ld. AR for the assessee had himself urged, inasmuch as:*

i. *The Ld. CIT (A) finds that “...particularly, when the shares have been transferred in the favour of a sister concern which is the case here...” Such a plea was not even canvassed by the Ld. AR for the assessee before the Ld. CIT (A), as is a matter of record, which speaks volumes as to what has actually transpired. This is also, as a matter of fact, wholly incorrect and the correct position as demonstrated at the time of hearing [See p. 59/Vol. II of the Revenue’s paper book], is set out below:*

- *It is nobody’s case that the shares were directly transferred by the five investor companies to DMG Finance and Investment Pvt. Ltd. (five investor companies were portrayed as shareholders of Spiral as of 31.03.2015 - See p. 43 of Paper book Vol. II filed by the Revenue).*
- *The shares of Spiral as held by investor companies were transferred to Sushant Gupta, a director of Spiral itself, as per public records available*

on the website of the Ministry of Corporate Affairs. These were later transferred to DMG Finance and Investment Pvt. Ltd. in AY 2016-17 (at p. 58 of Paper book Vol. II filed by the Revenue). Attention is invited to Form No. MGT-7 filed by Spiral for AY 2016-17 (See p. 44 of Paper book Vol. II filed by the Department).

- It follows that transfer of shares by Sushant Gupta in favour of DMG Finance and Investment Pvt. Ltd. was done sometime prior to 31.03.2016 (at Pg. 59 of Paper book Vol. II filed by the Department), and not by the so-called investor companies as held the Ld. CIT (A).
- The attention of this Hon'ble Tribunal was invited at the hearing to the fact that details of transfer of the subject shares from investor companies were sought by the Revenue in the course of the assessment proceedings for A.Y. 2011-12, but were neither furnished by the assessee, nor by the so-called investor companies.
- Details were again sought by the Revenue during the course of the assessment proceedings for AY 2016-17, under Section 153A. Yet again, there was complete silence as is a matter of record (See assessment order dated 30.09.2021 for A.Y. 2016-17 at Pg. 60-69 of Paper book Vol-II filed by the Department).
- A fortiori, the seized signed share transfer forms at p. 20-21 of the Paper Book (Seized Material) Vol-I (including blank share transfer forms signed on behalf of the investor companies @Pg. 43-46 of Paper Book (Seized Material) Vol-I) and similar share transfer forms signed by other so-called investor companies could not have pertained to transfer of shares of Spiral by the so-called investor companies to the sister concern of Spiral, i.e. DMG Finance and Investment Pvt. Ltd., which as the Revenue has demonstrated, is a wholly perverse finding.
- Having regard to the fact that transfer of the shares by the so-called investor companies was done only after F.Y. 2014-15, as contemporaneously held out by Spiral publicly, the share transfer forms for effecting the transfer ought to have been as per the provisions of the Companies Act, 2013. The seized share transfer forms being in terms of the Companies Act, 1956, are obviously incriminating and do therefore create a belief contrary to the picture painted by the assessee.

ii. It was never the case of the Ld. AR for the assessee that Memorandum/Articles of Association of the so-called investor companies including excerpts of their bank statements were produced at the time of assessment under Section 143(3) for Spiral. The insistence of the Ld. CIT (A) is that they "...are required for Income Tax proceedings. The assessee

*has already stated that its assessment was made in the past and therefore all the confirmations **may have been obtained then** for the purpose of the said assessment proceedings...”thus raises eyebrows. The Revenue pointed out at the final hearing that the burden was on the assessee to sustain this finding as per the assessment records of Spiral that these documents were actually produced by Spiral in the course of assessment proceedings. Nothing to that effect has been done. The perverse inference drawn to benefit the assessee, which is on conjectures and surmises anyways, is thus wholly unsustainable.*

(This Hon’ble Tribunal may also recall that no assessment order under Section 143(3) of the Income Tax Act, 1961, in respect of Spiral E-Systems Pvt. Ltd. for A.Y. 2011-12, has been produced before it).

iii. The finding returned that share transfer forms are not usually filled up by private companies is yet another instance of the Ld. CIT (A) making out a case for the assessee beyond what it has itself contended. The finding is unsustainable in law as a higher onus is cast on an assessee under Section 68 in matters of private placement to demonstrate the genuineness of the transaction under consideration, inter alia, as per the Memorandum to the Finance Act, 2012.

b. Secondly, the Revenue handed over the entire bunch of seized documents across the bar to this Hon’ble Tribunal and demonstrated that it was apparent on the face of it that all these seized documents were signed and executed on the very same day. It was specifically urged that this Hon’ble Tribunal may, if it considers it appropriate to do so, direct a forensic analysis into the entire bunch of documents, since that would leave no doubt that the paper on which all these documents are signed is of the same age and provenance, and even from the ink with which signatures have been affixed, it is clear that the same person signed each one of these documents in one go, on the same day at the same time. This is a complete response to the submission urged by the Ld. AR for the assessee, that the documents being undated, could very well have actually been given in AY 2016-17, making the Ld. CIT (A)’s finding factually plausible.

c. Thirdly, the very premise on which the finding of the Ld. CIT(A) rests, i.e. every share application form, by itself, can constitute a part of a statutory record of a company, is perverse, inasmuch as:

- i. *To the extent a document is treated as a statutory record of a company, it ought to be capable of being corroborated from the records of the concerned Registrar of Companies, or other statutory authorities. Documents filed with the jurisdictional Registrar of Companies are usually uploaded on the online portal of the Ministry of Corporate Affairs, and are easily accessible to the public, as well as the Revenue. The Revenue has placed on record all the documents available on the website of the statutory authorities in relation to Spiral in the paper book filed by it, to satisfy this Hon'ble Tribunal as to what all are actually the "statutory documents" and hence, the finding of the Ld. CIT (A) is plainly unsustainable.*
- ii. *The Revenue also invited attention to fact that the seized material contained share transfer forms under the Companies Act, 1956, which belies the stand taken by the assessee that transfer of the shares by the so-called investor companies was done only after AY 2015-16. If that was so the so-called "statutory records" including the seized share transfer forms ought to have been under the Companies Act, 2013.*
- iii. *Assuming without admitting that any share transfer form can qualify as a statutory record, it is submitted that only a share transfer form that actually can be acted upon by a statutory authority, as per law, which would qualify as a statutory record. As held in *Muniyamma v. Arathi Cine Enterprises Pvt. Ltd.*, 1992 SCC Online Kar 7, before a share transfer form can be acted upon, stamp duty thereon must be fully paid as per Entry 62(a) of Schedule-I to the Indian Stamp Act, 1899 as applicable to the National Capital Territory of Delhi. All the share certificates must also be enclosed with the same, for purposes of Section 108 of the Companies Act, 2013.*
- iv. *The seized share transfer forms admittedly do not carry any endorsement reflecting the payment of stamp duty. These could not thus have been acted upon by any statutory authority, given the statutory bar under the Indian Stamp Act, 1899 and could not thus be the "statutory record" of the assessee or investor companies.*
- v. *In terms of Section 33 of the Indian Stamp Act, 1899 unstamped share applications are impounded on presentation. Section 35 of the Indian Stamp Act, 1899 debars any statutory authority from even "acting upon" such an instrument, till deficit stamp duty and penalty, as assessed thereon, is recovered. This bar cannot even indirectly be circumvented, as emphatically held by the Hon'ble Supreme Court of India in *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao*, (1971) 1 SCC 545.*

- d. *Fourthly, the Ld. CIT (A) there is “nothing unusual” in the seized documents flies in the face of settled law that beneficial interest in these shares stood duly transferred to the ultimate beneficiary by the investor companies, as borne out from their contents. The Ld. AO in the assessment order, had clearly held that this is something no prudent investor would do, but an accommodation entry provider would certainly do so at the behest of the ultimate beneficiary. The Ld. CIT (A) fails to appreciate that even though the register of the company may later have been rectified pursuant to allotment, still:*
- i. *As per E.D. Sassoon & Co. Ltd. v. Patch, (1943) 45 Bom LR 46, in a situation such as the one at hand, the transferor holds shares for the benefit of the transferee to the extent necessary to satisfy its demands and as the transferee holds the whole beneficial interest and transferor has none, the transferor has to comply with all reasonable directions that a transferee may give. In other words, if he becomes a trustee of dividends, he also becomes a trustee of the right to vote because the right to vote is a right to property annexed to the shares, and as such the beneficiary has a right to control the said exercise by the trustee of the right to vote. This is a proposition of law that squarely applies in the facts of the present case because this is precisely what would happen in a transaction with an entry operator whereas no bona fide investor would want to lose control over its investment by doing this.*
- ii. *This proposition of law stands affirmed by the Hon’ble Supreme Court of India in Mathalone vs Bombay Life Assurance Co. Ltd., AIR 1953 SC 385, which has been cited with approval by a constitution bench of 5 judges of the Hon’ble Supreme Court of India in LIC v. Escorts Ltd., 1986 (1) SCC 264. It has thereafter acquired the force of law declared in terms of Article 141 of the Constitution of India, so far as the instant proceedings are concerned.*
- iii. *The seized documents appreciated in light of the law declared thus leave no doubt that actual beneficial interest stood vested in the hands of Sushant from the outset and thus, by extension, Spiral, right from the time of the receipt of share application money. This gives rise to the belief as discernible from the order of the Ld. AO that no right-thinking investor would do such an act, but entry providers would certainly do so. The belief that these so called investors were entry providers, in the mind of the Ld. AO was fortified by the seized bank statements that showed credit and debit entries on a back-to-back basis, on repeated occasions, as is borne out from the assessment orders. To turn a blind eye to this aspect discernible*

from the contents of the bank statements of the investor companies, by treating them as “statutory documents” is utterly perverse, to say the least.

e. *Fifthly, yet again the finding of the Ld. CIT (A) that there is “nothing unusual” in these seized documents flies in the face of the fact that the Ld. CIT (A) does not even notice that the seized documents included the confirmation of receipts from sale of shares (for instance, at Pg. 25 of Paper Book (Seized Material) Vol-I in the case of Ladliji). This is again something no prudent investor would do, but an accommodation entry provider would certainly do so, at the behest of the ultimate beneficiary, as held by the Ld. AO. The fact that Ladliji, for instance, is giving a signed blank receipt (at Pg. 39 of Paper book (Seized Material) Vol-I filed by the AR) at the time of applying for the shares qua the amounts to be received for full and final sale proceeds of those shares, is incriminating as no genuine investor would issue such a document, but an entry provider would.*

This confirmation of receipt has to be appreciated with the Delivery Note (See p. 40 of Paper Book (Seized Material) Vol-I) which no bona fide investor would issue, not knowing whether at all if he would ever be retransferring the shares, and if so, when, and at what consideration. An entry provider would however give a blank but signed form, with a seal, at the time of providing the share application money itself, as held by the Ld. AO.

Leave aside the fact that no explanation is forthcoming as to why a blank but signed Receipt and Delivery Note belonging to the investor company was found in the premises of the assessee, such blank documents most certainly could not be construed as a ‘statutory document’ of either the assessee or the investor company.

Clearly, blank receipts were collected of the amount that would be recovered when the shares would eventually be sold later on, at the time of the share application money being remitted, when the Share Application form was also issued (at Pg. 22 of Paper Book (Seized Material) Vol-I)). The Revenue additionally also pointed out in response to an observation that fell from the bench that at no stage has the assessee itself made any such submission or even so much as an attempt, to contend that the document was taken from the investor companies for purposes of income tax or other proceedings, which the Ld. CIT (A) has held. This is clearly yet another improvement of its stand.

f. *Sixthly, the finding of the Ld. CIT (A) that there is “nothing unusual” in these seized documents flies in the face of the fact that the Ld. CIT (A) does not even notice that one of the documents seized was a blank but signed power of attorney (Pg. 36-38 of Paper Book (Seized Material) Vol-I) belonging to the investor company. Leave aside the fact that this document could not be a so called ‘statutory document’, with utmost respect, no genuine investor would hand over such a document that makes him lose control over his investment, but an entry operator would on the other hand, as rightly appreciated by the Ld. AO, have no reservations to do so, even if it is not known as to what amount the recipient will eventually fill in therein, and on which date.*

It is borne out from the terms of the seized blank power of attorney that it was an irrevocable power of attorney, which as is settled law, creates an interest in property in terms of Section 202 of the Indian Contract Act, 1872, and cannot unilaterally be revoked by either party, as held by the Hon’ble High Court of Delhi in Harbans Singh v. Shanti Devi, 1977 SCC Online Del 102.

The blank power of attorney duly signed by an authorized representative/director of the investor company, unearthed from the premises of the assessee during the search, confirms that the investor company has already appointed Spiral as its agent from the outset, and had authorised it “to transfer any of the said shares to any person or persons or Corporation whether on sale or otherwise...” which cannot be unilaterally revoked, and therefore does confirm the transfer of beneficial interest and securing of the interest of the beneficiary as explained above. This further demonstrates the unsustainability of the finding of the Ld. CIT (A). In contrast, at page 33 of the assessment order, the AO has clearly observed that the assessee could not provide any explanation as to why blank but signed irrevocable power of attorney of the authorized representative/director of the investor companies was found at its premises. This fact has to be appreciated with the seized share transfer forms as it clearly gives rise to a belief that right from the time of transfer of share application money, a beneficial interest had simultaneously been created in favour of the ultimate beneficiary, which an entry operator would have no reservations in creating, as was held by the Ld. AO.

g. *Seventhly, it is submitted that there is no statutory provision requiring an assessee to maintain the following documents that were seized, and neither the Ld. CIT (A) has identified any such provision, nor could the Ld. AR in the proceedings before this Hon'ble Tribunal, identify/demonstrate any provision of law that requires any assessee to maintain with itself the following documents (as an illustration, references are made to documents belonging to Ladliji):*

- i. Certificate of investment at Pg. 23 of Paper Book (Seized Material) Vol-I*
- ii. Receipt of shares at Pg. 25 of Paper Book (Seized Material) Vol-I*
- iii. Bank statements of Spiral E-Systems at Pg. 28-30 of Paper Book (Seized Material) Vol-I*
- iv. Affidavit of allotment by the representative of the investor company at Pg. 34 of Paper Book (Seized Material) Vol-I*
- v. Blank but signed Power of Attorney belonging to the investor company at Pg. 36-38 of Paper Book (Seized Material) Vol-I*
- vi. Blank but signed receipt/acknowledgment of sale proceeds for sale of shares by investor company at Pg. 39 of Paper Book (Seized Material) Vol-I*
- vii. Blank but signed Delivery Note for transfer of shares by investor company at Pg. 40 of Paper Book (Seized Material) Vol-I*
- viii. Blank but signed share transfer forms (under the provisions of the Companies Act, 1956) belonging to the investor companies at Pg. 43-46 of Paper Book (Seized Material) Vol-I*

h. *Eighthly, the approach of the Ld. CIT (A) in setting aside the findings of the Ld. AO, is a clear instance of the taxing authorities putting on blinkers while looking at the documents produced before him, instead of trying to ascertain the reality of the content of the sized material. This is squarely in the teeth of the law declared in CIT v. Durga Prasad More, (1971) 82 ITR 540:*

*“...The taxing authorities were not required to put on blinkers while looking at the documents produced before them. **They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents...**Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, **the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities...**”*

Affidavit for allotment of shares, power of attorney, abstract of resolution

26. *The Ld. CIT (A) extends a similar treatment to the other seized documents by once again characterizing them as records pertaining to the company “...Similarly, an affidavit for allotment of shares; **power of attorney, abstract of resolution passed, list of directors are all records pertaining to the company and an affidavit for allotment of shares** can even be for the purpose of the shareholders which can be kept by the company as a confirmation by the shareholders **to be filed for statutory proceeding...**”*

27. *The cross references of these documents from Annexure A-29, are as under:*

Affidavit for allotment of shares:

- a) Ladliji –Pg. 34 of Paper Book (Seized Material) Vol-I filed by the AR*
- b) Top-Tech Cables – Pg. 7 of Paper Book (Seized Material) Vol-II filed by the AR*
- c) Pine View Investments – Pg. 61, 144 of Paper Book (Seized Material) Vol-II filed by the AR*
- d) Arrow Equity – Pg. 157 of Paper Book (Seized Material) Vol-II filed by the AR*

Power of Attorney:

- a) Ladliji–Pg. 36-38 of Paper Book (Seized Material) Vol-I filed by the AR*
- b) Top-Tech Cables – Pg. 9-11 of Paper Book (Seized Material) Vol-II filed by the AR*
- c) Pine View Investments – Pg. 63-66, 146-148 of Paper Book (Seized Material) Vol-II filed by the AR*
- d) Arrow Equity – Pg. 159-161 of Paper Book (Seized Material) Vol-II filed by the AR*

Abstract of Resolution:

- a) Ladliji – Pg. 24 of Paper Book (Seized Material) Vol-I filed by the AR*

- b) *Madhav Fincap – Pg. 78 of Paper Book (Seized Material) Vol-I filed by the AR*
- c) *Top-Tech Cables – Pg. 6, 12 of Paper Book (Seized Material) Vol-II filed by the AR*
- d) *Pine View Investments – Pg. 60, 67, 143, 149 of Paper Book (Seized Material) Vol-II filed by the AR*
- e) *Arrow Equity – Pg. 156, 162 of Paper Book (Seized Material) Vol-II filed by the AR*

28. *Comments of the Revenue:*

a. *First and foremost, it is submitted that the Ld. CIT (A) has again made out a better case for the assessee, that what it had itself contended, as borne out from the record. For instance, it was never the own case of the assessee that an affidavit for allotment of shares was obtained from the investor companies for any statutory proceedings. The finding returned by the Ld. CIT (A) is that this was “...kept by the company as a confirmation by the shareholders to be filed for statutory proceedings...”*

b. *Secondly, finding above is more instance of the surmises and conjectures that have persuaded the Ld. CIT(A) to set aside the order of the Ld. AO.*

c. *Thirdly, the finding above is plainly contrary to the judgement of the Hon’ble High Court of Delhi in CIT v. MAF Academy (P) Ltd., (2014) 361 ITR 258 (Para 32), where a document of a similar nature was held to raise suspicion as to genuineness of the transaction of share subscription:*

“32. The reason why we have referred to the date of attestation of the year 2001 is that we find it strange that the Assessee in the year 2001 felt the need of obtaining affidavits from the persons investing in the shares of the company to certify the genuineness of the transaction as far back in the year 2001 when there was no suspicion or inquiry/investigation in contemplation even in the Department. We find it strange that an Assessee along with share application money would obtain affidavits from the investors to confirm genuineness of the transaction. In a normal business transaction, no such certificate/affidavit would be obtained by any company from persons investing in its share capital. The fact that the Assessee felt the necessity of obtaining such affidavits raises a suspicion on the genuineness of the very transaction.”

d. *Fourthly, to the extent the Affidavit (for instance, at Pg. 34 of Paper Book (Seized Material) Vol-I) is shorn of material particulars, such as Share Certificate No./Distinctive No., etc., it could not have been used for any statutory proceedings, which demonstrates yet again, the utter perversity of the impugned order passed by the Ld. CIT (A).*

e. *As far as the fact that blank but signed irrevocable power of attorney belonging to, and signed by the authorized representative/director of the so-called investor companies is concerned, it has been demonstrated hereinabove that investor company has already appointed Spiral as its agent from the outset, and authorised it “to transfer any of the said shares to any person or persons or Corporation whether on sale or otherwise...” which cannot be unilaterally revoked, and thus does confirm the transfer of beneficial interest and securing of the interest of the beneficiary as explained above. This is to be appreciated in view of the fact that the assessee has failed to explain as to why the blank but signed power of attorney was unearthed in the premises of the assessee, when a board resolution was already passed by the investor companies authorizing the director to make the purported investment in Spiral E-Systems Pvt. Ltd.*

The Ld. CIT(A) does not even address himself to the other seized documents based on which the Ld. AO had returned a finding that they incriminated the assessee

29. *Annexure A-29 contains documents outside the various classes of documents in respect of which findings as extracted above, have been rendered by the Ld. CIT (A) in the impugned order. The impugned order is silent as to the certificate issued by the so-called investor companies [See for instance, the Certificate issued by Ladliji at p. 23 of Paper book (Seized Material) Vol-I filed by the AR.]*

30. *This documents is incriminating, inasmuch as:*

a. *Even before allotment of shares by Spiral E-Systems Pvt. Ltd., a certificate had been issued by Ladliji confirming that an investment had been made in the shares of Spiral E-Systems. In a genuine transaction, this would have been issued after the allotment was completed, at which point of time, share certificate numbers would also have been filled in.*

b. *No explanation is forthcoming from the assessee as to why a certificate issued by the so-called investor companies that they have made an investment in Spiral E-Systems Pvt. Ltd. was unearthed in the premises of the assessee, into which Spiral E-Systems had merged.*

c. *This document clearly raises suspicion as per the judgement of the Hon'ble High Court of Delhi in CIT v. MAF Academy (P) Ltd., (2014) 361 ITR 258 (Para 32).*

d. *At Pg. 32 of Paper book (Seized Material) Vol-I filed by the AR, a Certificate issued by Ladliji was unearthed indicating that an 'investment' had been made by it in an additional 14,600 equity shares of Spiral E-Systems, however, in the public domain, it was always held out by Spiral E-Systems that only 22,000 equity shares had been allotted by it to Ladliji. To the extent the seized material contains a certificate confirming allotment and receipt of an additional 14,600 shares, for which share application money was received, the said document is plainly incriminating. The said additional shares were never even allotted, to begin with. Only an entry operator would issues a certificate for shares, it has never even received, that too at a stage when that were never even allotted. This further begs the question - were 14,600 additional fresh shares ever issued by Spiral, so as to be capable of being allotted to any person, much less Ladliji? From the records that are publicly available, this does not seem to be the case. Only an entry operator will issue a certificate reflecting allotment of shares that do not even exist, in law.*

31. *Nowhere in the impugned order does the Ld. CIT(A) even advert to this seized document which is incriminating in nature. This document yet again gave rise to a belief in the mind of the Ld. AO that the source of investment never emanated from funds belonging to the said investor companies. Contrary to the submission of the Ld. AR for the assessee that the test identity was proved as soon as the five investor companies were served for purposes of Section 133(6), the true test of identify as held by the Hon'ble High Court of Delhi in CIT v. NR Portfolio, [2014] 42 taxmann.com 339, is the real and actual business undertaken. It is submitted that till date, no material has been brought on record as to what was the real business undertaken by the so called five investor companies. Even if money was received through banking channels, it could not be taken to reflect any genuine business activity, as nothing has been brought on record to satisfy this Hon'ble Tribunal as to the own profit making*

apparatus of the so called five investor companies and thus, it is nothing more than rotation of money through bank accounts.

32. *For the sake of completeness, the tabular analysis of the contents of seized documents by the Revenue during the course of the hearing, is reiterated under **Appendix B**.*

In re: The Revenue cannot be worse off in proceedings under Section 153A

33. *Submissions were made by the Ld. AR for the assessee, contradicting the judgements that had been cited before the Ld. CIT(A) that the applicable standard cannot be of “suspicion” or “belief”, but something far more substantial has to be established by the Revenue from the seized documents, to treat them as incriminating. It is submitted that not only Sunny Infraprojects (supra) but various other judgements cited by the assessee, hold otherwise.*

34. *The Hon’ble High Court of Delhi in CIT v. RRJ Securities Ltd., (2016) 380 ITR 612, cited by the assessee, has held that “...it is not disputed that the said hard disk also did not contain any incriminating material as the data on the hard disk only supported the return filed by the assessee...” Thus, once the seized material creates a belief that it does not support the return filed by the assessee, it ought to be treated as incriminating.*

35. *Even in ARN Infrastructure India Ltd. v. ACIT, New Delhi, [2017] 81 taxmann.com 260, cited by the assessee, the Hon’ble High Court of Delhi held that “...the ledger account could not have led the Assessing Officer to be satisfied that any income had escaped assessment...” In other words, contents of the seized documents were required to be scrutinized in order to evaluate whether they were incriminating or not.*

36. *The Revenue additionally also invites attention to ACIT, Ahmedabad v. Himalaya Darshan Developers (Gujarat) (P) Ltd., [2021] 128 taxmann.com 435, where it was held that:*

*“...any fact/evidence **which could suggest** that the documents/transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/make belief based on non-existent facts or*

suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute an 'incriminating material' sufficient to make assessment for the purposes of the Act...”

37. *It is submitted that Section 153A does not employ the expression “incriminate”. In point of fact, this expression is not defined anywhere in the Income Tax Act, 1961. The question as to whether a document “incriminates” has to be considered in the facts of every single case, contextually, having regard to the income disclosed by the assessee in its return, and the belief to the contrary created by the seized material. For the purpose of Section 68, “incrimination” has to be appreciated from the lens of the belief created by the seized material which dislodges the initial burden of proof and shifts the burden on the assessee to establish on the basis of matters especially within his knowledge, the aspects of identity, genuineness and creditworthiness.*

38. *In appreciating the phraseology employed in Section 153A, due regard must also be had to the background/mischief for which purpose it was enacted. Till 1995, in respect of income that had escaped assessment, the one machinery provision was of Section 148. When the mechanism of block assessments in terms of Section 158BB was introduced, Section 148 was however retained. Section 153A which succeeded this framework, envisaged that the two streams of assessment get merged into one, and yet at the same time, it was mandated that the assessment or reassessment had to be of the **total income**. Section 148 continued to be retained, in parallel. Parliament thus made it clear that it had created two machinery provisions, both of which were relatable to total income. The dividing line between the two machineries is the non-obstante clause employed in Section 153A.*

39. *In other words, the object and purpose of Section 153A is to ensure that the Revenue does not have to go through the rigours of having to meet the preconditions under Section 148, while proceeding against undisclosed income. In the face of the express language employed by Parliament in Section 153A and Section 148, there is no reason why the Revenue ought to be worse off, in proceedings under Section 153A so far as the threshold, vis-à-vis the threshold prescribed under Section 148, i.e. of belief, given the object and purpose of both provisions. Reading anything more in Section 153A which is not apparent from its plain language is to rewrite the provision altogether, which is impermissible as a matter of law. It would also create an artificial divide between Section 153A and Section 148*

beyond what Parliament had intended, which would have no nexus with the object sought to be achieved by such machinery provisions.

40. This is why the Revenue reiterates for emphasis that once even a single seized document is found to incriminate, the door of Section 153A cannot be shut in the face of the Revenue, unlike what the Ld. CIT (A) has done in the present case, that too on conjectures, surmises and superficialities, even after material has been unearthed in the search that creates a belief as to undisclosed income, as found by the Ld. AO. This defeats the very object and purpose for which the non-obstante clause was inserted vis-à-vis Section 147/148 in Section 153A and reads something more into Section 153A that goes beyond its plain language.

41. The Revenue is fortified by the judgement of the Hon'ble High Court of Delhi in CIT v. Anil Kumar Bhatia, (2013) 352 ITR 493, holding that once incriminating material is found, Section 153A is triggered, and an assessing officer is under a bounden duty to assess the total income of the assessee, even when the return filed, was processed in terms of Section 143(1), or when an order of assessment was actually passed in terms of Section 143(3):

“20...A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3). If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. For this purpose, the restrictions imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, **have been removed by the non obstante clause with which sub-section (1) of Section 153A opens**...With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21...but in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders are subsisting at

the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income...

42. *Drawing sustenance from Anil Kumar Bhatia (supra) the Hon'ble High Court of Delhi has gone a step further in Filatex India Ltd. v. CIT, [2014] 49 taxmann.com 465 and held that:*

“...there is no condition in this Section that the additions should be strictly made on the basis of evidence found during the course of the search or other post search material or information available with the Assessing Officer, related to the evidence found. Subsequent observation to the effect that the assessment under section 153A should not be arbitrary or made without any relevance or nexus with the seized material, is basically clarificatory that the assessment under Section 153A emanates and starts on the foundation of the search, which is the jurisdictional precondition...”

43. *As already demonstrated above, a similar view taken in Dayawanti (supra) has received the imprimatur of the Hon'ble Supreme Court of India in Abhisar Buildwell (supra). There can thus be no rationale for the Revenue to be worse off under Section 153A, while going after undisclosed income, especially after the judgements cited by the assessee, such as Sunny Infra projects (supra) themselves hold that the Ld. CIT (A) ought to have applied his mind as to whether “...the seized material must have some nexus or relevance to the additions sought to be made and must be relevant for the belief formed regarding income having escaped assessment...”.*

In re: Extracts from the pen drive placed on record in terms of Rule 29

44. *The Revenue is not relying on the extracts from the pen driveⁱ, produced in terms of Rule 29, to establish/make out jurisdiction for*

purposes of Section 153A. It is submitted that the 341 pages of seized documents is more than sufficient for that purpose.

45. *Once the door of Section 153A however opens, the Revenue, while assessing total income, cannot be precluded from considering any other material that is otherwise available on the record, to substantiate any addition sought to be made/sustained.*

46. *The Revenue has placed on the record the extracts from the pen drive, and respectfully submits that this would have to be considered by the Ld. CIT (A), in the event it succeeds in the present appeal. It is submitted that even though jurisdiction is being assumed on the basis of the incriminating documents under Annexure A-29 alone, to restrict the ability of the Revenue to rely on the pen drive material before the Ld. CIT (A), if it succeeds in this appeal, would tantamount to rewriting Section 153A by unnecessarily whittling down its ambit to make it coextensive with Section 158BB, contrary to the intention of Parliament.*

47. *It is borne out from the said extracts from the pen drive (belonging to Mr. Sushen Mohan Gupta) received by the Revenue from the Enforcement Directorate, that there is an excel sheet titled 'Inter company Balances 31Mar16Yogendra.xlsx' (Pg. 170-180 of Paper book Vol-II filed by the Department). The pen drive extracts in respect of the share application money received by Spiral, recorded in that excel sheet, speak for themselves and ought to be considered by the Ld. CIT (A) in the event the Revenue succeeds in the instant appeal.*

48. *Without prejudice to the above, the pen drive extracts are corroborative of seized material under Annexure A-29, and are relevant/relatable to the addition sought to be made, it can be considered, in terms of the principle laid down in Sanjay Kaul v. PCIT, Delhi-8, New Delhi, (2020) 427 ITR 63, and in GTC Industries Ltd. v. ACIT, (1998) 65 ITD 380.*

In re: Identity, genuineness and creditworthiness not proved by assessee

49. *The assessee has argued at length, on the merits of the addition made under Section 68. It is submitted that the Ld. CIT (A) has not returned any findings on that aspect and the appeal is confined only to findings returned by him. The Revenue beseeches this Hon'ble Tribunal not to travel into the*

*merits of the addition while passing its order, but to the extent various submissions have been made, it is dealing with them under **Appendix C** only to satisfy the conscience of this Hon'ble Tribunal that the Revenue has a strong case on merits."*

7.1 Ld. Counsel of assessee has replied to each of the aforesaid submissions and relied the order of Ld. CIT(A). His specific rebuttal shall be referred in further discussion, where ever relevant.

8. At the outset we observe that an application dated 18.10.2024, was filed on behalf of the Appellant department under section 254(1) of the Act read with Rule 29 and Rule 18 of the Income tax (Appellate) Tribunal Rules 1963. This application has been filed midway the hearing seeking opportunity to place on record documents/material allegedly relevant for adjudication of the issues arising in this appeal. Learned special counsel, has contended that assessing officer had relied upon 341 pages under annexure A-29 of the seized material, which the learned 1st appellate authority, has not found to be incriminating material. Therefore, by way of this application revenue intends to file pendrive that was received from the directorate of enforcement subsequent to search action and which will help establishing certain incriminating facts. Learned special counsel has submitted that the learned AO had found annexure A-29 sufficiently in committing and did not refer to other material which was otherwise available and need to refer to the said material has a reason only after the impugned order of Ld. 1st appellate authority. We find that 2 separate paper

books have also been filed which have certain documents including which were part of seized material as annexure A-32.

8.1 The merits of this application can be conveniently discussed at later stage having considered the rival submissions in regard to the issues before this bench.

9. Accordingly, we first take up the merits of the grounds and for that we have carefully gone through the material before us and the submissions of learned representatives of both the sides. To be fair to the Shri. Debesh Panda, Ld. Spl. Counsel for the department, we have reproduced his written submissions, in totality. We find that the learned Spl. counsel for the Department has made strenuous efforts to defend the order of Id. AO and to point out the shortcomings in the order of Id. CIT(A), however, when the Id. Spl. Counsel for the Department was requested to explain as to how the disputed documents fall into that category of ‘incriminating material’, he was not able to, point out from the contents of the disputed documents itself, as to if there was anything in the form of any absolute admission against the interest of the assessee, that any of the investor companies or anyone operating these companies had received any funds, by any means, from the assessee company or anyone operating the assessee company. He was unable to cite from the disputed documents that there was any evidence emanating from the documents

themselves which show that cash was given by the assessee company or anyone operating the assessee company in lieu of the share capital receipts.

10. All that was attempted to be canvassed by the Ld. Spl. Counsel for the Department was to draw inferences after inferences, from the existence of these documents themselves and from the fact of having been found at the time of search and that as possibly these disputed documents were prepared contemporaneous to the application for subscribing to the share capital, in a way, that these disputed documents will enable the assessee company or its operators to subsequently deal with the allotted shares, without any intervention of the investor companies or their operators. Meaning thereby, that the application for subscription of the shares and the payment of share capital, was a sham transaction, of which the assessee company was beneficiary and therefore for the purpose of section 68 of the Act, the assessee company has failed to rebut the onus of explaining the genuineness of the transaction.

11. Thus the first question to be determined is as to find if the disputed documents fall into the scope of 'incriminating material'? To be precise whether in spite of their being nothing emanating in the form of an admission of fact disclosing incorrect reporting of income or undisclosed income, merely the circumstances surrounding the existence of certain documents found during search, alone can be considered as 'incriminating material'.

12. In regard to this controversy, we find that the learned Spl. counsel for the Department has relied the ratio of Hon'ble jurisdictional High Court, in the case of **Dayawanti v. CIT (2017)390 ITR 496**, to argue that once the seized material gives rise to 'belief' in the mind of the assessing officer, then that is sufficient to consider the 'seized material' to be 'incriminating material' and that CIT(A) was wrong in the approach having presuppositions that unless a document carries a stamp of incrimination on its forehead, its contents need not be examined and the belief created thereby, is wholly irrelevant.

13. In this context only, it was argued, that this '**belief**', was sufficient to transfer the onus of rebuttal of this '**belief**' on the assessee for the purpose of section 68 of the Act. Despite being very generous to all the contentions of ld. Spl. Counsel for the Department, we fail to agree with the same. We are of the considered view that the 'seized material' can be considered to be 'incriminating material' for the purpose of section 153A of the Act, when the fact in issue, is established by the direct evidence from some of the content of the document itself. If it is a question of establishing the fact in issue by circumstantial evidence then the same can be only when the complete chain of events are independently established by direct evidence. 'Incriminating material' for the purpose of 153A of the Act, has to be distinguished from 'inculpating material' or 'any material that may implicate the assessee'. Implicating circumstances surrounding a document are not sufficient to label it

as ‘incriminating material’. The latter two material, inculcating or implicating, may be dependent or outcome of inferences drawn from the content of the document, surrounding circumstance or the existence of the document and may be relevant for forming a ‘belief’ of escapement of income or for discrediting any claim of the assessee with regard to any income or expenses during any other form of assessment or reassessment, except where the assessment is supposed to be on the basis of incriminating material found during search.

14. In that case by drawing inferences or any process of reasoning, preponderance of probabilities or circumstances should first explore how the seized material reflects on total income for the search assessment. Thus, where the seized material is sought to be considered as incriminating material, it has to have in its body some narration or even omission of facts which lead to instant conclusion that there may be a source of undisclosed income of assessee and the incriminating document establishes the same without any necessity of an exercise of drawing inferences beyond the content.

15. The fact in issue, to ascertain if the seized material is incriminating in nature, may vary according to the nature of alleged act of misreporting or concealment of income, its source, investment etc.. Thus it is in accordance with the nature of allegations the seized material has to be examined and then based on the contents of the seized material a conclusion has to be drawn that the content establishes the fact in issue.

16. Like in case in hand the allegations are of introduction of own funds by way of bogus share capital receipt through shell companies. This fact in issue, certainly required that the disputed documents had some information about some trail of transaction which is of incriminating nature so as to constitute incriminating material. However, as we go through the assessment order we find that the Id. AO has not spelt out any information of incriminating nature spilling out of the disputed documents. The assessing officer seems to have been convinced himself on his understanding of the seized documents that as the seized documents are generally used for transactions of bogus share capital receipt so they are incriminating material for the purpose of search assessment.

17. It can be observed from the impugned assessment order that same is marred by use of language which in no manner would suggest that any document was specifically examined in its nature or contents to give the finding that as to how that seized document is 'incriminating material'. Except for inferences and presumptions, drawn on assessing officer's own prudence, the conclusion was arrived.

18. In this context we note that the assessing officer has drawn an inference on the basis of some shareholders being common with another company to make it 'evident' that both the company's investments bear the same colour and nature. Ld. AO has also half heartedly relied the statement of Sh. Sushen Mohan Gupta recorded under section 132(4), but without actually bringing on record of

assessment order as to what was incriminating against the assessee company.

The relevant part is reproduced from **Page No. 3 and 4** of the assessment order as follows;

“Thus, the shareholders/share capital subscribers of M/s Spiral E-Systems Private Limited being same as that of M/s American Hotels and Restaurants Pvt. Ltd, it is evident that the share application/ share capital subscription received by M/s Spiral E-Systems Private Limited from these very/same share capital applicants/subscribers bears the same color and nature as that of the share capital subscription received by American Hotels and Restaurants Pvt. Ltd. from these very/same share capital subscribers.”

“During the course of search proceedings, the documents found and seized as Annexure A-29 (i.e. pertaining to share capital subscription in M/s Spiral E-Systems Private Limited), were also confronted to Sh. Sushen Mohan Gupta, who in his statement recorded on oath (as aforesaid) on 04.01.2020 had stated that his brother Sh. Sushant Mohan Gupta is aware about these transactions.”

18.1 Regarding allegation of common share subscribers, Ld. Counsel of assessee has submitted that only two share subscribers are common i.e. Madhav Fincap Pvt. Ltd. and M/s Ladliji Enterprises Pvt. Ltd. which subscribed the share capital in M/s Spiral E Systems Pvt. Ltd. as well as American Hotels and Restaurants Pvt. Ltd. Thus, it cannot be said that share capital subscription in Spiral E Systems Pvt. Ltd. bears the same colour as that of American Hotels and Restaurant Pvt. Ltd.

18.2 It can be observed that infact Sh. Sushen Mohan Gupta in his statement merely stated that his brother, Sushant Mohan Gupta is aware about the share capital subscription of Spiral E Systems Pvt. Ltd and did not make any adverse

remark about the share capital subscription of Spiral E System Pvt. Ltd. Besides, none of the statements of Sh. Sushen Mohan Gupta was provided to the assessee company during the course of assessment proceedings before utilizing the same against it. Otherwise too, in **Best Infrastructure (India) (P.) Ltd [2017] 397 ITR 82 (Delhi HC)**, Hon'ble Delhi High Court has held that Statements recorded under section 132(4) do not by themselves constitute incriminating material.

19. It can next be observed from the assessment order that the assessee's submission that seized material as Annexure A-29 are not of incriminating nature and there was no evidence of any cash given for share capital subscription was outrightly discarded by the assessing officer by following observations at the concluding part of **page No. 10 and beginning of page No. 11 as follows:-**

“ As per para 4(a) of the above submissions, the assessee has contended that the documents seized as annexure A-29 are not incriminating in nature and there was no evidence of any cash given for share capital subscription. In this regard, the issue is being elaborately discussed in subsequent paras. However, to give a quietus to the aforesaid contention of the assessee, the very fact that original blank unexecuted share transfer deeds/share transfer forms, original blank power of attorney to sell shares of share capital subscribers signed by their directors were found as part of the seized annexure A-32. If, these are not incriminating, what else is incriminating In the present case, as already and subsequently discussed, there were specific and clear incriminating material which in light of circumstantial evidence and human probability would only render the assessee (lest there is lack of prudence), answerless.

As per para 4(b) of the above submissions, the assessee has contended that the documents seized as annexure A-29 contains the confirmations from the shareholders and therefore, the assessee need not give any further

confirmations in the matter since all these copies, share capital documents, receipts etc are seized.

In this regard, while there is no denial to the fact that the seized annexure A-29 contains the purported documents as aforesaid, yet the fact that neither the assessee could adduce these documents afresh, nor any of the purported share applicant furnished any details wrt notices issued under Section 133(6) of the Act itself proves that these documents were merely a smoke screen and there was a pre-arranged agreement/understanding under which these documents were provided to the assessee company at the time of Availment/receipt of bogus capital. Clearly, neither primary onus has been discharged, nor the assessee could ensure compliance of notices under Section 133(6) of the Act from these so called share applicants despite being specifically asked to do so.

Lastly, as per para 4(c) of the above submissions, the assessee has contended that there is no direct evidence of any cash given for share capital subscription.

In this regard, I pose a question to myself as to whether a tax evader would ever keep evidence against himself. The fact that under civil law circumstantial evidence is vital alone is sufficient for making an addition. In the present case, even at the cost of repetition, it is stated that shares subscribed at Rs. 382/- per share (out of money received from the tainted share applicants) were sold to a sister concern of the assessee during AY 2016-17 at Rs.10/- per share (i.e. Rupees ten per share).

20. This is defended, by the Ld. Spl. Counsel as ‘**belief**’ of the Ld. AO and which accordingly to Ld. Spl Counsel was not appreciated by the Ld. CIT(A), making impugned order, not sustainable. On this aspect, on going through the assessment order we find that the ld. AO has merely raised questions to himself which as per the ld. Spl Counsel, was the belief of ld. AO, which has not been accepted by ld. CIT(A), however, we are of view that this ‘belief’ of ld. AO was of some consequence and relevant had the ld. AO based it on some finding of fact by discussion of disputed documents. Merely posing questions to oneself without reference to facts does not form a belief. The foundation of belief is

acceptance of something which is true or correct. Else it is merely surmises and conjectures which cannot be basis to hold the seized material be incriminating and which fails to pass the rigour of tests for completing a search assessment on basis of incriminating material.

21. It can be observed from the impugned assessment order that assessing officer has laid more emphasis on the examination of the reasons for investment, financials of the investor companies, their assets, taxable income etc., for drawing a conclusion that investor companies were shell companies and based upon this conclusion a backward flip is taken to draw an inference that existence of the disputed documents and the possession with the assessee makes these disputed documents 'incriminating material' for purpose of section 68 of the Act.

22. We are of considered view that it is only after establishing that seized material is incriminating the same can be relied for the purpose of seeking an explanation from an assessee for the purpose of section 68 of the Act. However, here in the case in hand the assessing officer has first examined the veracity of the investment and then concluded that the seized material is incriminating material.

23. Thus, whatever submissions the learned spl. counsel for the Department has made bringing forth as to how the disputed documents have in themselves

certain contents which make them incriminating material has not at all been examined and brought on record in the assessment order. On the contrary the assessing officer has preferred to complete the search assessment on the basis of principles of preponderance of probabilities and circumstantial evidence. The findings of Ld. AO in that regard **on page No. 28** are required to be reproduced below:-

“The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities and not the one relating to beyond reasonable doubt.

*With respect to the circumstantial evidence and in the matter related to the discharge of onus of proof and the relevance of surrounding circumstances of the case, the relevant observations and findings of **Hon'ble Supreme Court** in the case of **CIT vs. Durga Prasad More [82 ITR 540]**, are as under:*

*"That though an appellant's statement must be considered real until it was shown that there were reasons to believe that the appellant was not the real, in a case where the party relied on self-serving recitals in the documents, it was for the party to establish the transfer of those recitals, **the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and the Tribunals have to judge the evidence before them by applying the test of human probability. Human minds, may differ as to the reliability of piece of evidence, but, in the sphere, the decision of the final fact finding authority is made conclusive by law.**"*

*The above ratio laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in the case of **Sumati Dayal vs. CIT 214 ITR 801 (S.C)**. It is essential on the part of the Assessing Officer to look into the real nature of transaction and what happens in the real world and contextualize the same to such transactions in the real market situation."*

24. Here we would like to observe that the judgement of Hon'ble Supreme Court of India in **Sumati Dayal Case(supra)**, as relied by Ld. AO, was not in regard to search assessment. Similarly the assessing officer has relied on judgement of Hon'ble Supreme Court of India in **Pr. CIT v. NRA Iron and Steel Pvt. Ltd.** (supra) and same is also not in an assessment under section 153A of the Act. This helps us to also take up the proposition of Id. Spl. Counsel for the Department, that the scope of search assessment cannot be narrower but is in fact wider than the case of reopening assessment. This proposition has no legs to stand as without doubt the scope of search assessment is narrower and for that reason Hon'ble Supreme Court of India in the judgement of **PCIT vs Abhisar Buildwell P. Ltd. [Civil Appeal No. 6580 of 2021] dated 24.04.2023** has left the revenue with an alternate remedy of reopening assessments in cases where there is no incriminating material to conclude the search assessment.

25. The Id. Spl. Counsel for the Department has also strenuously argued that on the facts of the case, this Tribunal is empowered to rectify the errors/deficiencies/lacuna in orders passed by the forums below after independently examining/considering all the incriminating material seized in this case, in exercise of its jurisdiction under section 254(1) of the Act, as it is the last fact-finding body in the hierarchy of the forums under the Act. It was submitted that the bench should set aside the impugned order and remand the

matter to either the Id. CIT(A) or the assessing officer with the direction to evaluate the contents of the seized documents, ascertain their true character, and decide if it has a nexus to the addition sought to be sustained and the relevance to the belief that income has escaped assessment in terms of the law laid down in **Manohar Glass works case (supra)** and **Smt. Thakuri Devi case (supra)**.

26. We have also considered the proposition of law cited by the Id. Spl counsel that the process of appeal before ITAT is part of integrated process of assessment and, therefore, the powers of Tribunal are co-extensive with the powers of Assessing Officer and that of CIT(A) subject to the limitation that ITAT cannot enhance the assessed income as held in **Hukamchand Mills Ltd. v. CIT [1967] 63 ITR 232 (SC)**. That the Tribunal has also incidental and ancillary powers for doing such acts as are reasonably necessary in exercise of powers granted by the Act, as held in **Union of India v. Paras Laminates (P.) Ltd. [1990] 186 ITR 722 (SC)**.

27. On this aspect we are of the considered view that no doubt as a final fact-finding body this Tribunal is supposed to thrash the facts but that does not include discretion wide enough to give the Department a fresh lease of life, though for ends of justice the assessee may be. The litigants before this Tribunal are not contesting in an adversarial mode still the principles of natural justice require that parties should stand on their own legs.

28. Then, in context to this argument we are supposed to examine as to on what grounds the Department has challenged the impugned order of Id. CIT(A) and in context to the grounds alone we can actually consider, whether remitting the matter back to any of the tax authorities below is justified. However, what we find is that the Department while raising the grounds challenging the order of learned 1st appellate authority has not raised any ground questioning the lack of exercise of co-terminous powers of learned 1st appellate authority leading to committing an error.

29. As discussed above we have concluded that the assessing officer has not applied its mind to any of the contents or the specific nature of the disputed documents and there consequences for building a case based on incriminating material. The learned assessing officer seems to have been driven more on doctrine of *Res Ipsa Loquitur*, which is a latin phrase that means the ‘facts speaks for themselves’. No attempt was made to examine the disputed documents individually to bring forth a case as has been casted before us by the learned spl. counsel for the Department.

30. Now if the Department wants to succeed before us on the grounds as raised the burden was to show that though the learned assessing officer had done his work but the Id. 1st Appellate authority has fallen in error in not appreciating the contents of the disputed documents in right prospective as was done by the learned assessing officer. However, that seems to be not the case of

the Department and the learned counsel for the Department asserts that even if assessing officer had erred the learned CIT(A) should have examined the disputed documents independently to establish as to how the disputed documents were incriminating material for the purpose of search assessment.

31. However, this argument cannot be sustained for the reason as observed above that the grounds as raised do not question the lack of exercise of co-terminous powers of learned 1st appellate authority. Further, in our considered opinion these powers being coterminous and coextensive with that of the Assessing Officer, CIT(A) should come for assistance of an assessee more often than for the revenue, unless it is case of enhancement. At least not in the case like the present, where the assessment order does not show as to if the Ld. AO had even gone through the disputed documents individually, as has been now done by the Ld. Spl. counsel appearing before us.

32. It is pertinent to mention that Section 254 (1) of the Act, restricts the jurisdiction of the Tribunal to the subject matter of the appeal and at the same time there is no doubt that the Tribunal has powers of remanding a case to the lower Appellate Authority or the Assessing Authority as the case may be, requiring him to hold further inquiry and to dispose of the case on the basis of such inquiry, but the jurisdiction of the Tribunal is confined only to the subject matter of the appeal. However, we are also of the considered view that in case of search assessments the subjective satisfaction of the Ld. AO, about the

incriminating material, is of vital significance and consequence and in a manner of jurisdictional aspect. Therefore, too, the Ld. CIT(A) could not have introduced his subjective assessment of the disputed documents as incriminating material to improve the case of assessing officer.

33. Even otherwise we are of considered view that the issue as to if disputed documents form incriminating material is a mixed question of fact and law and there was absence in the assessment order giving valid factual reasons for holding that disputed documents were incriminating material so that the learned 1st appellate authority was supposed to examine the reasoning of assessing officer for holding these disputed documents as incriminating material and as there was nothing in the assessment order in that regard, therefore the findings of learned 1st appellate authority that the seized materials were merely statutory records which are usually lying in the corporate offices is a reasonable opinion which cannot be alleged to be an erroneous finding of fact. We cannot thus justify giving a fresh opportunity to make further enquiry into questions of fact which touch the question of assumption of jurisdiction under particular sections of the Act.

33.1 The attempt of Department to now improve the case further by bringing on record certain part of seized material not at all relied by the learned assessing officer or which was subsequently received from enforcement directorate cannot be sustained and this material cannot be considered additional evidences so as to

be admitted and considered or to be sent back for verification. The additional evidences can only be accepted from and Appellant in support of the claim or defence already on record or additional plea accepted to be considered. However, the revenue cannot come up with the plea of examining the issue of incriminating material afresh on pretext of relying additional evidences.

33.2 Taking a call upon the contentions of Id. Special Counsel about the seriousness of the issues involved due to the background of the search operations, we also considered the contents of the complaint filed by the Directorate of Enforcement made available in the form of additional evidence from page No.181 to 304. We find that at internal pages No.82 to 90, of the complaint the money laundering allegations in terms of placement, layering and integration of proceeds of crime invested in assets to project the same as untainted, were examined in respect to Sushen Gupta only and in the case of American Hotels and Restaurants Pvt. Ltd., the alleged proceeds of crime were found to be invested and there is no reference of Spiral E-Systems Pvt. Ltd. and only Sushen Mohan Gupta, DM South India Hotel and M/s American Hotels and Restaurants are booked as the accused.

33.3 Next, taking into consideration the copy of statement of Shri Sushen Gupta dated 02.01.2020 available at pages 1-6 of the paper book Volume-I filed by the Department, we find that in regard to Annexure A-29 by way of question No.68, Sushen Gupta was questioned about the equity investment of several

entities in Spiral E-Systems Pvt. Ltd. for which he had replied that he is not involved in the working of Spiral E-Systems Pvt. Ltd. and Sushant Mohan Gupta, his brother would be able to answer this question. There is nothing on record to suggest that Shri Shushant Mohan Gupta was thereafter questioned for the same.

33.4 We also find that from the copy of satisfaction recorded for the purpose of section 153A of the Act available at page 107-112 of the paper book filed by the Department and, that primarily on the basis of statement of Shri Sushen Gupta, recorded on 04.01.2020 and for the reason that investors of Spiral E-Systems Pvt. Ltd. being common with American Hotels and Restaurants Pvt. Ltd., the seized record forming part of Annexure A-29 was relied. Here, reference to a question No.66 is made wherein Shri Sushen Gupta was questioned with regard to seized document forming part of Annexure 32 which included original share transfer form, etc., for which Shri Sushen Gupta had responded that the investors wanted to exit and after several rounds of discussion with the intervention of one Mr. Sandeep Gupta, the transaction of sale of shares was effected. There was no material otherwise referred to draw the inference of any cash paid. Thus, where the assessment for AY 2011-12 in case of Spiral E-Systems Pvt. Ltd. was completed assessment on the date of search so the disputed documents belonging to investor companies cannot be incriminating material since they only confirmed transaction of share capital

with the assessee company and nowhere demonstrated in undisclosed income of the assessee company.

33.5 This establishes that the assessing officer seems to have been driven by a 'borrowed belief' arising out of the examination of transactions by the Enforcement Directorate. Nothing was found specifically implicating the Spiral E-Systems Pvt. Ltd. or any investor company or Shri Susant Mohan Gupta. The fundamental principle of assessment being of taxing real income even if under the deeming provisions seems to have been ignored and on a principles of alchemy, all the transactions around Shri Sushen Gupta and M/s American Hotels and Restaurants Pvt. Ltd. were considered tainted.

33.6 Accordingly we also find no merit in application dated 18.10.2024, filed under section 254(1) of the Act on 18.10.2024, by the appellant department and same is hereby dismissed.

34. We are equally inclined to accept that the seized materials which included the alleged incriminating material were primarily statutory records required to be maintained under the relevant Companies law provisions. These alleged incriminating material were also of the nature which any assessee would have kept as record of past transactions or for future convenience references. Indeed there may be suspicion for having certain documents in the blank form or in pre-mediated arrangement, but in the absence of any material coming forth at

the time of seizure showing there was any cash transacted in lieu of share capital receipt, merely on suspicion, an incriminating circumstance could not have been metamorphosed, by the intervention of learned 1st appellate authority.

34.1 We observe that Id. Spl. Counsel in written submissions has mentioned that the seized share transfer forms admittedly do not carry any endorsement reflecting the payment of stamp duty. These could not thus have been acted upon by any statutory authority, given the statutory bar under the Indian Stamp Act, 1899 and could not thus be the “statutory record” of the assessee or investor companies. Similarly the Id. Spl. Counsel has submitted that to the extent the Affidavit (for instance, at Pg. 34 of Paper Book (Seized Material) Vol-I) is shorn of material particulars, such as Share Certificate No./Distinctive No., etc., it could not have been used for any statutory proceedings, which demonstrates yet again, the utter perversity of the impugned order passed by the Ld. CIT (A). We are of considered view then how such documents become incriminating. That somehow, only fortifies the findings of Id. CIT(A), as such documents turn out to be a dumb documents, having no legal sanctity on their own.

34.2 Here we find substance in the contention of Ld. Counsel of the assessee that the judicial decisions seems to be more in favour of the assessee to hold that Balance Sheets. Profit & Loss account, ITRs and ROC data and blank share

transfer forms and Power of Attorney of investor companies cannot be termed as incriminating material. Reliance in this regard as placed by ld. Counsel of assessee on following judgements, bolsters his submissions:-

- a) M/s Prakash Industries Ltd. bearing ITA nos. I.T.As. No.4039, 4040, 4041, 4042 & 4043/DEL/2017; Delhi bench of ITAT order dated 18.06.2021.
- c) M/s. Gee Ispat Pvt. Ltd., New Delhi US Acit4256-4259/Del/2014 and M/s Gee Ispat Pvt. Ltd., V ACIT ITA No. 5424.5425.5475.5476/Del/2014
- c) PCIT v. Sunway Realtech (P.) Ltd. [2022] 142 taxmann.com 477 (Delhi)
- d) PCIT v. Panchmukhi Management Services Pvt. Ltd. (Delhi IIC)2022] Taxscan (HC) 712
- e) Sunny Infraprojects Ltd. - ITA No. 502 of
- f) Index Securities Pvt. Ltd. (86 taxmann.com 84)
- g) Therapeutic India Pvt. Ltd. (ITA No. 4515/Del/2012
- h) M/S. Brahamputra Finlease (P) Ltd. V DCIT, ITA No. 3332/Del/2017 59

35. There is no substance to allege that the learned CIT (A) proceeded on a predetermined notion to hold their was nothing unusual about the documents. Learned sr. counsel for the Department has vehemently stressed that on the point that on the basis of seized material a belief had formed in the mind of assessing officer, however, when such belief is not exhibited in the form of reasoning such belief is of no consequence and learned 1st appellate authority was justified to hold that merely because of possession these disputed documents will not become incriminating material. The findings of learned 1st

appellate authority cannot be said to be on conjectures and surmises rather the same applies to the assessment order as framed. There is no substance in the contention of learned counsel appearing for the Department that the learned 1st appellate authority has proceeded to make out a better case for the assessee and for that reason the impugned order should be held to be erroneous. Rather we are of view that being the 1st appellate authority, ld. CIT(A) was supposed to consider all the pleas of the assessee which were brushed aside by the assessing officer without any sound reasoning, but on his belief alone.

36. At the same time we find that the five shareholders had sold all their shares in the company to Mr. Shushant Gupta in AY 2014-15 and Mr Shushant Gupta had further sold the shares to DMGFI in AY 2016-17. However, the Ld. AO proceeded on the premises that the five shareholders had directly sold the shares to the DMGFI, so it was the money of assessee which was infused as capital receipt through shell companies. In fact, Ld. Spl. counsel appearing for the Department was not able to rebut the fact asserted by Ld. counsel of assessee that the Department has accepted the sale of shares at ₹ 10 each share in the hands of Mr. Shushant Gupta, and no addition is made under section 56 of the Act, to allege that there was bogus share premium at any stage earlier. Admittedly the search is of 02.1.2020, while the investor companies had sold the shares in AY 2014-15. Thus if any blank documents were found, in search in the year 2020, then the Ld. Assessing officer was supposed to establish as to

how keeping any of these blank documents would have been part of the transaction initiated in AY 2011-12, of introducing undisclosed income of assessee, by way of capital receipts through alleged shell companies, while these alleged shell companies had sold the shares further to Mr. Sushant Gupta.

36.1 As a matter of fact, the scrutiny assessment of M/s Spiral E-Systems Pvt. Ltd., for AY 2013-14 has been completed u/s 143(3) of the Act on 18.03.2016 wherein income has been accepted as the returned income after examination of share capital issued including justification of higher share premium. The assessee received the application money in the impugned assessment year 2011-12, but, share capital was allotted in AY 2013-14. Therefore, the issue of share capital was examined by the AO in AY 2013-14 u/s 143(3) proceedings. Hence, the argument of Id. Spl. Counsel for Revenue that the original investors were never subjected to any examination, the AO, falls flat.

36.2 Then Id. Spl. Counsel has also submitted at one stage that a Certificate issued by Ladliji was unearthed indicating that an 'investment' had been made by it in an additional 14,600 equity shares of Spiral E-Systems, however, in the public domain, it was always held out by Spiral E-Systems that only 22,000 equity shares had been allotted by it to Ladliji. To the extent the seized material contains a certificate confirming allotment and receipt of an additional 14,600 shares, for which share application money was received, the said document is plainly incriminating. The said additional shares were never even allotted, to

begin with. Only an entry operator would issues a certificate for shares, it has never even received, that too at a stage when that were never even allotted. This further begs the question - were 14,600 additional fresh shares ever issued by Spiral, so as to be capable of being allotted to any person, much less Ladliji? But, for this the AO could have verified from the records of Spiral E Systems, which AO was having which was not done. This only indicates that AO had only approached the issue with pre-conceived notion in order to reach a predetermined finding and destination, so for that reason the assessment order is not a speaking order but parrot like version of how bogus transactions are generally effected.

37. In the light of aforesaid discussion we are of the firm view that the impugned order before us requires no interference by way of either reversal of findings or setting aside the issue to the files of either of the two of the learned tax authorities below. The grounds raised cannot be sustained. **Consequently the appeal of revenue fails and same is dismissed.**

Order pronounced in the open court on 28.11.2024.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 28th November, 2024.

dk

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi