

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' : NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA Nos.1698/Del/2014, 1699/Del/2014, 1700/Del/2014, 1701/Del/2014
& 1753/Del/2014**

Assessment Years : 2005-06, 2006-07, 2007-08, 2008-09 & 2009-10

**M/s Best Infrastructure
(India) Pvt.Ltd.,
Plot No.H-8, 1st Floor,
Best Plaza,
Netaji Subhash Place,
Pitampura,
New Delhi – 110 034.
PAN : AACCB5568R.
(Appellant)**

**Vs. Assistant Commissioner of
Income Tax,
Central Circle-4,
New Delhi.**

(Respondent)

**ITA Nos.1702/Del/2014 & 1703/Del/2014
Assessment Years : 2006-07 & 2007-08**

**M/s Best City Projects (India)
Pvt.Ltd.,
Plot No.H-8, 1st Floor,
Best Plaza,
Netaji Subhash Place,
Pitampura,
New Delhi – 110 034.
PAN : AACCB7635D.
(Appellant)**

**Vs. Assistant Commissioner of
Income Tax,
Central Circle-4,
New Delhi.**

(Respondent)

**ITA Nos.1704/Del/2014 & 1705/Del/2014
Assessment Years : 2007-08 & 2008-09**

**M/s Best City Developers
India Pvt.Ltd.,
Plot No.H-8, 1st Floor,
Best Plaza,
Netaji Subhash Place,
Pitampura,
New Delhi – 110 034.
PAN : AADCB1847N.
(Appellant)**

**Vs. Assistant Commissioner of
Income Tax,
Central Circle-4,
New Delhi.**

(Respondent)

**ITA Nos.1706/Del/2014 & 1707/Del/2014
Assessment Years : 2007-08 & 2008-09**

<p>M/s Best City Realtors (India) Pvt.Ltd., Plot No.H-8, 1st Floor, Best Plaza, Netaji Subhash Place, Pitampura, New Delhi – 110 034. PAN : AACCB7687B. (Appellant)</p>	<p>Vs. Assistant Commissioner of Income Tax, Central Circle-4, New Delhi. (Respondent)</p>
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**ITA Nos.1708/Del/2014 & 1709/Del/2014
Assessment Years : 2005-06 & 2007-08**

<p>M/s Best Realtors (India) Pvt.Ltd., Plot No.H-8, 1st Floor, Best Plaza, Netaji Subhash Place, Pitampura, New Delhi – 110 034. PAN : AACCB5569Q. (Appellant)</p>	<p>Vs. Assistant Commissioner of Income Tax, Central Circle-4, New Delhi. (Respondent)</p>
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Appellants by	:	Shri Ved Jain, Advocate & Shri Ashish Chadha, CA.
Respondent by	:	Shri Ravi Jain, CIT-DR.

Date of hearing	:	04.05.2016
Date of pronouncement	:	31.05.2016

ORDER

PER G.D. AGRAWAL, VP :-

ITA No.1698/Del/2014 – Assessee’s appeal in the case of M/s Best Infrastructure (India) Pvt.Ltd. for AY 2005-06 :-

This appeal by the assessee for the assessment year 2005-06 is directed against the order of learned CIT(A)-XXXIII, New Delhi dated 11th November, 2013.

2. The assessee has raised the following grounds of appeal:-

“1. That the Id.CIT(A) has erred on both facts and law of the case in confirming the additions of Rs.3.60 crores u/s 68 on account of share capital issued by the assessee company and holding the same to be undisclosed income of the assessee company, which is unjustified, arbitrary, contrary to the law and facts and bad in law.

2. The Id.CIT(A) has erred both in law and facts of the case in confirming the additions made in assessment framed u/s 153A, which is not based upon any incriminating material found during the course of the search and that the Ld. AO erred in making the assessment in view of the fact that the assessment was not pending as on the date of the search, which is incorrect, unjustified and bad in law.

3. The Id.CIT(A) has erred in law & facts of the case in confirming the additions of Rs.8,10,000/- on account of alleged commission paid for obtaining accommodation entries which is highly arbitrary, unjustified, bad in law, uncalled for and merely on presumption of the Id.A.O.

4. The Id.CIT(A) has erred in facts and law of the case in holding the validity of assessment u/s 153A which is bad in law, unjustified, uncalled for and needs to be quashed.

5. The assessee craves the right to add, amend or modify any ground of appeal.”

3. At the time of hearing before us, it is submitted by the learned counsel that for the year under consideration, the assessee filed the return of income declaring loss of ₹43,287/- on 27th October, 2005. A search and seizure operation was carried out at the business premises of the assessee company on 15th September, 2008 and a notice u/s 153A was issued to the assessee on 1st May, 2009. The assessment u/s 153A of the Income-tax Act, 1961 was completed on 30th December, 2010 by making the following additions:-

- (i) Addition on account of unexplained cash credit - ₹3,60,00,000/-
- (ii) Addition on account of unexplained expenditure - ₹8,10,00,000/-

4. It is submitted by the learned counsel that the Assessing Officer treated the share application money received from twelve companies amounting to ₹3,60,00,000/- as unexplained cash credit in its books of account. The Assessing Officer alleged that the assessee had taken accommodation entries in the form of share capital and for obtaining such accommodation entries, the assessee has paid commission at the rate of 2.25%. Accordingly, the Assessing Officer worked out the commission of ₹8,10,000/- which was added as unexplained expenditure. It is submitted by the learned counsel that during the course of search, no loose paper or other evidence was found which may indicate that the assessee had taken the accommodation entries in the form of share capital. Therefore, no incriminating material was found relating to share capital. He fairly admitted that various loose papers and documents were found and seized at the time of search. However, these documents contain the details of advance received for the sale of certain properties. In the statement recorded during the course of search, Shri Anu Aggarwal, director of the assessee company, had surrendered the sum of ₹8 crores. That later on, Shri Anu Aggarwal, vide letter dated 24th March, 2010, modified the earlier statement and the undisclosed income declared at ₹8 crores was reduced to ₹2 crores. However, the fact remains that no incriminating material relating to share capital was found during the course of search and, therefore, the addition for share capital and alleged payment of commission on presumption, is out of the purview of assessment u/s 153A. In support of this contention, he relied upon the following decisions of Hon'ble Delhi High Court :-

- (i) CIT Vs. Kabul Chawla in ITA No.707, 709 and 713/2014 dated 28.08.2015.

- (ii) CIT Vs. RRJ Securities Ltd. in ITA No.175 to 177/Del/2015 dated 30.10.2015.

5. Learned DR, on the other hand, relied upon the order of the Assessing Officer as well as learned CIT(A). He stated that there was search and seizure operation at the premises of Shri Tarun Goyal group of companies. During the course of such search, Shri Tarun Goyal admitted that he is carrying on the business of providing accommodation entries to various parties. He also admitted to have provided accommodation entries to Best Group of cases. That during the course of search of Shri Tarun Goyal group, he was also taken to the assessee's premises for allowing his cross-examination to the assessee. However, the assessee refused to cross-examine Shri Tarun Goyal. He, therefore, submitted that the statement of Shri Tarun Goyal is a conclusive evidence against the assessee. He further pointed out that during the course of search of the assessee's premises, various loose papers and documents were found and seized. When those loose papers were confronted to the director of the assessee company viz., Shri Anu Aggarwal, he admitted the undisclosed income of ₹8 crores which is claimed to be representing the unexplained cash received, unexplained work in progress as well as share capital. Therefore, during the course of search, incriminating material in the form of statement of Shri Tarun Goyal as well as Shri Anu Aggarwal is available and, therefore, the addition for unexplained cash credit in the form of share capital is validly made u/s 153A of the Income Tax Act.

6. In the rejoinder, learned counsel for the assessee stated that the statement cannot be said to be incriminating material. In support of this contention, he relied upon the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Harjeev Aggarwal vide ITA No.8/2004 and the decision of ITAT in the case of ITO Vs. M/s Softline Creations (P)

Ltd. vide ITA No.744/Del/2012. He further submitted that the case of Tarun Goyal group of companies has already been adjudicated upon by the ITAT Delhi Bench vide ITA Nos.4527 to 4531/Del/2012. In the said case, on behalf of Shri Tarun Goyal and his group companies, it was claimed that Shri Tarun Goyal is entry provider and he received the cash from the beneficiary and the same cash is deposited in the company's bank account and therefore, the cash deposited in those companies should be treated as explained and no addition for unexplained cash credit u/s 68 should be made. He stated it was also claimed that only the commission income should be assessed. However, the ITAT rejected the contentions put forward on behalf of Tarun Goyal group of companies and held that the addition for peak credit at the first point should be made. Therefore, the contention of the learned CIT-DR, that Shri Tarun Goyal and his group companies are entry provider, is without any basis and has been impliedly disapproved by the ITAT. He further stated that the assessee was never allowed the opportunity for cross-examination. In fact, during the remand proceedings, learned CIT(A) specifically directed the Assessing Officer to allow cross-examination of Shri Tarun Goyal. The Assessing Officer did not allow cross-examination of Shri Tarun Goyal to the assessee and, therefore, his statement cannot be used against the assessee. In support of this contention, he relied upon the following decisions:-

- (i) M/s Andaman Timber Industries Vs. CCE, Kolkata-II – Civil Appeal No.4228 of 2006, judgment dated 2nd September, 2015 (SC).
- (ii) CIT, Delhi Vs. SMC Share Brokers Ltd. – [2007] 159 Taxman 306 (Delhi).
- (iii) Alok Agarwal Vs. DCIT – [2000] 67 TTJ 109 (Del).

7. With regard to the statement of Shri Anu Aggarwal, it is stated by the learned counsel that when a question was put to Shri Anu Aggarwal in respect of loose papers, he stated that the loose papers are with regard to receipt of cash as advance for sale of property in certain cases which has not been reflected in the books of account. Part of the cash received which has not been accounted in the regular books of account has been utilized for making expenses in construction business. This reflects unexplained or unaccounted work in progress. He had surrendered the sum of ₹8 crores during the course of search. However, subsequently, the surrender was modified and the assessee made the surrender of only ₹2 crores. In the assessment order also, the Assessing Officer has nowhere pointed out that any loose paper found and seized is pertaining to the receipt of share capital by the assessee. Accordingly, he stated that the addition for share capital as well as commission is out of purview of Section 153A and should be deleted.

8. We have carefully considered the arguments of both the sides and have perused the material placed before us. In the case of Kabul Chawla (supra), Hon'ble Jurisdictional High Court has considered all earlier decisions of Hon'ble Delhi High Court and has also considered the decisions of other High Courts and Tribunals and summarized the legal position in paragraph 37 and at the conclusion of the case in paragraph 38, which are reproduced below:-

“Summary of the legal position.

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

i. Once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person searched requiring him to

file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

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

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

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

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

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

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of

search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

9. In clause (iv) above, their Lordships held "Obviously an assessment has to be made under this Section only on the basis of seized material". In clause (v), the same is reiterated by holding "In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made". In clause (vii), it is stated "Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search".

10. In the case of RRJ Securities Ltd. (supra), in paragraph 21, it has been held :-

"In respect of such assessments which have abated, the AO would have the jurisdiction to proceed and make an assessment. However, in respect of concluded assessments, the AO would assume jurisdiction to reassess provided that the assets/documents received by the AO represent or indicate any undisclosed income or possibility of any income that may be remained undisclosed in the relevant assessment years. This Court in Commissioner of Income Tax (Central)-III v. Kabul Chawla : ITA 707/2014, decided on 28th August, 2015 has held that completed assessments could only be interfered with by the AO on the basis of any incriminating material unearthed during the course of the search or requisition of the documents. In absence of any incriminating material, the AO does not

have any jurisdiction to interfere in concluded assessments.”

11. In the case of Harjeev Aggarwal (supra), Hon'ble Jurisdictional High Court considered the evidentiary value of the statement recorded during the course of search. The relevant portion is paragraph 19, 20 & 24, which are reproduced below for ready reference :-

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

20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words “evidence found as a result of search” would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation.

24. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assesseees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is

necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee."

12. Thus, Hon'ble Jurisdictional High Court has held "*The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations".* Their Lordships further observed "*However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation".* In paragraph 24, their Lordships have mentioned about the prevailing practice of extracting statement by exerting undue influence or coercion by the search party. Though the above decision in the case of Harjeev Aggarwal is with reference to the meaning of undisclosed income u/s 158BB of the Income-tax Act, however, in our opinion, the above observation of Hon'ble Jurisdictional High Court would be squarely applicable while considering the evidentiary value of the statement while making the assessment u/s 153A.

13. Having discussed the legal position held by Hon'ble Jurisdictional High Court above, let us examine the facts of the case so as to ascertain whether the addition for share capital can be made u/s 153A. Admittedly, for the year under consideration, the assessee had filed the return of income on 27th October, 2005. The returned income was accepted u/s 143(1) as no notice u/s 143(2) was issued. The search and seizure operation was carried out at the assessee's business premises on 15th September, 2008. During the search, various loose papers were found and seized. However, the seized documents were with regard to unaccounted receipt from sale of certain properties and unrecorded expenditure in the construction business. It would be

evident from question No.15 and reply thereof in the statement of Shri Anu Aggarwal, director of the assessee company :-

“Q.No.15 I am showing you Annexure A-1 of party BO-1 page No.1 to 71, which gives details of cash received for sale of property not reflected in the books of accounts. Annexure A-4, pages 1 to 31 and Annexure A-11 pages 1 to 100 which give details of expenses made for construction work which are also not reflected in the books of accounts. You are requested to explain these documents and reconcile them with your regular books of accounts.

Ans : I have gone through these documents in Annexure A-1, A-4 and A-11 and I am unable to explain these documents. We have received cash as advance for sale of property in certain instances which has not been reflected in our books of accounts. Part of the cash received which has not been accounted by us in regular books of accounts has been utilized for making expenses in our construction business. This reflects our unexplained, unaccounted work in progress. This is the explanation for the seized documents Annexure A-1. To account for these seized documents and other seized documents which can not be adequately explain by us, we voluntarily offer a sum of Rs.8 Crores (Rs. Eight Crores) which is over and above the normal income earned by us during the course of the year. This Rs.8 Crores (Eight Crores) represents our undisclosed income earned during the year on accounts of unexplained cash receipts, unexplained work in progress as well as share capital and share premium received. This disclosure of Rs. Eight Crores which is over and above the normal income earned by us during the course of the year is being made to buy peace of mind, to avoid penalty and prosecution proceedings and also to avoid protected litigation.”

14. From the above statement, it is clear that the authorized officer who was recording the statement has stated that certain loose papers were with regard to cash received for sale of properties which is not reflected in the books of account and some other loose papers were with regard to details of expenses incurred for construction work which are not reflected in the books of account. The assessee in his reply

has virtually accepted this position. Therefore, admittedly, none of the loose papers found from the assessee's premises was relating to share capital issued by the assessee.

15. The case of the Revenue is that the statement of Shri Tarun Goyal as well as Shri Anu Aggarwal which was recorded during the course of search of their respective premises is the incriminating material. As per Assessing Officer, in the statement, Shri Tarun Goyal has admitted that he is providing accommodation entries from his group companies to the Best group of companies. Undisputedly, the statement of Shri Tarun Goyal was recorded behind the back of the assessee. Shri Tarun Goyal's statement was recorded during the course of search at his premises. It is the claim of the Revenue that Shri Tarun Goyal was taken to the assessee's premises for offering cross-examination of Shri Tarun Goyal to the assessee but assessee refused to avail such opportunity. However, there is no evidence to support this contention of the Assessing Officer except the statement of Shri Tarun Goyal vide question and answer No.4, which read as under:-

"Q.No.4 Please confirm that regarding your answer to Q.No.2 of this statement you were taken to the office of the Best Group of Companies at Plot No.H-8, Best Plaza, Netaji Subash Place, Pitampura, New Delhi to confront your statement with them. However they refused any such confrontation or cross examination.

Ans. I confirm that I was taken to the office of Best Group of Companies for confrontation/cross examination by the directors of the company, however they refused any such cross examination/confrontation regarding transactions mentioned in my answer to Q.No.2 of this statement."

16. It is trite law that the statement of a third party recorded behind the back of the assessee cannot be utilized against the assessee

unless assessee is given an opportunity to cross-examine. Therefore, anything stated in the statement of Shri Tarun Goyal cannot be relied upon to claim that the assessee was allowed an opportunity to cross-examine Shri Tarun Goyal and it was refused by them. No documentary evidence has been placed on record before us by the Revenue to support their contention that the director of the assessee company has refused to cross-examine Shri Tarun Goyal. It is pertinent to note that the search at assessee's premises as well as Shri Tarun Goyal group of companies took place simultaneously i.e., on 15th September, 2008. The statement of Shri Tarun Goyal on which the Department is placing heavy reliance is recorded on 15th September, 2008 and, in the said statement, it is mentioned by Shri Tarun Goyal that he was taken to the office of Best Group of companies for cross-examination by the director of the said company. However, they refused any such cross-examination. On the same day i.e., 15th September, 2008, the statements of Shri Anu Aggarwal as well as Shri Harjeet Singh, directors of Best group of companies are recorded but, in such statement, nowhere it is mentioned that they refused to cross-examine Shri Tarun Goyal. This issue arose before the CIT(A) and he, in his letter dated 19th February, 2013 written to Deputy Commissioner of Income-tax, directed the Assessing Officer to provide an opportunity to the appellant company to cross-examine Shri Tarun Goyal to settle the controversy forever. The relevant paragraph of the said letter is reproduced below for ready reference :-

"3. I have perused the assessment order, the addition is made under section 68 of the I.T. Act, mainly on the basis of statement of Shri Tarun Goyal and it is mentioned in the assessment order that during the course of search on 15.09.2008, Shri Tarun Goyal was taken to the premise of Best Group at H-8, Netaji Subash Place, Pitampura, New Delhi-110034. The directors/promoters of Best Group however refused the opportunity of cross-examination. This is confirmed by Sh. Tarun Goyal, in his statement to

query no.4. However, Ld. AR has made the submission that during the assessment proceedings, the assessee has contended that he was never given an opportunity to cross-examine Sh. Tarun Goyal. In the assessment order, nowhere it is mentioned that directors/promoters of this group of companies has signed on any statement or document that they have refused cross-examination. Therefore, for the sake of clarity on this matter, I direct you to provide an opportunity to appellant company to cross-examine Sh. Tarun Goyal to settle the controversy forever. This may be treated as direction under section 250(4) of I.T. Act.”

17. Despite the above specific direction, the Assessing Officer did not allow opportunity to cross-examine Shri Tarun Goyal. From the remand report submitted by the Assessing Officer dated 10th July, 2013, it is gathered that he did issue notice u/s 131 to Shri Tarun Goyal to attend his office twice. However, Shri Tarun Goyal did not appear in compliance to such notice. Thereafter, he asked the director of the assessee company to produce Shri Tarun Goyal for cross-examination, in response to which, the director of the assessee company replied that they are not aware about the whereabouts of Shri Tarun Goyal since long. Thus, the fact remains that the cross-examination of Shri Tarun Goyal could not be allowed to the assessee. It is settled law that the statement of a third party recorded behind the back of the assessee cannot be utilized against the assessee unless he has been allowed an opportunity to cross-examine the said third party.

18. Hon'ble Apex Court has considered the issue of validity of statement without allowing opportunity of cross-examination to the other side in the case of M/s Andaman Timber Industries (supra). Their Lordships held as under:-

“According to us, not allowing the assessee to cross-examine the witness by the Adjudicating Authority though the statements of those witnesses were made the basis of

the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee."

19. Hon'ble Jurisdictional High Court has also considered a similar issue in the case of SMC Share Brokers Ltd. (supra). The relevant finding of their Lordships is in paragraph 6 of the order. The same is reproduced below:-

"6. Learned counsel for the revenue relied upon One-up Shares & Stock Brokers (P) Ltd. v. R.R. Singh, CIT [2003] 262 ITR 275 to contend that the statement of Manoj Aggarwal had evidentiary value, as observed by the Bombay High Court. There is no doubt that the statement of Manoj Aggarwal had evidentiary value but weight could not be given to it in proceedings against the assessee without it being tested under cross-examination. In the absence of the statement being tested, it cannot be said that it should be believed completely to the prejudice of the assessee. Under the circumstances, we do not think that the judgment relied upon by the learned counsel carries him any further."

20. Admittedly, the assessee was not allowed the cross-examination of Shri Tarun Goyal with reference to his statement which was recorded behind the back of the assessee. Therefore, we, relying upon the above decision of Hon'ble Apex Court as well as Hon'ble Jurisdictional High Court, hold that the statement of Shri Tarun Goyal cannot be used against the assessee.

21. So far as the statement of Shri Anu Aggarwal dated 15th September, 2008 is concerned, the relevant portion of the same has already been reproduced by us in paragraph 13 above. The authorized

officer asked the query with regard to certain loose papers found and seized. From a reading of the question, it is evident that as per authorized officer also, the loose papers were pertaining to some unaccounted receipt and unaccounted expenditure on construction. Shri Anu Aggarwal also admitted the similar position in his reply. Thus, admittedly, the question was not relating to issue of share capital, much less whether the share capital was taken as accommodation entry by the assessee. Another statement of Shri Anu Aggarwal was recorded on 24th October, 2008. Question Nos.3, 6 & 7 were relating to share capital, which are reproduced below for ready reference:-

“Q.No.3 Please provide the details of share premium of various companies of the Best Group of companies for the last 6 year.

Ans. The required information is being produced/submitted today itself.

Q.No.6 During the course of search on Sh. Tarun Goyal, he has stated in his statement that he has provided you accommodation entries. Please explain the same.

Ans. I personally do not know Sh. Tarun Goyal, except that he may have invested in our group companies. However, we have not received any accommodation entries from any body. I have already given my statement on 15-09-2008 in which in my answer to question no.15. I had surrendered a total amount of Rs.8 Cr. on account of unexplained cash received from various bookings in my group companies and the unexplained expenses towards the work in progress of various projects in those companies and other outgoing. These unexplained receipts and out goings can be correlated and detailed at the time of assessment after going through the seized material and other available records.

Q.No.7 At the time of search on 15-09-2008 to the question No.15, you also confirmed in your answer that this surrender of Rs.8 Cr. Includes receipt of share capital and share premium. Please explain and clarify the same.

Ans. As explained in the answer to the question no.6, the utilization of the unexplained receipts and its correlation with the outgoings can be ascertained after examining the seized material and therefore it is difficult to detail if any amount from the surrender was utilize towards the receipt of any share capital or not."

22. From the above, it is evident that by question No.3, Shri Anu Aggarwal was asked to submit the details of share premium of various companies of Best group of companies. In reply, he stated that the details are being furnished. In question No.3, Shri Anu Aggarwal was confronted with the statement of Shri Tarun Goyal wherein, as per authorized officer, Shri Tarun Goyal has stated that he has provided accommodation entry to the assessee's group of companies. In reply, Shri Anu Aggarwal has denied to have received any accommodation entries from anyone. He also explained the surrender of ₹8 crores to be on account of unexplained cash received from various bookings in the group companies and unexplained expenditure towards the work in progress. Therefore, in the statement of Shri Anu Aggarwal dated 24th October, 2008 also, there is no admission for receipt of any accommodation entry either from Tarun Goyal group of companies or from anybody else.

23. We have discussed in detail the legal position as laid down by Hon'ble Jurisdictional High Court and Hon'ble Apex Court in various cases. We have also discussed the facts of the assessee's case. Now, applying the law as laid down by Hon'ble Jurisdictional High Court and Hon'ble Apex Court to the facts of the assessee's case, the following position emerges.

(i) No addition u/s 153A in respect of a completed assessment can be made unless some incriminating material was unearthed during the course of search. Admittedly, in the case of the assessee, no

incriminating material with regard to issue of share capital has been found and seized during the course of search.

(ii) Any statement recorded during the course of search cannot on a standalone basis without reference to any other material discovered during search and seizure operation would empower the Assessing Officer to make the addition. The words “evidence found as a result of search” would not take within its sweep statement recorded during search and seizure operations. Therefore, the Revenue’s stand that the addition u/s 153A can be made in respect of share capital on account of statement of Shri Tarun Goyal and Shri Anu Aggarwal cannot be accepted.

(iii) Even otherwise, the statement of Shri Tarun Goyal cannot be utilized against the assessee as his statement was recorded behind the back of the assessee and the assessee was not allowed opportunity to cross-examine him.

(iv) In the statement of Shri Anu Aggarwal dated 15th September, 2008, the query was raised with regard to loose papers found and seized from their premises. Admittedly, none of the loose papers was relating to issue of share capital. The loose papers were pertaining to unaccounted receipt on sale and unaccounted expenditure on construction. In the statement dated 24th October, 2008, though the query was raised with regard to issue of share capital and the statement of Shri Tarun Goyal was confronted wherein he has alleged to have provided accommodation entry to the assessee group, Shri Anu Aggarwal categorically denied to have received any accommodation entries from anybody.

24. In view of the above, we hold that the issue of share capital was out of the purview of assessment u/s 153A as the assessment for assessment year 2005-06 was not pending on the date of search and no incriminating material relating to share capital was found during the course of search. Accordingly, the addition of ₹3,60,00,000/- made by the Assessing Officer and sustained by learned CIT(A) for unexplained share capital is deleted.

25. So far as the addition of ₹8,10,000/- for alleged unexplained expenditure for obtaining the share capital is concerned, both the parties agreed that this issue is consequential to the issue of share capital. We have accepted the assessee's contention that the issue of share capital cannot be considered u/s 153A because no incriminating material was found with regard to share capital. Similarly, no incriminating material was found so as to establish that the assessee has taken the accommodation entry and has paid commission for obtaining such accommodation entry. Therefore, the addition for alleged payment of commission is also out of the purview of Section 153A. Accordingly, the same is also deleted.

ITA No.1699/Del/2014 & 1700/Del/2014 - M/s Best Infrastructure (India) Pvt.Ltd. for AY 2006-07 & 2007-08, ITA No.1702/Del/2014 & 1703/Del/2014 – M/s Best City Projects (India) Pvt.Ltd. for AY 2006-07 & 2007-08, ITA No.1704/Del/2014 – M/s Best City Developers India Pvt.Ltd. for AY 2007-08, ITA No.1706/Del/2014 – M/s Best City Realtors (India) Pvt.Ltd. for AY 2007-08 and 1708/Del/2014 & 1709/Del/2014 – M/s Best Realtors (India) Pvt.Ltd. for AY 2005-06 & 2007-08 :-

26. In all these appeals by the assessees, the grounds raised are identical to the grounds raised by the assessee in the appeal in the case of M/s Best Infrastructure (India) Pvt.Ltd. for assessment year 2005-06 vide ITA No.1698/Del/2014. For ready reference, the details of the additions made and sustained by the learned CIT(A) in each case are summarized below :-

M/s Best Infrastructure (India) Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1699/Del/2014	2006-07	2,60,15,000/-	5,85,340/-
1700/Del/2014	2007-08	3,71,00,000/-	8,34,750/-

M/s Best City Projects (India) Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1702/Del/2014	2006-07	2,27,50,000/-	5,11,875/-
1703/Del/2014	2007-08	5,37,00,000/-	12,08,250/-

M/s Best City Developers India Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1704/Del/2014	2007-08	1,00,00,000/-	2,25,000/-

M/s Best City Realtors (India) Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1706/Del/2014	2007-08	3,55,00,000/-	7,98,750/-

M/s Best Realtors (India) Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1708/Del/2014	2005-06	2,00,00,000/-	4,50,000/-
1709/Del/2014	2007-08	15,00,000/-	33,750/-

27. At the time of hearing before us, both the parties fairly agreed that the grounds raised and the facts in all these appeals are identical

to the facts and grounds raised in the case of M/s Best Infrastructure (India) Pvt.Ltd. for assessment year 2005-06 vide ITA No.1698/Del/2014, except the difference in amount of share capital. Therefore, both the parties fairly stated that the outcome of the appeal in ITA No.1698/Del/2014 in the case of M/s Best Infrastructure (India) Pvt.Ltd. for assessment year 2005-06 would be squarely applicable in all the above appeals.

28. We have already decided the appeal of M/s Best Infrastructure (India) Pvt.Ltd. for assessment year 2005-06 vide ITA No.1698/Del/2014 and, for the detailed discussion from paragraph No.8 to 25, we allow these appeals of the assessee also. The additions made for unexplained credit in the form of share capital as well as the addition made for alleged commission are deleted because they are out of the purview of assessment u/s 153A.

ITA No.1701/Del/2014 - M/s Best Infrastructure (India) Pvt.Ltd. for AY 2008-09, ITA No.1705/Del/2014 - M/s Best City Developers India Pvt.Ltd. for AY 2008-09 and ITA No.1707/Del/2014 - M/s Best City Realtors (India) Pvt.Ltd. for AY 2008-09 :-

In all the above appeals, the grounds raised are identical. Ground No.2 in all the above cases is against the sustainability of addition u/s 153A. Learned counsel for the assessee has not pressed this ground of appeal and, therefore, ground No.2 in all the above appeals is rejected.

Ground No.1 in all the above appeals is against the addition sustained for unexplained share capital while ground No.3 is against the addition sustained for alleged commission on the share capital. The same are summarized as under:-

M/s Best Infrastructure (India) Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1701/Del/2014	2008-09	5,00,000/-	11,250/-

M/s Best City Developers India Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1705/Del/2014	2008-09	1,50,00,000/-	3,37,500/-

M/s Best City Realtors (India) Pvt.Ltd. :-

ITA No.	AY	Addition for unexplained share capital	Addition for alleged expenditure on commission
1707/Del/2014	2008-09	2,00,00,000/-	4,50,000/-

29. At the time of hearing before us, it is stated by the learned counsel that in all the above appeals, only one ground has been raised with regard to addition for alleged unexplained share capital. He submitted that the assessment order in the case of all the assesseees for all the years are identically worded. In fact, the Assessing Officer has prepared a chart at page 7 & 8 of the assessment order in which he has summarized the share capital of all the companies in all the years and thereafter, he made the addition in respect of respective assessment year in each case. He, therefore, submitted that if any one case is taken and considered, the finding in that one case would be made applicable to all the assesseees in both the years.

30. Learned DR also fairly admitted that the facts in all the cases for both the years are identical and the Assessing Officer has virtually passed identically worded order in all the cases. He, therefore, agreed

with the submission of the learned counsel that any one case can be taken up for detailed consideration and arguments. Accordingly, as agreed by both the parties, the appeal in ITA No.1705/Del/2014 i.e., in the case of M/s Best City Developers India Pvt.Ltd. for assessment year 2008-09 is taken up for consideration. In this case, the assessee has raised the following grounds:-

“1. That the Id.CIT(A) has erred on both facts and law of the case in confirming the additions of Rs.1.5 Crore u/s 68 on account of share capital issued by the assessee company and holding the same to be undisclosed income of the assessee company, which is unjustified, arbitrary, contrary to the law and facts and bad in law.

2. The Id.CIT(A) has erred both in law and facts of the case in confirming the additions made in assessment framed u/s 153A, which is not based upon any incriminating material found during the course of the search and that the Id.AO erred in making the assessment in view of the fact that the assessment was not pending as on the date of the search, which is incorrect, unjustified and bad in law.

3. The Id.CIT(A) has erred in law & facts of the case in confirming the additions of Rs.3,37,500/- on account of alleged commission paid for obtaining accommodation entries which is highly arbitrary, unjustified, bad in law, uncalled for and merely on presumption of the Id.A.O.

4. The Id.CIT(A) has erred in facts and law of the case in holding the validity of assessment u/s 153A which is bad in law, unjustified, uncalled for and needs to be quashed.

5. The assessee craves the right to add, amend or modify any ground of appeal.”

31. Learned counsel for the assessee fairly conceded that on the date on which the Assessing Officer issued notice u/s 153A, the original assessment was pending inasmuch as the time limit for issue of notice u/s 143(2) did not expire. Therefore, on issue of notice u/s 153A, original pending assessment abated and the Assessing Officer had

authority to consider all the issues, whether in respect of those issues, any incriminating material is found or not. In view of the above, he withdrew ground No.2 of the assessee's appeal and submitted that the addition for unexplained share capital may be considered on merits. In view of the above, ground No.2 of the assessee's appeal is rejected being not pressed.

32. In so far as ground No.1, i.e., the addition for unexplained share capital is concerned, it is submitted by the learned counsel that the assessee has duly discharged the onus of proving the share application money by producing the confirmation of the creditors, certificate of incorporation of the applicant company, income tax return of the applicant company and share application form before the Assessing Officer. Further, before the learned CIT(A), the assessee furnished the bank statement of the share applicants. He, therefore, submitted that in view of these evidences furnished by the assessee, the assessee has duly discharged the onus of proving the cash credit which lay upon the assessee. In support of this contention, he relied upon the following decisions:-

- (i) Pr.CIT Vs. Rakam Money Matters Pvt.Ltd. – ITA No.778/2015, judgment dated 13th October, 2015 of Hon'ble Delhi High Court.
- (ii) CIT Vs. Victor Electrodes Ltd. – [2010] 329 ITR 271 (Del).
- (iii) DCIT Vs. G.S. Controls (P) Ltd. – ITA No.1560/Del/2010, order dated 13th March, 2015 of ITAT, Delhi Bench 'C', New Delhi.
- (iv) CIT Vs. Fair Finvest Ltd. – [2013] 357 ITR 146 (Delhi).
- (v) CIT Vs. Gangeshwari Metal (P) Ltd. – [2014] 361 ITR 10 (Delhi).

(vi) CIT Vs. Vrindavan Farms (P) Ltd. – ITA No.71/2015 and others, judgment dated 12th August, 2015 of Hon'ble Delhi High Court.

(vii) ITO Vs. Nishit Fincap (P) Ltd. – 2016 (4) TMI 213, order dated 31st March, 2016 in ITA No.2515/Del/2010 (ITAT Delhi).

(viii) ITO Vs. Softline Creations (P) Ltd. – ITA No.744/Del/2012, order dated 10th February, 2016 of ITAT, Delhi Bench 'G', New Delhi.

(ix) Suncity Projects Pvt.Ltd. Vs. DCIT & others – ITA No.14/Del/2012 and others, order dated 21st March, 2016 of ITAT, Delhi Bench 'G', New Delhi.

(x) CIT, Orissa Vs. Orissa Corporation P.Ltd. – [1986] 159 ITR 78 (SC).

33. He further submitted that the Assessing Officer made the addition mainly on the basis of the statement of Shri Tarun Goyal wherein he has allegedly stated to have provided the accommodation entries to the assessee. He stated that the statement of Shri Tarun Goyal was recorded behind the back of the assessee and the assessee was never allowed any opportunity to cross examine Shri Tarun Goyal. In the absence of his cross-examination having been allowed to the assessee, his statement cannot be utilized against the assessee. He further pointed out that even during remand proceedings, learned CIT(A) asked the Assessing Officer to allow cross-examination of Shri Tarun Goyal to the assessee. However, despite the specific direction of learned CIT(A), the assessee was not allowed the cross-examination of Shri Tarun Goyal and, therefore, his statement cannot be utilized against the assessee. He further submitted that as per the Assessing Officer, the assessee has taken the accommodation entry from Tarun

Goyal group by paying cash to him and then obtaining the cheque in the form of share capital against such cash payment. He stated that from the bank account of the share applicant, it would be evident that in the bank account of none of the share applicants, cash has been deposited, therefore, the allegation of the Assessing Officer, that the assessee provided cash to Shri Tarun Goyal who deposited the same in his group company and issued cheques to the assessee is factually incorrect. He further submitted that the matter of Tarun Goyal group of companies came before the Tribunal because in those companies also, the additions for unexplained cash credit were made. On behalf of Shri Tarun Goyal, it was contended that since Shri Tarun Goyal is providing accommodation entries, the cash deposited in his group companies is the cash received from the beneficiary who intended to avail the benefit of accommodation entry. Therefore, no addition for unexplained cash credit should be made in the group companies. However, the ITAT, vide order dated 18th October, 2013 in ITA No.4527 to 4531/Del/2012 and others rejected the contention of Shri Tarun Goyal and set aside the matter to the file of the Assessing Officer for considering the peak credit in his group companies on merit.

34. Learned DR, on the other hand, relied upon the order of learned CIT(A) and stated that the search at the premises of Shri Tarun Goyal and the assessee took place simultaneously. Shri Tarun Goyal admitted to have provided accommodation entries to various parties including Best group of companies. That Shri Tarun Goyal was brought to the assessee's premises for providing cross-examination to the assessee but it could not be provided because the assessee refused to cross-examine him. That during remand proceedings, the Assessing Officer issued notice twice to Shri Tarun Goyal but he did not appear. Thereafter, the assessee was also requested to produce Shri Tarun Goyal but the assessee also did not produce. Therefore, despite all

sincere efforts, the Assessing Officer could not provide cross-examination of Shri Tarun Goyal to the assessee during remand proceedings. But when the assessee was offered the cross-examination of Shri Tarun Goyal, the assessee refused to cross-examine him. Therefore, now, assessee cannot claim that the statement of Shri Tarun Goyal cannot be utilized against him. He further submitted that even the assessee in his statement while making the surrender of ₹8 crores referred to unexplained share capital. That the assessee claimed to have furnished the affidavit of the share applicant which is not notarized and the stamp paper on which the affidavit was drafted was purchased even prior to the date of application for allotment of share capital. This ultimately shows that the evidences furnished by the assessee before the Assessing Officer are the make-believe evidences and cannot be relied upon. He further submitted that the share application raised by the assessee was not by public offer but it is by private placement. Therefore, the burden is more upon the assessee to establish the identity of the shareholder, creditworthiness of the shareholder and genuineness of the transaction. He stated that the assessee despite repeated opportunities having been allowed by the Assessing Officer has not produced the director of any of the share applicant company. In view of the above, learned CIT(A) was fully justified in sustaining the addition for unexplained cash credit in the form of share capital. The same should be sustained.

35. In the rejoinder, it is fairly admitted by the learned counsel that the so-called affidavit of the share applicant furnished by the assessee before the Assessing Officer is not notarized and, therefore, technically, it cannot be called an affidavit. Nevertheless, it remains a self-declaration by the share applicant wherein he has confirmed having invested in the assessee company and has also disclosed his

income tax number. He further submitted that even if the said affidavits are ignored, still the assessee has furnished the confirmation of the share applicant, their income tax return, share application form, certificate of incorporation etc. which is sufficient to discharge the onus lay upon the assessee to explain the cash credits in its accounts. He, therefore, submitted that learned CIT(A) should be deleted.

36. We have carefully considered the arguments of both the sides and have perused the material placed before us. From a reading of the assessment order as well as arguments of learned CIT-DR, it is evident that the main reason for treating the share capital as bogus and unexplained is the statement of Shri Tarun Goyal wherein he has admitted to have provided accommodation entries to the assessee group. Admittedly, the statement of Shri Tarun Goyal was recorded behind the back of the assessee and the assessee has not been allowed any opportunity to cross-examine him. Hon'ble Apex Court has considered the validity of statement in the case of M/s Andaman Timber Industries (supra) and held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority is a serious flaw which makes the order nullity inasmuch as it is violating the principles of natural justice. Similar view is expressed by Hon'ble Jurisdictional High Court in the case of SMC Share Brokers Ltd. (supra) wherein Hon'ble Jurisdictional High Court has held "*There is no doubt that the statement of Manoj Aggarwal had evidentiary value but weight could not be given to it in proceedings against the assessee without it being tested under cross-examination*". We have already discussed this issue at length earlier in this order and have arrived at the conclusion that the statement of Shri Tarun Goyal cannot be used against the assessee.

37. Further, Hon'ble Jurisdictional High Court in the case of Harjeev Aggarwal (supra) has also considered the evidentiary value of the statement recorded at the time of search and has held that any statement recorded during the course of search on a standalone basis without reference to any other material discovered during search and seizure operation would not empower the Assessing Officer to make a block assessment on the basis of such statement. Thus, any statement recorded during the course of search should be corroborated with the material discovered during the course of search. Let us examine the facts of the assessee's case and the stand of the Revenue in the light of the above decision of Hon'ble Jurisdictional High Court. The stand of the Revenue is that the assessee has taken the accommodation entry in the form of share capital from Tarun Goyal group of companies. In this regard, the assessee has paid cash against which Shri Tarun Goyal has issued cheque in the form of share capital from his group companies. The Revenue has further alleged that the assessee has also paid commission to Shri Tarun Goyal for availing accommodation entries. The Revenue has not pointed out any corroborative evidence in support of the above allegation except the statement of Shri Tarun Goyal. The search and seizure has taken place at the business premises of all the group companies of the assessee group. Various loose papers were found and seized. Those loose papers indicate the receipt of unrecorded money from the sale of properties as well as the expenditure incurred by the assessee in the construction work which is not recorded in the books of account. Admittedly, in none of the loose papers, there is mention of any cash payment by the assessee to Shri Tarun Goyal for obtaining accommodation entry. Similarly, there is no mention of payment of commission to Shri Tarun Goyal. Search has simultaneously taken place at the premises of Shri Tarun Goyal and his group companies and during the course of search at his premises also, no evidence is found

for receipt of cash from the assessee's group companies. Had it been so, the Assessing Officer would have certainly mentioned the same in the assessment order.

38. Before the learned CIT(A), the assessee has produced the copy of bank account of all the share applicant companies. The CIT(A) has admitted the same as additional evidence and has called for the remand report from the Assessing Officer. There is no cash deposit in the bank account of any of the share applicant before the issue of cheque for share application money to the group companies of the assessee. On the other hand, the credit is by way of transaction. During remand proceedings, the Assessing Officer has made necessary verification from the bank of the share applicant and no adverse finding is recorded by him in the remand report. Therefore, the facts on record are contrary to the allegation of the Revenue that the assessee gave cash to Shri Tarun Goyal and he, after depositing the same in the bank account of various companies, issued cheques for share application money. On these facts, the decision of Hon'ble Jurisdictional High Court in the case of Harjeev Aggarwal (supra) would be squarely applicable. Therefore, we hold that the statement of Shri Tarun Goyal cannot be used against the assessee because :-

- (i) His statement was recorded behind the back of the assessee and the assessee was not allowed any opportunity to cross-examine him.
- (ii) There is no corroborative evidence in support of the statement of Shri Tarun Goyal. On the other hand, the material found during the course of search and other evidences placed on record by the assessee are contrary to the allegation made by Shri Tarun Goyal in his statement.

39. Now, the next question is whether the assessee has been able to discharge the onus which lay upon it to prove the credit in its books of account in the form of share capital. It has been contended by the learned counsel that the assessee has duly discharged such onus and in support of his contention, he has relied upon various decisions of Hon'ble Apex Court, Hon'ble Jurisdictional High Court as well as ITAT Delhi Benches. Before going into the facts of the assessee's case, it would be appropriate to refer to those decisions relied upon by the learned counsel.

40. Learned counsel for the assessee has relied upon the decision of Hon'ble Apex Court in the case of Orissa Corporation P. Ltd. (supra). In the said case, the assessee furnished before the Assessing Officer letters of confirmation and gave the particulars of income tax number of the creditors. The Assessing Officer issued summons u/s 131 to the creditor which were returned unserved with the remark "left". Therefore, the Assessing Officer made the addition of ₹1,50,000/- as unexplained cash credit. The Tribunal deleted the addition holding that merely because the assessee could not produce the parties, it did not follow automatically that an adverse inference should be drawn against the assessee. When the Revenue took up the matter to Hon'ble Supreme Court, Hon'ble Apex Court held :-

"that in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the

conclusion that the respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such arose. The High Court was right in refusing to state a case."

41. Hon'ble Jurisdictional High Court in the case of Rakam Money Matters Pvt.Ltd. (supra) held as under:-

"13. It is not in dispute that extensive material was produced by the assessee in the present case to prove the identity, genuineness and creditworthiness of the companies who had subscribed to its shares. Among the materials produced were the income tax returns and the PAN card details of the eight companies. Even if the Directors of these companies did not respond to the summons issued by the AO, it was not impossible for the AO to make proper enquiries to ascertain the genuineness of these entities and satisfy himself of their creditworthiness. As pointed out by the CIT(A), the AO failed to make any effort in that direction. He did not take to the logical end the half-hearted attempt at getting the Directors to appear before him. He did not even seek the assistance of the AOs of the concerned companies whose ITRs and PAN card copies had been produced."

42. In the case of CIT Vs. Victor Electrodes Ltd. – [2010] 329 ITR 271 (Del), Hon'ble Jurisdictional High Court has held :-

"9. There was no legal obligation on the assessee to produce some Director or other representative of the applicant companies before the Assessing Officer. Therefore, failure of assessee to produce them could not, by itself, have justified the additions made by the Assessing Officer, when the assessee had furnished documents, on the basis of which, the Assessing Officer, if he so wanted, could have summoned them for verification. No attempt was made by the Assessing Officer to summon the Directors of the applicant companies. The addresses of these companies must be available on the share applications, Memorandum and Articles of Association and

their income tax returns. If the Assessing Officer had any doubt about identity of the share applicants, he could have summoned the Directors of the applicant companies. No such attempt was, however, made by him. Therefore, the Commission of Income Tax (Appeals) and the Income Tax Appellate Tribunal, in our view were justified in holding that the identity of share applicants and the genuineness of the transactions had been established by the assessee."

43. In the case of CIT Vs. Fair Finvest Ltd. – [2013] 357 ITR 146 (Delhi), Hon'ble Jurisdictional High Court has held :-

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT (Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68.

7. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (P) Ltd. (supra).

8. The decision in this case is based on the peculiar facts which attract the ratio of Lovely Exports (P) Ltd. (supra). Where the assessee adduces evidence in support

of the share application monies, it is open to the assessing officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators; such a link was shown to be present in the case of Nova Promoters & Finlease (P.) Ltd. (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under section 68, the ratio of Lovely Exports (P) Ltd. (supra) is attracted, irrespective of the facts, evidence and material.

9. No substantial question of law arises. The appeal is accordingly dismissed."

44. In the case of CIT Vs. Gangeshwari Metal (P.) Ltd. – [2014] 361 ITR 10 (Delhi), Hon'ble Jurisdictional High Court held as under:-

"9. As can be seen from the above extract, two types of cases have been indicated. One in which the assessing officer carries out the exercise which is required in law and the other in which the assessing officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the assessing officer, after noting the facts, merely rejected the same. This would be apparent from the observations of the assessing officer in the assessment order to the following effect: -

"Investigation made by the Investigation Wing of the Department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of ₹1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was ₹55,50,000/- and not ₹1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at ₹55,50,000/-. The

assessee has further tried to explain the source of this amount of ₹55,50,000/- by furnishing copies of share application money, balance sheet, etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the Department. As such entries of ₹55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately."

The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case. However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on the part of the assessing officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under section 68 of the Act. Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law."

45. Now, we come back to the facts of the assessee's case in respect of the share application money received. The assessee has furnished the affidavit of the director of share applicant company, share application form, confirmation from share applicant, certificate of incorporation of the shareholder company and copy of income tax return of share applicant company. The Assessing Officer has disputed the validity of the affidavit on the ground that affidavit is not certified by the notary and the stamp paper for purchase of affidavit is dated prior to the application made for share application money. On verification of the copy of the affidavit which is placed at pages 48 & 49 of the assessee's paper book, we find that the affidavit is not made in the presence of notary public and, therefore, it cannot be considered

as affidavit in legal sense. Nevertheless, it remains a self-declaration by the director of share applicant company in which he has confirmed that the company has applied to M/s Best City Developers (India) Private Limited for 15 lakhs equity shares for which payment of ₹1,50,00,000/- has been made by cheque. The detail of cheque number and the name of the bank have also been provided. In paragraph 3, the permanent account number of the share applicant company has also been provided. In paragraph 2, it is mentioned that the share applicant company is registered with Registrar of Companies and registration number along with date of registration is also given. The assessee has furnished share application form for which also the address of the share applicant company, number of shares applied for, amount paid by cheque, details of cheque number as well as permanent account number of the company has been given. The confirmation has been filed by the share applicant company giving all necessary particulars and, for ready reference, we reproduce the same herein below :-

"Aries Crafts Private Limited

13/34, W.E.A., IVth Floor, Main Arya Samaj Road, Karol Bagh,

New Delhi – 110005

To whom it may concern

Name of the Company : *Best City Developers (India) Pvt.Ltd.*

Number of shares : *15000000 Equity Shares of Rs.1 each at a premium of Rs.9 per share.*

Amount invested : *Rs.150,00,000/-
Rupee One Crore Fifty Lac Only.*

Details of Payment as under :

<i>Chq. No.</i>	<i>Date</i>	<i>Amount (Rs.)</i>	<i>Bank</i>	<i>Branch</i>
<i>474604</i>	<i>15.03.2008</i>	<i>100,00,000</i>	<i>HDFC Bank Limited.</i>	<i>New Delhi</i>

474615	25.03.2008	50,00,000	HDFC Bank Limited. New Delhi
	Total	150,00,000	

Bank Account No. : 003142340000152
 Bank Particulars : HDFC Bank Limited
 Ansari Road, Darya Ganj,
 New Delhi – 110 002

Source of funds : Out of sale of shares
 Occupation : Business
 Income Tax PAN Number : AADCA 5439 P Ward 1(3), New Delhi.
 Share Certificates Received : Yes
 We do hereby confirm that the information furnished above is correct.

For Aries Crafts Private Limited
 Sd/-
 Authorised Signatory”

46. From the above, it is evident that the share applicant company has given the confirmation on its letter head which gives the complete address of the said company. In the confirmation, number of shares applied and the amount invested has been given. Details of payments i.e., cheque number, date of cheque and name of the bank on whom cheque is drawn is given. Address of the bank and bank account number has also been given, source of fund is given as well as permanent account number of the company is also given.

47. Hon’ble Apex Court in the case of Orissa Corporation P. Ltd. (supra) has considered the situation wherein the assessee has furnished only the confirmation of the creditor which gave the particulars of income tax number of the creditor. The Assessing Officer issued summons u/s 131 to the creditors which were returned unserved with the remark “left”. Thereafter, the Assessing Officer did not make any further verification from the income tax files of those creditors and confirmed the addition. The Tribunal deleted the addition holding that merely because the assessee could not produce the creditors, an adverse inference cannot be drawn against the assessee. When the matter reached to Hon’ble Apex Court, their Lordships held that on these facts, if the Tribunal came to the conclusion that the respondent had discharged the burden which lay

upon it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence.

48. In the case of Rakam Money Matters Pvt. Ltd. (supra), the facts before Hon'ble Jurisdictional High Court were that the assessee furnished income tax return and permanent account number details of the companies. The directors of those companies did not respond to summons issued by the Assessing Officer. Hon'ble Jurisdictional High Court upheld the deletion of addition on the ground that the Assessing Officer did not take to the logical end the evidences furnished by the assessee. He even did not seek the assistance of the Assessing Officer of the concerned companies whose income tax returns and permanent account number copies had been produced. Similar view is taken by Hon'ble Jurisdictional High Court in the case of Victor Electrodes Ltd. (supra) and Fair Finvest Ltd. (supra). In the case under consideration before us, the assessee has duly furnished the declaration of the director of the share applicant company, share application form, confirmation and certificate of incorporation from Registrar of Companies as well as income tax return of the share applicant company. The Assessing Officer did not make any verification from those documents. In this case, he even did not issue any summons to the director of the share applicant company neither made any cross verification from the income tax record of the share applicant company whose permanent account number was furnished before him. The Assessing Officer simply rejected the evidences furnished by the assessee. Hon'ble Jurisdictional High Court in the case of Gangeshwari Metal Pvt. Ltd. (supra) has disapproved the action of the Assessing Officer wherein the Assessing Officer sits back with folded hands till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The facts in the assessee's case are identical to the facts before the Hon'ble Jurisdictional High Court in the case of

Gangeshwari Metal Pvt. Ltd. (supra). In the case under appeal before us also, the Assessing Officer simply sits back till the assessee submitted all the evidences and thereafter rejected those evidences on the basis of presumption and suspicion. He did not make any enquiry, he did not issue any summons to the share applicant company, he did not try to verify from the record of the share applicant company who are all assessed to income tax. In view of the above, respectfully following the decision of Hon'ble Apex Court in the case of Orissa Corporation P. Ltd. (supra) and of Hon'ble Jurisdictional High Court in the case of Rakam Money Matters Pvt. Ltd. (supra), Victor Electrodes Ltd. (supra), Fair Finvest Ltd. (supra) and Gangeshwari Metal Pvt. Ltd. (supra), we hold that the assessee has duly discharged the onus which lay upon it to prove the credit in the form of share capital. Accordingly, the addition made for unexplained share capital is deleted.

49. The addition relating to unexplained expenditure on alleged commission on the share application money is made by the Assessing Officer on the presumption that the assessee has taken the accommodation entry and for availing such accommodation entry, the assessee paid the commission. We have not accepted the Revenue's contention that the assessee has taken the accommodation entry in the form of share capital. Therefore, the allegation of the Revenue that the assessee has paid commission for taking the accommodation entry cannot be accepted. Accordingly, the addition made for unexplained expenditure on alleged commission is deleted.

ITA No.1753/Del/2014 – Assessee's appeal in the case of M/s Best Infrastructure (India) Pvt.Ltd. for AY 2009-10 :-

At the time of hearing before us, the learned counsel for the assessee has not pressed this appeal of the assessee. Accordingly, the same is dismissed as not pressed.

50. In the result, :-

(i) the appeals of the assessee in ITA Nos.1698/Del/2014, 1699/Del/2014, 1700/Del/2014, 1702/Del/2014, 1703/Del/2014, 1704/Del/2014, 1706/Del/2014, 1708/Del/2014 and 1709/Del/2014 are allowed;

(ii) the appeals of the assessee in ITA Nos.1701/Del/2014, 1705/Del/2014 and 1707/Del/2014 are partly allowed; and

(iii) the appeal of the assessee in ITA No.1753/Del/2014 is dismissed.

Decision pronounced in the open Court on 31.05.2016.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(G.D. AGRAWAL)
VICE PRESIDENT

VK.

Copy forwarded to: -

1. Appellant : **M/s Best Infrastructure (India) Pvt.Ltd.,
M/s Best City Projects (India) Pvt.Ltd.,
M/s Best City Developers India Pvt.Ltd.,
M/s Best City Realtors (India) Pvt.Ltd.,
M/s Best Realtors (India) Pvt.Ltd.,
Plot No.H-8, 1st Floor, Best Plaza, Netaji Subhash
Place, Pitampura, New Delhi – 110 034.**
2. Respondent : **Assistant Commissioner of Income Tax,
Central Circle-4, New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar