

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : E : NEW DELHI  
(Through Virtual Court Hearing)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.115 to 118/Del/2018  
Assessment Years: 2009-10 to 2012-13

ACIT,  
Central Circle-15,  
New Delhi.

Vs Moon Beverages Ltd.,  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

PAN: AAACM1635J

CO Nos.73 to 76/Del/2018  
(ITA Nos.115 to 118/Del/2018)  
Assessment Years: 2009-10 to 2012-13

Moon Beverages Ltd.,  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

Vs. ACIT,  
Central Circle-15,  
New Delhi

PAN: AAACM1635J

ITA Nos.122 & 123/Del/2018  
Assessment Years: 2009-10 to 2011-12

ACIT,  
Central Circle-15,  
New Delhi

Vs. Hindustan Aqua Ltd.,  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

PAN: AAACH3298J

CO Nos.86 & 87/Del/2018  
(ITA Nos.122 & 123/Del/2018)  
Assessment Years: 2009-10 to 2011-12

Hindustan Aqua Ltd.,  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

Vs. ACIT,  
Central Circle-15,  
New Delhi

PAN: AAACH3298J

ITA Nos.111 to 114/Del/2018  
Assessment Years: 2009-10 to 2012-13

ACIT,  
Central Circle-15,  
New Delhi

Vs. Hal Offshore Ltd.  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

PAN: AAACH3144B

CO Nos.79 to 82/Del/2018  
(ITA Nos.111 to 114/Del/2018)  
Assessment Years: 2009-10 to 2012-13

Hal Offshore Ltd.  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

Vs. ACIT,  
Central Circle-15,  
New Delhi

PAN: AAACH3144B

ITA No.816/Del/2018  
Assessment Year : 2012-13

ACIT,  
Central Circle-15,  
New Delhi

Vs. Sunstar Infra Developers Pvt. Ltd.,  
25, Bazar Lane,  
Bengali Market,  
New Delhi.

PAN: AAOCS7259Q

CO No.88/Del/2018  
(ITA No. 816/Del/2018)  
Assessment Year : 2012-13

Sunstar Infra Developers Pvt. Ltd., Vs. ACIT,  
25, Bazar Lane, Central Circle-15,  
Bengali Market, New Delhi  
New Delhi.

PAN: AAOCS7259Q

ITA No.119/Del/2018  
Assessment Year 2011-12

ACIT, Vs. Fortune Industrial Resources Ltd.,  
Central Circle-15, 153/1, Nirankari Colony,  
New Delhi New Delhi.

PAN: AAACF1853B

CO No.90/Del/2018  
(ITA No.119/Del/2018)  
Assessment Year 2011-12

Fortune Industrial Resources Ltd., Vs. ACIT,  
153/1, Nirankari Colony, Central Circle-15,  
New Delhi New Delhi.

PAN: AAACF1853B

ITA Nos.124 & 125/Del/2018 & 815/Del/2018  
Assessment Years: 2010-11, 2011-12 & 2009-10

ACIT, Vs. Metbrass Plassim India Ltd.,  
Central Circle-15, 25, Bazar Lane,  
New Delhi Bengali Market,  
New Delhi.

PAN: AADCM9501A

CO No.71, 72 & 70/Del/2018  
(ITA Nos.124 & 125/Del/2018 & 815/Del/2018)  
Assessment Years: 2010-11, 2011-12 & 2009-10

Metbrass Plassim India Ltd., Vs. ACIT,  
25, Bazar Lane, Central Circle-15,  
Bengali Market, New Delhi  
New Delhi.  
PAN: AADCM9501A

ITA Nos.128 & 129/Del/2018  
Assessment Years : 2009-10 & 2010-11

ACIT, Vs. Competent Infoways Pvt. Ltd.,  
Central Circle-15, 25, Bazar Lane,  
New Delhi Bengali Market,  
New Delhi.  
PAN: AADCC2681F

CO Nos.84 & 85/Del/2018  
(ITA Nos.128 & 129/Del/2018)  
Assessment Years : 2009-10 & 2010-11

Competent Infoways Pvt. Ltd., Vs. ACIT,  
25, Bazar Lane, Central Circle-15,  
Bengali Market, New Delhi  
New Delhi.  
PAN: AADCC2681F

(Appellant)

(Respondent)

Assessee by : Shri Gautam Jain, Advocate  
Revenue by : Ms Pramita M. Biswas, CIT-DR  
Date of Hearing : 18.11.2020  
Date of Pronouncement : 27.11.2020

ORDER

PER R.K. PANDA, AM:

This batch of appeals filed by the Revenue are directed against the separate orders of the Id. CIT(A)-26, New Delhi, relating to different assessment years as mentioned above.

2. The respective assessees have filed cross objections against the appeal filed by the Revenue. Since identical grounds have been taken by the Revenue in these appeals and by the respective assessees in their cross objections, therefore, these were heard together and are being disposed of by this common order.

3. First, we take up ITA No.115/Del/2018 and CO No.73/Del/2018 as the lead case in the case of M/s Moon Beverages Ltd. for A.Y. 2009-10.

4. Facts of the case, in brief, are that the assessee company is one of the group companies of MMG (MM Aggarwal) group and is engaged in the business of preparation, manufacturing, packing and sale of soft drinks on the basis of concentrate and other raw material procured from Coca Cola in the capacity of bottler and distributor of Coca Cola products in India. In addition, the MMG group has business interests in several segments like chartering and leasing of vessels to ONGC and other companies, real estate, education and hospitality etc. It had filed its return of income on 30.09.2009 declaring total income of Rs.10,21,50,894/-. Assessment u/s 143(3) was made determining the total income at Rs.10,27,91,857 which was subsequently rectified u/s 154 determining the total income at Rs.7,50,20,860/-

4.1 A search & seizure operation u/s 132 of the I.T. Act, 1961 was carried out on 28.03.2015 in the case of M.M. Aggarwal Group of cases. The case of the assessee was also covered in the said search. During the course of search carried out at the different premise located in India in M.M. Aggarwal Group of cases,

documents and data storage devices, etc. belonging to the assessee were found and seized. In response to notice u/s 153A of the IT Act, 1961 issued to the assessee on 10<sup>th</sup> May, 2016, the assessee filed the return of income on 29<sup>th</sup> June, 2016 declaring total income at Rs.7,50,21,800/-.

5. During the course of assessment proceedings, the AO noted that the assessee company is shown to have received share capital at substantial premium from the following parties:-

| S. No.                 | Name of Subscriber                | No. of shares subscribed | Face value of share | Paid up value | Premium received | Total       |
|------------------------|-----------------------------------|--------------------------|---------------------|---------------|------------------|-------------|
| Financial Year 2008-09 |                                   |                          |                     |               |                  |             |
| 1.                     | Fortune Industrial Resources Ltd. | 66,000                   | 10/-                | 6,60,000      | 3,89,40,000      | 3,96,00,000 |
| 2.                     | Sterling Foils Ltd.               | 33,350                   | 10/-                | 3,33,500      | 1,96,76,500      | 2,00,10,000 |
| 3.                     | Mahesh Finese Pvt. Ltd.           | 8,350                    | 10/-                | 83,500        | 49,26,500        | 50,10,000   |
|                        | Total                             | 1,07,700                 |                     | 10,77,000     | 6,35,43,000      | 6,46,20,000 |

6. He observed that during the course of pre-search enquiries, it was gathered that the assessee group had received substantial amount of share capital from various non-descript and shell companies which did not have any factual identity and creditworthiness. It was also gathered that the investment by such entities with the assessee group was mainly in the form of share capital which was subscribed at an abnormally high premium which lacked genuineness on their part to have agreed to subscribe at such premium without having received any return either in the form of dividends or appreciation in the value of their investment till date. He observed that search action further established beyond doubt that the assessee company like other group companies had received the impugned share capital from

various non-descript and shell entities/companies which grossly lacked creditworthiness and were in the nature of accommodation entries to convert the undisclosed income of the assessee group having been received in the form of such share capital from the stated entities/companies. He further observed that search action revealed the modus operandi of the assessee group for converting their undisclosed income through the aid of various personnel/employees who categorically admitted having aided the group in such misdemeanor by facilitating the process of creating various bogus companies within the group and having received share capital from such outside non-descript/shell companies and thereafter making the same available in the operating companies of the group through a layered structure as per the instructions of the promoter and his other employees/office bearers.

6.1 The Assessing Officer analyzed the tax returns from the income-tax data base and referred to the enquiries conducted on Delhi and Kolkata based companies. He also referred to the statement of Shri Narender Kumar Jain, who is close confidant and associate of the promoter of the MMG Group, Shri Sanjeev Agrawal and their CA, Shri Ashwani Verma, the statement of Shri Narinder Kumar Garg who is Director of M/s North Delhi Beverages Pvt. Ltd., the statement of Shri Sanjeev Aggarwal, who is director- cum-promoter of MM group companies, the statement of Shri Krishan Kumar Bajaj, General Manager-Finance of the assessee company. He further referred to the statement of various other

persons, the enquiries conducted u/s 133(6) of the I.T. Act and the summons issued to various directors of the non-descript companies u/s 131 of the I.T. Act which were either returned back or delivered but there was no response or only part compliance. Ultimately the Assessing Officer came to the conclusion that the assessee failed to establish the identity, creditworthiness and genuineness of the parties wherefrom funds were received by the investor of the assessee who are also group companies of the assessee group. Since the assessee has received an amount of Rs.6,46,20,000/- towards share capital and share premium and the assessee could not discharge the burden cast on it to the satisfaction of the Assessing Officer, he treated the same as unexplained cash credit u/s 68 of the I.T. Act as the income of the assessee for the relevant period under consideration.

7. Before the CIT(A), the assessee, apart from challenging the addition on merit, challenged the assumption of jurisdiction u/s 153A of the Act. It was submitted that original return in this case was filed on 30<sup>th</sup> September, 2009 declaring an income of Rs.10,21,50,894/- which was assessed at an income of rs.10,27,91,857/- u/s 143(3) of the Act. This assessment was subsequently rectified u/s 154 of the Act determining the total income at Rs.7,50,20,860/-. The search u/s 132 was conducted in this case on 28.03.2015 and notice u/s 153A was issued on 10.05.2016. It was argued that no incriminating material was detected as a result of search and the addition was made on the basis of post-search enquiries and statements recorded u/s 132(4) of the I.T. Act. Relying on various decisions, it



was argued that since no assessment was pending on the date of search and the addition has been made on the basis of post-search enquiries and statements recorded u/s 132(4) of various persons, therefore, the Assessing Officer has no power to assume jurisdiction under the provisions of section 153A of the I.T. Act.

8. So far as the merit of the case is concerned, it was submitted that the assessee had filed full details on account of the sum received from M/s Fortune Industrial Resources Ltd. (Rs.3,96,00,000/-), Sterling Foils Ltd. (Rs.2,00,10,000/-) and Mahesh Finese Pvt. Ltd. (Rs.50,10,000/-) towards share capital and share premium. It was submitted that the assessee has furnished the complete details including address and PAN of the investor companies along with the distinctive number of share certificates, the various cheques issued on different dates with the name of the bank, the name and address of the directors as on 31.03.2013, the complete copy of the income tax return for assessment year 2009-10, copy of Form No.2 of Moon Beverages Ltd. filed with ROC as 'Return of Allotment', copy of Board Resolution of the assessee company and various other details to substantiate the identity and creditworthiness of the investor companies and the genuineness of the transactions. Therefore, addition cannot be made u/s 68 of the [I.T. Act](#). It was accordingly argued that the addition made by the Assessing Officer should be deleted.

9. However, the Id.CIT(A) was not satisfied with the arguments advanced by the assessee. So far as the legal ground challenging the validity of assumption of

jurisdiction u/s 153A is concerned, he dismissed the ground raised by the assessee

by observing as under:-

5.1.1 have considered the submission of the Ld. A.R.. assessment order and cases law cited in this regard. The AO invoked the process u/s 153A after the search on appellant group on 28.03.2015 and on receipt of appraisal report from the DI (Investigation) with the allegation that the appellant company had received unexplained credit in its books u/s 68 of the IT Act. All the grounds of appeal are dealt with together being of similar nature.

5.2.The basic facts are as follows: The basis of addition as taken by the AO was statement recorded of Shri Sanjeev Agarwal during the course of search wherein he surrendered an amount of Rs. 88.52 crore out of which a sum of Rs. 30.78 crores were referred to for the assessment year 2008-09. The disclosure was non descriptive and vague and it was also contended that the appellant shall explain the transactions after examining the books of accounts. The said statement was retracted by said Shri Sanjeev Agarwal on 18.05.2015 within two months from the date of original statement. Though the appellant has stated to have recorded all the transactions under appeal in its books of account and offered all the necessary and relevant proof thereof as such. These being primary and basic the legal ground going to the root of the assessment, it is necessary to examine the nature of incrimination material conferring upon the AO necessary jurisdiction u/s 153 A to utilize such material arising consequent to the search operation. The material so found and seized and thereafter relied upon and utilized thereon in the assessment of the assessee leading the AO to conclude that the share application / capital received by the appellant are unexplained.

But, It is undisputed fact that the department found information in respect of the share certificates and the counterfoils thereof and other significant related material during the course of search operations that upon collating with the information received by the department lead to specific inputs in respect of doubtful nature on genuineness of the equity infused in the companies of the group. The material so gathered is prima facie incriminating in its nature and substance so as to attract the provisions of S. 153 A of the Act in the case of the appellant. The overall schema that emerges there from indicates that there was prima facie material available in this regard to enable the AO to initiate proceedings u/s 153A. The assessee contentions in this regard as under-

a)In respect of share certificate found during the course of search in respect of companies mentioned at serial no 1 & 2 It has also been submitted that companies JA Builders Ltd and JPM Automobiles Ltd was also assessed with the ACIT, Central Circle -13, New Delhi and the order have also been passed at the same time. In the order passed in the case of JA Builders Ltd and JPM Automobiles Ltd no addition towards share capital have been made. As

such the appellant contended that same Assessing officer while passing the order at the same time in respect of same issue has formed two different views.

b) The shares certificates found in respect of companies mentioned at serial no 3 to 5 is related to investments made by group concerns of JPM group and does not pertain to outsiders

5.3. These merit examination of the case under 153 A of the IT Act 1961. The availability of such documents raises valid doubts on the genuineness of the transactions involved herein. The issue of existence of incriminating material has to be considered in totality. The assessee cannot hide behind seizure or non seizure of documents. The same has to be construed with the trade practices and the expected action on part of an independent entity in normal circumstances. Any such entity will surely expect due returns or capital appreciation in due course. The investor is surprisingly bereft of interest in the matter. The AO and this appellate forum too have to construe the incriminating material in a harmonious fashion. Honøble Delhi High court has also reiterated in many rulings that action u/s 153 A is bound to be initiated in such situations. Therefore, this action of the AO is in tune with judgment of Honøble Delhi High Court in CIT (C)-III vs. Kabul Chawla (Delhi) [2015] 61 taxman.com 412 (Delhi), 234 Taxman 30. The same is further strengthened by the judgment of Honøble Delhi High Court in the case of Dayawanti Gupta vs CIT in -ITA Nos 357,358.359/2015 and otherø dated 27/10/2016. Having considered the detailed and belaboured submissions of the Ld AR and the material on record, I am drawn to the conclusion that the action of the AO does not go at variance with the provisions of law and the available jurisprudence in this matter in so far as invoking the proceedings per section 153A is concerned. The AO was well within his powers to invoke section 153 A of the Act on prima facie finding about information that surfaced during the search. Basis above discussions, these grounds of appeal are not sustainable. The ground No.4(a) and 4(b) are therefore dismissed.ö

10. He, however, deleted the addition made by the AO on merit by observing as under:-

ö5.4 Regarding the merits, as per ground of appeal No.3, I have gone through the assessment order passed by the AO and verified the material placed on paper book and was part, of the transaction and credit worthiness of the investors by issuing notices u/s 133(6) of the Act

- a) M/s Fortune Industrial Resources Limited, -
- b) Sterling Foils Limited v
- c) M/s Mahesh Finsec Pvt. Ltd. -

5.5. And information and documents requisitioned u/s 133(6) were as under:

- i) Relevant extracts Statements of bank account statement of the investors showing payments made towards share application money.
  - ii) Copies of allotment letters.
  - iii) Share Application form duly filled by the investor companies.
  - iv) Confirmation in respect of allotment of equity shares to the investors.
  - v) Copy of PAN card of the investor companies.
  - vi) Memorandum & Articles of Association of the investor companies clearly depicting their corporate identity number.
  - vii) Copies of share certificates issued by the assessee company,
  - viii) A chart showing details of director of the investor companies.
  - ix) A chart showing details of shareholders of the investor companies.
- i) Copies of the acknowledgement of the Income tax return filed for AY 2009-10 by the investor companies along with their audited financials for the year ended 31st March 2009.

5.6. The notice u/s 133(6) of the act was complied with and the requisite Information and documents were furnished to the AO required information and documents were available according to text of order itself. The assessee has furnished the details of financials of the investing entities. After considering the identities and financials and credit worthiness of the investor companies and genuineness of transaction and source and availability of fund by investors, I am of the considered view that the AO has merely accepted the appraisal report of the Investigation Wing without meeting the touchstone tests of section 68 like - credit worthiness, identities and genuineness of transaction. Further A.O has made such addition stating that the income declared by the investors is lesser than the investment made by them which in my opinion has no criteria it is only source and availability of fund which remain the factor to observe accordingly the addition made by A.O. u/s 68 of the Act is deleted.

5.7. Ld AR also placed reliance on the judgments in CIT vs. Sophia finance Ltd. [1994] 205 ITR 98 (FB) (Delhi), CIT vs. Nipuan Auto (P) Ltd. {[2014] 49 taxmann.com 13 (Del.) 361 ITR 155 (Del.), Commissioner of Income-tax vs Winstral Petrochemicals P. Ltd. 2011 330 ITR 603 (Del.), CIT v. Divine Leasing and Finance Ltd. [2008] 299 ITR 268 (Delhi), CIT v. Stellar Investments Ltd 192 ITR 287 (Del.) & CIT v. Stellar Investment Ltd 2001 251 ITR 263 (SC) and contended that the appellant duly discharged the initial burden to establish the identity, creditworthiness and genuineness by submitting necessary documentary evidences in respect of the share application money. Reliance is also placed on the judgments in CIT v. Lovely Exports Pvt. Ltd. 319 ITR (ST.) 5 (SC), CIT v. Divine Leasing & Fiance Ltd 299 ITR 268 (Del.), [SLP rejected by Honøble SC vide order dated

21.01.2008], CT=It vs Five Vision Promoters Pvt Ltd 65 taxmann.com 71 (Dehli HC), CIT v. Vrindavan Farms Pvt Ltd (ITA 71/2015) (Delhi He), CIT V. Kamdhenu Steel & Alloys Ltd. [2004] 361 ITR 0220 (Del HC).

5.8. It is pertinent to refer to the recent judgment dated 01st August 2017 in the case of Principal Commissioner of Income Tax, Delhi - 2 vs Best Infrastructure India Pvt Ltd ITA No 13/2017 covers the case of the appellant on the facts. Relevant Para of the judgment is extracted below:-

31. In Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia (supra), this Court had considered the entire gamut of case law on the assumption of jurisdiction under Section 153A of the Act. In Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia (supra) this Court had the occasion to extensively discuss the decision in Smt. Dayawanti Gupta v. CIT (supra) to point out why the said decision was distinguishable in its application to the facts of the former case. However, since the same arguments have been advanced by the Revenue in the present case, the said decision in Smt. Dayawanti Gupta v. CIT (supra) is being again discussed herein.

32. In Smt. Dayawanti Gupta v. CIT (supra) the Assesseees were dealing in the business of pan masala, gutkha, etc. Firstly, the Assesseees therein were, by their own admission not maintaining regular books of accounts. Secondly, they also admitted that the papers recovered during the search contained "details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside books of accounts" and they were "actually unaccounted transactions made by two of the firms of the Assesseees. Thirdly, the Court found as a matter of fact that the Assesseees were "habitually concealing income" and that they were "indulging in clandestine operations" and that such persons "can hardly be expected to maintain meticulous books or records for long." As pointed out by this Court in Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia (supra) the decision in Smt. Dayawanti Gupta v. CIT (supra), therefore, turned on its own facts and did not dilute the law explained in Commissioner of Income Tax (Central-III) v. Kabul Chawla (supra).

33. At this stage, it requires to be noticed that the decision of this Court in Commissioner of Income Tax (Central-III) v. Kabul Chawla (supra) took note inter alia of the decision of the Bombay High Court in Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 (Bom), wherein it was held that if no incriminating material was found during the course of search, in respect of each issue, then no addition in respect of any such issue can be made to the assessment under Sections 153A and 153C of the Act. The decisions of this Court in CIT v. Anil Kumar Bhatia (supra) and CIT v. Chetan Das Lachman Das [2012] 254 CTR 392 (Del) were extensively discussed in Commissioner of Income Tax

(Central-III) v. Kabul Chawla (supra). The Court in Commissioner of Income Tax (Central-III) v. Kabul Chawla (supra) had also discussed and concurred with the decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (2013) 36 Taxman 523 (Raj) which had held that the assessment in respect of each of the six assessment years, preceding the year of search "is a separate and distinct assessment." It was further held in the said decision that "If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated."

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.

-- Conclusion ó

44. Accordingly the question framed by the Court in IT A Nos. 11, 12 and 21 of 2017 by the order dated 21st March, 2017 is answered in the negative i.e. in favour of the Assessee and against the Revenue by holding that the additions made under Section 68 of the Act on account of the statements made by the Assessee's Directors in the course of search under Section 132 of the Act were rightly deleted by the ITAT. ö

5.9. Respectfully following the above judgment, which is on identical factual matrix, it can be reasonably inferred that material found during the

search in respect of the equity received by the assessee cannot lead to the conclusions drawn by the AO. No specific corroborative evidence has been brought on record by Assessing Officer to prove that the equity subscription is an accommodation entry. Besides, appellant has also discharged its onus and submitted all the documentary evidence in respect of the investment. The details submitted in this regard by the appellant have also been made part of order by Assessing officer. It is also undisputed fact that the director of the appellant companies have never made any statement regarding the share capital / share premium / share application money and no disclosure have been made with regard to share capital / share premium / share application money / unsecured loan. As such, the addition made by the Assessing officer is unsustainable on the various legal grounds and on facts of the case. The addition made in the case of the appellant is deleted. These grounds are accordingly allowed.ö

10.1 So far as M/s Moon Beverages Ltd. for A.Y. 2011-12 is concerned, the AO, apart from addition u/s 68, has made another addition of Rs.4,26,00,000/- being interest received on investments with Citi Bank, Gurgaon. The Id.CIT(A) deleted the same by observing as under:-

öAs per ground of appeal no. 4, the Appellant has raised objection on addition made by AO for Rs. 4,26,00,000/- on account of interest received from the Citi Bank. I have gone through the submission and facts of the case, the appellant has been victim of fraud committed by an authorized representative of the Citi Bank and had given deposits of Rs. 71.00 crores. Ultimately the appellant and bank had settlement which categorically mentioned that the depositor would get principal amount only and whatever paid earlier shall be appropriated toward the principal as such no interest payment either is paid or payable. In view of submission and citations given by the appellant in case of Rockwell Engineering Co. Ltd. Vs. CIT, (1989) 180 ITR 227 (Ker) that interest will be taxable only when the same is received after settlement of dispute. In the case of the assessee, since no interest was received, nothing was accordingly offered to tax as per the settlement of the dispute with Citi Bank. Similarly, where the income itself is subject matter of dispute, the law is now settled that the income cannot be treated as accruing or arising till such time as the dispute itself is finally settled as was decided in CIT vs. Hindustan Housing and Land Development Trust Ltd., [1986] 161 ITR 524 (SC). After considering the facts of the case, I am of opinion that the addition made of A.O. on account of notional interest of Rs. 4,26,00,000 is not sustainable as such the same is deleted.ö

11. Aggrieved with the order of the CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds for A.Y. 2009-10:-

1. On the facts & circumstances of the case the CIT(A) has erred in deleting the addition of Rs. 6,46,20,000/- made by AO on account of unexplained Share Capital and Share Premium u/s 68 of the I.T.Act 1961.

2. On the facts & circumstances of the case the CIT(A) has erred in holding the source of share capital genuine when it was specifically established that investor companies are paper companies.

3. The CIT(A) has erred on facts and in law in observing that requisite details and evidences filed by the assessee were sufficient to prove the genuineness of the transaction related to share capital/premium where as the assessee failed to discharge the primary onus case upon it u/s 68 of the IT act 1961 of proving identity, satisfactorily explaining the creditworthiness and genuineness of these transactions.

4. The Ld. CIT(A) has erred on facts and in law in not even considering the statements of directors of the investing companies admitting that the investing companies in which they are directors, are actually paper companies meant for providing accommodation entries.

5. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

12. The assessee has filed the CO by taking the following grounds:-

1. That the learned Commissioner of Income Tax (Appeals)-26, New Delhi has erred both in law and on facts in upholding the initiation of proceedings u/s 153 A of the Act and, framing of assessment u/s 153 A/143(3) of the Act since no incriminating material was found as a result of search conducted on the appellant and therefore, both the notice issued and, assessment framed were without jurisdiction and, deserved to be quashed as such.

1.1 That addition made of Rs. 6,46,20,000/- is without jurisdiction since it is not based on any material found as a result of search on the appellant, as have been also held by the judgments of Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla reported in 380 ITR 573 and Pr. CIT vs. Meeta Gutgutia reported in 395 ITR 526.

2. That since approval obtained u/s 153D of the Act was a mechanical and, invalid approval having been granted without due application of mind to



the facts of the assessee company, order of assessment made u/s 153 A/143(3) is invalid and not in accordance with law.

It is therefore, prayed that it be held that notice issued u/s 153A of the Act and also assessment framed u/s 153A/143(3) of the Act are without jurisdiction.ö

13. Similarly, the additions made by the AO in respect of the assessee for other years and for other assessees for different assessment years are as under:-

| Assessee                           | A.Y. 2009-10 | A.Y. 2010-11 | A.Y. 2011-12 | A.Y. 2012-13 |
|------------------------------------|--------------|--------------|--------------|--------------|
| Moon Beverages Ltd.                | 6,46,20,000  | 7,92,18,000  | 10,98,60,000 | 5,33,10,000  |
| Hindustan Aqua Ltd.                | 4,25,00,000  | -            | 4,25,00,000  | -            |
| Hal offshore Ltd.                  | 7,65,00,000  | 4,30,00,000  | 1,55,00,000  | 9,50,00,000  |
| Sunstar Infra Developers Pvt. Ltd. | -            | -            | -            | 2,91,00,000  |
| Fortune Industrial Resources Ltd.  | -            | -            | 9,00,00,000  | -            |
| Metbrass Plassim India Ltd.        | 5,24,00,000  | 1,50,00,000  | 6,30,00,000  | -            |
| Competent Infoways Pvt. Ltd.       | 4,63,63,000  | 2,11,50,000  | -            | -            |

14. Identical grounds have been taken by the Revenue in appeal filed in respect of the above cases and the respective assessees have filed cross objections taking identical grounds.

15. The Id. Counsel for the assessee, at the outset, strongly objected to the order of the Id.CIT(A) in upholding the initiation of proceedings u/s 153A of the Act and framing of assessment u/s 153A/143(3) of the Act. He submitted that in absence of any incriminating material *qua* addition in respect of non-abated assessment, no addition can be validly made. He submitted that the addition made in the instant

case is not based on any incriminating material found as a result of the search on respective assesseees. So far as the addition on account of share capital and share premium u/s 68 of the IT Act and the addition on account of interest received from Citi Bank (Addition of Rs.4.26 crores in case of Moon Beverages Ltd. for A.Y. 2011-12) is concerned, he submitted that no incriminating material was found as a result of search on the assessee. Referring to pages 1-9 of the common paper book, the Id. Counsel for the assessee submitted that a *panchnama* was drawn dated 30<sup>th</sup> March, 2015 in respect of the premises, namely, 1010, Vijaya Building, Barakhamba Road, New Delhi, which shows that the aforesaid search was initiated pursuant to purported warrant in the name of following entities:-

| Sr. No. | Name of the entity                | Address as per ROC   | If any incriminating document found from the address of Assessee under consideration |
|---------|-----------------------------------|--|--|
| i)      | Moon Beverage Limited             | Superior House 25, Bazar Lane, Bengali Market, New Delhi DL 110003 IN  | No.  |
| ii)     | Hindustan Aqua Limited            | Superior House 25, Bazar Lane, Bengali Market New Delhi DL 110003 IN   | No   |
| iii)    | HAL Offshore Limited              | 4wing B/Plot No.32 Corporate Aveneue - Premises, Off Mahakali Caves Road, Village Gundavali Paper Box, Mumbai Mumbai City MH 400093 IN | No   |
| iv)     | Fortune Industrial Resources Ltd  | 25, Bazar Lane, Bengali Market New Delhi Central Delhi DL 110001 IN  | No   |
| v)      | Lumax Builders Pvt. Limited       | 25, Bazar Lane, Bengali Market New Delhi Central Delhi DL 110001 IN  | No   |
| vi)     | Versatile Detamatics Pvt. Limited | Not under consideration  |  |
| vii)    | Superior Calltech Pvt. Limited    |  |  |
| viii)   | Swastika Calltech Pvt. Limited    |  |  |

|        |                                       |   |    |
|--------|---------------------------------------|---|----|
| ix)    | Horizon Infra Realtors Pvt. Limited   |   |    |
| x)     | Gemini Buildtech Pvt. Limited         |   |    |
| xi)    | Indo global infra energy limited      |   |    |
| xii)   | Metbrass Plassim India Limited        | 25, Bazar Lane, Bengali Market New Delhi Central Delhi DL 110001 IN | No |
| xiii)  | Adhist Garment Export Pvt. Limited    | Not under consideration   |    |
| xiv)   | Utility Developers Pvt. Limited       |   |    |
| xv)    | Goldsmith Realtech Pvt. Limited       |   |    |
| xvi)   | Maksad Buildwell Pvt. Limited         |   |    |
| xvii)  | Sunstar Infra Developers Pvt. Limited | 25 Bazar Lane Bengali Market New Delhi DL 110001 IN                 | No |
| xviii) | Sanjeev Agarwal                       | Not under consideration   |    |
| xix)   | Sanjeev Agarwal (HUF)                 | .   |    |

16. He submitted that it is evident from the above that no search has taken place in respect of M/s Competent Infoways (P) Ltd. The Id. Counsel, referring to page 42 of the assessment order of Moon Beverages Ltd. for A.Y. 2009-10 submitted that the seized document at page No.59 of A-10 is seized from corporate office of M/s Hindustan Aqua Ltd. at 1010, 10<sup>th</sup> Floor, Vijaya Building, Barakhamba Road, which is a flow chart showing details of flow of funds from one entity to another entity. He submitted that this document is not in the nature of incriminating material. Referring to the order of the CIT(A) in the case of Moon Beverages Ltd. for A.Y. 2010-11 at page 11, he submitted that the Id. CIT(A) has taken note of this document and did not find it to be incriminating in nature *qua* the addition made. However, for A.Y. 2009-10, the Id. CIT(A) has observed that the Department found information in respect of share certificates and the counterfoils thereof and other significant related material during the course of search operation that upon collating with the information received by the Department led to specific

inputs in respect of doubtful nature on genuineness of the equity infused in the companies of the group. According to the Id.CIT(A), the material so gathered is prima facie incriminating in its nature and substance so as to attract the provisions of section 153A of the Act in the case of the assessee. The Id. Counsel for the assessee submitted that such a finding is also vague and factually incorrect and in absence of any specific incriminating material qua the addition, no addition is tenable u/s 153A of the Act in view of the decision of the Honøble Delhi High Court in the case of CIT vs. Meeta Gutgutia, reported in 395 ITR 526.

16.1 Referring to the decision of the Honøble Delhi High Court in the case of PCIT vs. SMC Power Generation Ltd. reported in ITA 406/2019, order dated 23<sup>rd</sup> July, 2019, copy of which is paced at pages 429 to 432 of the common paper book, the Id. Counsel drew the attention of the Bench to para 10 of the said order which reads as under:-

ö10. The requirement that the incriminating material to have the co-relation to the particular addition sought to be made is a logic that will hold good not only for Section 153 C of the Act but in relation to Section 153A of the Act as well. Consequently, this Court does not find any error having been committed by the ITAT in accepting the plea of the Assessee that there is no incriminating document which was seized in the course of search relating to the addition sought to be made on account of the share capital. Therefore, the jurisdictional requirement of Section 153 A of the Act was not satisfied.ö

17. Referring to the decision of the Honøble Supreme Court in the case of CIT vs. Sinhgad Technical Education Society, reported in 397 ITR 344, he submitted that the Honøble Supreme Court in the said decision has upheld the decision of the

Honorable Bombay High Court where it has been held that incriminating material which was seized had to pertain to the assessment years in question.

18. The Id. Counsel for the assessee, referring to various other decisions, submitted that in absence of any incriminating material found during the course of search, no addition can be made in respect of completed assessment. He submitted that there is no discussion in the assessment order which would suggest that any incriminating material was found in the course of search relating to the said addition. In absence of reference of incriminating material in the assessment order, the addition made is bad in law and is liable for deletion.

19. The Id. Counsel for the assessee submitted that there was no surrender for the period under consideration, namely, A.Y. 2009-10 to 2015-16. The surrender was only for A.Y. 2007-08 which too was retracted within two months. Referring to the statement of Shri Sanjeev Agarwal on 29<sup>th</sup> March, 2015, he submitted that during the course of search, Shri Sanjeev Agarwal on behalf of MM Aggarwal group of companies made an offer of undisclosed income vide letter dated 29<sup>th</sup> March, 2015 in respect of F.Y. 2007-08, a copy of which is placed at page 83 of the paper book. He submitted that in the said letter, there was no surrender in respect of the period under consideration i.e., 2009-10 to 2015-16. Referring to pages 84 to 91 of the paper book, he submitted that even the surrender made by Sanjeev Aggarwal was retracted by him within a period of two months i.e., on 18<sup>th</sup> May, 2015. Referring to the order of the Tribunal in the case of Moon Beverages

Ltd., vide ITA No.7374/Del/2017 and in the case of Hindustan Aqua Ltd., vide ITA No.7567/Del/2007, common order dated 7<sup>th</sup> June, 2018 for A.Y. 2013-14, copy of which is placed at pages 226 to 261 of the paper book, the ld. Counsel for the assessee submitted that identical addition made on the basis of such surrender was deleted by the Tribunal. Referring to the decision of the Tribunal in the case of Metbrass Plassim India Ltd., vide ITA No.7532/Del/2017, order dated 17<sup>th</sup> September, 2018, for A.Y. 2013-14 and batch of other appeals, copy of which is placed at pages 370 to 398 of the common paper book, he submitted that here also identical addition made on the basis of such surrender was deleted by the Tribunal in the case of group companies.

20. The ld. Counsel for the assessee submitted that no assessment has abated for A.Y. 2009-10 to 2013-14 and, therefore, in absence of any incriminating material/document found during the course of search, no addition can be made in view of the decision of the Honorable Delhi High Court in the case of CIT vs. Kabul Chawla, 380 ITR 573 and in the case of CIT vs. Meeta Gutgutia reported in 395 ITR 526. The ld. Counsel submitted that the addition made and disputed in this appeal and assessment framed u/s 153A/143(3) of the Act is without jurisdiction since the addition made by the AO is not based on any incriminating material found as a result of the search on the assessee. He submitted that the search u/s 132 of the Act was conducted on 20<sup>th</sup> March, 2015 and no proceeding was pending on the date of search for the assessment year i.e., A.Y. 2009-10 to 2013-14 in

respect of various group assesseees. In other words, the assessments made prior to search had not abated under second proviso to section 153A of the Act and, therefore, the addition made is beyond the scope of assessment framed u/s 153A/143(3) of the Act. He submitted that as a result of the search no incriminating material qua the addition has been detected, therefore, the addition made on account of alleged share capital is without jurisdiction.

21. The Id. Counsel submitted that the statements recorded u/s 132(4) of the Act do not by themselves constitute incriminating material and, therefore, the same cannot be considered a basis to make addition unless corroborated by some incriminating material. The Id. Counsel for the assessee drew the attention of the Bench to the various statements relied on by the AO in the assessment order which are as under:-

| Sr. No. | Name of person  | Address  | Date of statement recorded | Extracts of statement at pages of Assessment order |
|---------|---|--|----------------------------|--|
| i)      | Sh Narinder Kumar Jain  | G-22/354-355, Sector-7, Rohini, Delhi.                                   | 28.03.2015                 | 16-27<br>28-29                                     |
| ii)     | Sh Mukesh Agarwal,<br>Director of MM Group M/s Moo Beverages Limited. | A-48, Chander Nagar, Ghaziabad, UP                                       | 28.03.2015                 | 27-28  |
| iii)    | Sh Narinder Kumar Garg  | Office premises of M/s North Delhi Beverages (P) Ltd                     | 28.03.2015                 | 28-29  |
| iv)     | Sanjeev Agarwal   |  | 28.03.2015                 | 43-49  |
| v)      | Sanjeev Agarwal   | 1010, 10 <sup>th</sup> Floor, Vijaya Building Barakhamba Road, New Delhi | 29.03.2015                 | 29-30, 32-37, 44-45                                |
| vi)     | Krishan Kumar Bajaj   | GM, M/s Moon Beverages Ltd   | 28.03.2015                 | 31-32  |

22. He submitted that no basis whatsoever is emerging with respect to the addition made. Further, the AO has failed to appreciate that there is no whisper of any particular company which is alleged to be in the business of providing accommodation entries. He submitted that the statements made are general in nature and do not contain any specific detail as to the name of the entry provider, amount of entry, bank details, etc. The statements so recorded do not in any way brought out any live nexus with the fact that the assessee company has routed its own unaccounted money through each of the shareholder companies and each of the shareholder companies were bogus and non-existent. Referring to the order of the Id. CIT(A), he submitted that he has referred to the statement so recorded of Shri Sanjeev Agarwal during the course of search u/s 132(4) of the Act. Referring to para 5 at page 12 of the order of Moon Beverages for A.Y. 2009-10 of the CIT(A), he submitted that the statement recorded during search u/s 132(4) of the Act in absence of any incriminating material as a result of search has no evidentiary value. For the above proposition, he relied on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Best Infrastructure (India) (P) Ltd., reported in 397 ITR 82, copy of which is placed at pages 438 to 451 of the common paper book. Referring to the decision of the coordinate Bench of the Tribunal in the case of M/s Brahmaputra Finlease (P) Ltd., vide ITA no.3332/Del/2017, order dated 29<sup>th</sup> December, 2017, for A.Y. 2007-08, a copy of which is placed at pages 465 to 484 of the paper book, he submitted that under identical circumstances the Tribunal has deleted the addition holding that the



statement u/s 132(4) cannot be treated as incriminating material found during the course of search. Referring to another order of the Tribunal in the case of DCIT vs. Pratap Singh Rajendra Hamola & Co., reported in 19 DTR 182 (Chd.), he submitted that here also the Tribunal held that statement recorded u/s 132(4) of the Act does not constitute incriminating material found as a result of the search. Similar view has been held in the case of CIT vs. Harjeev Agarwal reported in 290 CTR 263 (pages 452 to 464 of the common paper book) and Jodhpur Bench of the Tribunal in the case of Shree Chand Soni vs. DCIT, 101 TTJ 1028. Referring to various other decisions, the Id. Counsel for the assessee submitted that the statement recorded u/s 132(4) of the Act does not tantamount to unearthing of any incriminating evidence during the course of search and, therefore, no addition can be made on that score.

23. The Id. Counsel for the assessee submitted that the seized document at page 59 of Annexure A-19 is seized from the corporate office of M/s Hindustan Aqua Ltd. which is evident from page 42 of the assessment order of Moon Beverages Ltd. for A.Y. 2009-10 which is a third party premises in respect of the below mentioned assessee:-

| Sr. No. | Name of Cases                                      | Assessment Year             | ITA No. Appeal filed by Revenue | Cross Objection No. |
|---------|--|-----------------------------|---------------------------------|---------------------|
| i)      | Moon Beverages Ltd.                                | 2009-10                     | 115/D/18                        | 73/                 |
| ii)     | (25, Bazar Lane, Bengali Market, New Delhi-110001) | 2010-11                     | 116/D/ 8                        | 74/D/2018           |
| iii)    |  | 2011-12                     | 117/D 18                        | 75/D/2018           |
| iv)     |  | 2012-13                     | 118D/18                         | 76/D/2018           |
| v)      |  | 2014-15                     | 6955/D/18                       | 6/D/2018            |
| Vi)     |  | Metbrass Plassim India Ltd. | 2009-10                         | 815/D/18            |

|       |   |         |           |           |
|-------|---|---------|-----------|-----------|
| vii)  | (25, Bazar Lane, Bengali Market,<br>New Delhi-110001)                                       | 2010-11 | 124/D/18  | 71/D/2018 |
| viii) |   | 2011-12 | 125/D/18  | 72/D/2018 |
| ix)   | Hall Offshore Ltd.  | 2009-10 | 111/D/18  | 79/D/2018 |
| x)    | (25, Bazar Lane, Bengali Market,<br>New Delhi-110001)                                       | 2010-11 | 112/D/18  | 80/D/2018 |
| xi)   |   | 2011-12 | 113/D/18  | 81/D/2018 |
| xii)  |   | 2012-13 | 114/D/18  | 82/D/2018 |
| xiii) |   | 2015-16 | 6956/D/18 | 83/D/2018 |
| xiv)  | Competent Infoways (P) Ltd.   | 2009-10 | 128/D/18  | 84/D/2018 |
| xv)   | (25, Bazar Lane, Bengali Market,<br>New Delhi-110001)                                       | 2010-11 | 129/D/18  | 85/D/2018 |
| xvi)  | Sun Star Infra Developers (P) Ltd.<br>(25, Bazar Lane, Bengali Market,<br>New Delhi-110001) | 2012-13 | 816/D/18  | 88/D/2018 |
| xvii) | Fortune Industrial Resources Ltd.<br>(153/1, Nirankari Colony, Delhi -<br>110009)           | 2011-12 | 119/D/18  | 90/D/2018 |

24. Referring to the following decisions, he submitted that addition in above mentioned cases could have only been made u/s 153C of the Act:-

- i) ITA No.5870/Del/2017, dated 20.08.2019, Mr. Trilok Chand Chaudhary vs. ACIT;
- ii) IITA No.5585/Del/2015 dated 19.03.2019 DCIT vs. Smt. Shivani Mahajan;  
and
- iii) ITA No.5216/Del/2015 dated 26.05.2020 DCIT vs. S.R. Credits (P) Ltd.

25. So far as the Cross Objection No.2 is concerned, the ld. Counsel for the assessee submitted that the order of assessment passed u/s 153A/143(3) of the Act is invalid since approval obtained u/s 153D is not in accordance with law and the same has been granted without application of mind to the facts and law. The ld. Counsel submitted that the approval u/s 153D was granted mechanically in a routine manner without application of mind. Referring to the following table

which is as per para 13.2 of the written synopsis pages 48 and 49, the Id. Counsel for the assessee drew the attention of the Bench to the following details:-

| Sr. No. | Name of Cases                     | A.Y.    | ITA No. Appeal filed by Revenue | Cross Objection No. | Date of Draft order sent for approval. | Date of Approval | Date of order passed u/s 153A rws 143(2) |
|---------|-----------------------------------|---------|---------------------------------|---------------------|--|------------------|--|
| i)      | Moon Beverages Ltd.               | 2009-10 | 115/D/18                        | 73/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| ii)     |                                   | 2010-11 | 116/D/18                        | 74/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| iii)    |                                   | 2011-12 | 117/D18                         | 75/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| iv)     |                                   | 2012-13 | 118D/18                         | 76/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| v)      |                                   | 2014-15 | 6955/D/18                       | 6/D/2018            | Not known                              | 22.12.2017       | 22.12.2017                               |
| vi)     | Metbrass Plassim India Ltd.       | 2009-10 | 815/D/18                        | 70/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| vii)    |                                   | 2010-11 | 124/D/18                        | 71/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| viii)   |                                   | 2011-12 | 125/D18                         | 72/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| ix)     | Hindustan Aqua                    | 2009-10 | 122/D/18                        | 86/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| x)      | Ltd                               | 2011-12 | 123/D/18                        | 87/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xi)     | Hall Offshore Ltd.                | 2009-10 | 111/D/18                        | 79/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xii)    |                                   | 2010-11 | 112/D/18                        | 80/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xiii)   |                                   | 2011-12 | 113/D/18                        | 81/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xiv)    |                                   | 2012-13 | 114/D/18                        | 82/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xv)     |                                   | 2015-16 | 6956/D/18                       | ---                 | Not known                              | 22.12.2017       | 22.12.2017                               |
| xvi)    | Competent Infoways (P) Ltd.       | 2009-10 | 128/D/18                        | 84/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xvii)   |                                   | 2010-11 | 129/D/18                        | 85/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xviii)  | Sun Star Infra Developers (P) Ltd | 2012-13 | 816/D/18                        | 88/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xix)    | Fortune Industrial Resources Ltd. | 2011-12 | 119/D/18                        | 90/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |
| xx)     | Lumax Builders (P) Ltd.           | 2010-11 | 817/D18                         | 93/D/2018           | Not known                              | 29.12.2016       | 29.12.2016                               |

26. Referring to the provisions of section 153D and the CBDT Circular No.3 of 2008 dated 12<sup>th</sup> March, 2008, the Id. Counsel submitted that a combined reading of the both show that the approval granted u/s 153D does not reflect due application

of mind and, therefore, such approval given being not in accordance with the law, the assessment orders are liable to be quashed. For the above proposition, he relied on the decision of the Mumbai Bench of the Tribunal in the case of Shreelekha Damani reported in 173 TTJ 332 which was affirmed by the Honøble Mumbai High Court in the case of PCIT vs. Smt. Shreelekha Damani reported in 174 DTR 86. Referring to clause 9 of Manual of Office Procedure, Volume II (Technical) issued in the month of February, 2003 by the Directorate of Income-tax on behalf of CBDT, he submitted that the said clause mandates the assessing officer that he should submit the draft assessment order for such approval well in time. The submission of the draft order must be docketed in the order sheet. However, such mandatory direction prescribed by the CBDT has not been followed. Therefore, the approval granted u/s 153D for completing the assessment u/s 153A read with section 143(3) of the Act being mechanical in nature and granted without due application of mind, makes the assessment invalid and the same should be quashed. For the above proposition, the Id. Counsel also relied on the following decisions:

- i) Kalyankumar Ray vs. CIT, 191 ITR 634 (SC);
- ii) Sahara India F(rim) vs. CIT, 300 ITR 403 (SC);
- iii) Bently Nevada LLC vs. ITO, WP(C) 774/2019 (Del);
- iv) PCIT vs. Sunrise Finlease (P) Ltd., 252 Taxman 407 (Guj);
- v) CIT vs. Smt. Phoolmati Devi, 144 ITR 954 (All);
- vi) M/s M3M India Holdings vs. DCIT, 71 ITR (Trib) 451 (Del);

- vii) Smt. Indra Bansal vs. Acit, 192 TTJ (JD) 968;
- viii) Akil gulamali Sonji vs. ITO 137 ITD 94 (Pune) (upheld by Bombay High Court vide ITA No.1416-1419/2012 and SLP dismissed by Honøble Supreme Court in the case of CIT vs. Akil Gulamali in ITA No.1417/2012 dated 15.01.2013); and
- ix) Verma Roadways vs. CIT, 75 ITD 183 (All).

26.1 The Id. Counsel for the assessee submitted that approval envisaged u/s 153D of the Act is not merely an administrative approval but there is a statutory duty on the higher authorities to apply its mind before granting the approval. He submitted that this duty cannot be discharged mechanically by the officers as the inbuilt purpose to safeguard the interest of the citizens in that case cannot be fulfilled. He accordingly submitted that in view of the above decisions and various other decisions mentioned in the synopsis, the order passed by the AO is illegal and void ab-initio since the approval u/s 153D of the Act has been granted in a mechanical manner.

27. So far as the merit of the case is concerned, the Id. Counsel submitted that the assessee has discharged the burden of proof by producing the copies of audited financial statements, acknowledgement of return of income, bank statement, confirmation,, etc. and such evidence remained unrebutted. He submitted that all the investors have duly responded to the notice issued u/s 133(6) of the Act. Thus, the assessee has duly discharged the burden cast on it in terms of provisions of

section 68 of the Act i.e., by proving the identity and credit worthiness of the shareholders and the genuineness of the transaction. He submitted that the AO while making the addition u/s 68 of the Act failed to appreciate that the assessee has placed on record the entire evidence and material to discharge the burden which lay upon it u/s 68 of the Act. For the above proposition, the Id. Counsel relied on the following decisions:-

**øBURDEN OF ASSESSEE STOOD DISCHARGED AS ENTIRE EVIDENCE STOOD FURNISHED**

- i) 319 ITR 5 (St.) CIT v Lovely Exports (P) Ltd reported in
- ii) Civil Appeal no. 618 of 2010 dated 30.07.2010 (pages 1-2 of JPB-I) in case of Earthmetal Electrical (P) Ltd. reversing the decision of Mumbai Tribunal reported in 4 SOT 484 and Honøble High Court in ITA No. 590/2005 dated 15.10.2008
- iii) ITA No. 2525/D/2015 M/s Prabhatam Investment (P) Ltd. v. ACIT
- iv) C.O.No.163, 164 & 165/Del./2016 M/s. Garuda Imaging & Diagnostics Pvt. Ltd v. ACIT.
- v) 251 ITR 263 (SC) CIT vs. Stellar Investment Ltd. reported in

**SUPREME COURT**

- i) 319 ITR 5 (St.) CIT v Lovely Exports (P) Ltd.
- ii) 159 ITR 78 (SC) CIT vs. Orissa Corp. (P) Ltd
- iv) 262 Taxman 207 (SC) Pr. CIT v. Chain House International (P) Ltd. affirmed the judgment in the case of Pr. CIT v. Chain House International (P) Ltd. reported in 98 taxmann.com 47 (MP).

**DELHI HIGH COURT**

- i) ITANo. 645/2012 dated 13.1.2015 Funnay Time Finvest Ltd.
- ii) ITA No. 443/2014 dated 25.2.2015 (Del)CIT vs. Well Worth

Construction Udyog Ltd.

iii) ITA No. 778/2015(Del) dated 13.10.2015 CIT vs. Rakam Money Matters(P) Ltd.

iv) ITA No. 467/2016 (Del) dated 24.8.2016 Pr. CIT v. Lakshmi Float Glass Ltd. affirming the decision of Tribunal in ITA No. 535/D/2009 dated 31.3.2015 CIT(A) order dated 18.11.2008 and order of assessment dated 17.12.2007 u/s 143(3) of the Act

v) 387 ITR 636 (Del) CIT v. Softline Creations (P) Ltd.

vi) ITA No. 678/2016 dated 26.9.2016 (Del) Pr. CIT v. Muni Ram Verma

vii) 391 ITR 11 (Del) dated 11.1.2017 Pr. CIT vs M/s N.C. Cables Ltd.

viii) ITA No. 169/2017 (Del) dated 14.3.2017 Pr. CIT v. Laxman Industrial Resources Ltd.

ix) 101 CCH 004 (Del) dated 8.1.2018 Pr. CIT v. Oriental International Co. (P) Ltd.

x) ITA No. 130/2018 (Del) Dated 6.2.2018 Pr. CIT v. M/s Adamine Construction (P) Ltd.

xi) ITA No. 151/2018 (Del) dated 9.2.2018 Pr. CIT v. Rathilspat (P) Ltd.

xii) 237 Taxman 104 (Del) CIT vs. Shiv Dhooti Pearls & Investment Ltd.

xiii) 299 ITR 286 (Del) CIT vs. Divine Leasing & Finance Ltd

xiv) 330 ITR 298 (Del) CIT vs. Dwarkadhish Investment (P.) Ltd.

xv) 333 ITR 119 (Del) CIT vs. Oasis Hospitalities (P) Ltd.

xvi) 354 ITR 282 (Del) MOD Creations (P) Ltd. vs. ITO

xvii) 361 ITR 147 (Del) CIT v. Expo Global India Ltd.

xviii) 361 ITR 220 (Del) CIT v. Kamdhenu Steel and Alloys Ltd  
affirmed by

Apex Court in SLP No. 15640 of 2012 dated 23.12.2011

xix) 366 ITR 110 (Del) CIT vs. Empire Buildtech (P) Ltd.

xx) 380 ITR 289 (Del) CIT v. Five Vision Promoters (P.) Ltd.

xxi) ITA No. 71/2019 (Del) Pr. CIT vs. Priyatam Plaschem Pvt. Ltd affirming the decision of Delhi Tribunal in the case of M/s Priyatam Plaschem (P) Ltd. v. ITO reported in 53 CCH 0448.

xxii) WPC No.5536/2012 dated 16.01.2013 Pardesi Developers and Infrastructure Pvt Ltd.

xxiii) 300 CTR 501 (Del) CIT v. Russian Technology Centre (P) Ltd.

xxiv) 361 ITR 10 (Del) CIT v. Gangeshwari Metal (P) Ltd.

xxv) ITA No. 602/2019 dated 10.7.2019 Pr. CIT v. Kautilya Monetary Services (P) Ltd.

#### BOMBAY HIGH COURT

i) ITA No. 66/2016 dated 10.4.2017 Pr. CIT v. Paradise Inland Shipping (P) Ltd.

ii) 397 ITR 136 (Bom) CIT v. Orchid Industries (P) Ltd.

iii) 394 ITR 680 (Bom.) CIT v. Gagandeep Infrastructure (P) Ltd.

iv) 403 ITR 415 (Bom) PC.IT vs. Veedhata Tower (P) Ltd.

v) ITA No. 1502/2016 dated 26.5.2019 Pr. CIT v. Aditya Birla Telecom Ltd.

#### ALLAHABAD HIGH COURT

i) 350 ITR 220 (All) CIT vs. Jay Dee Securities and Finance Ltd.

ii) 350 ITR 222 (All) CIT vs. Misra Preservers (P) Ltd.

#### MADHYA PRADESH HIGH COURT

i) 356 ITR 65 (MP) CIT vs. Peoples General Hospital Ltd

ii) 262 Taxman 207 (SC) Pr. CIT v. Chain House International (P) Ltd. affirmed the judgment in the case of Pr. CIT v. Chain House International (P) Ltd. reported in 98 taxmann.com 47 (MP)

#### CALCUTTA HIGH COURT

i) ITA No. 263/2011 GA No. 2856/2011 (Cal) dated 21.9.2011 CIT vs. Dataware (P) Ltd.



ii) 2016 TIOL 1227 CIT v. J. J. Development (P) Ltd.

#### INCOME TAX APPELLATE TRIBUNAL

- i) ITA No. 6492/M/2016 AY 2007-08 Arceli Realty Ltd. v. ITO
- ii) ITA No. 453/D/2016 AY 2012-13 ACIT v. TRN Energy (P) Ltd.
- iii) ITA No. 5955/D/2014 AY 2010-11 dated 23.2.2018 Umbrella Projects (P) Ltd. Ltd.
- iv) 62 ITR (T) 512 (Del) ACIT v. Shyam Indus Power Solutions (P) Ltd.
- v) ITA No. 02 & 03/D2016 AY 2012-13 & 2013-14 ACIT v. DevSumanSindhu
- vi) ITA No. 3342/D/2013 ITO v. XO Infotech Ltd.
- vii) ITA No. 2525/D/2015 for Assessment year 2011-12 M/s Prabhatam Investment (P) Ltd. v. ACIT.
- viii) C.O.No.163, 164 & 165/Del./2016 M/s. Garuda Imaging & Diagnostics Pvt. Ltd v. ACIT
- ix) ITA No. 2995/D/2015 dated 30.11.2018 Roseberry Mercantile (P) Ltd. vs. ACIT
- x) ITA No. 2808/D/2016 dated 16.12.2016 M/s Aas Research & Solutions (P) Ltd. v. Pr. CIT
- xi) ITA No. 2534/Del/2018 dated 10.08.2018 M/s Priyatam Plaschem (P) Ltd vs ITO affirmed by Honøble High Court in the case of Pr. CIT v. Priyatam Plaschem (P) Ltd. in ITA No. 71/2019 dated 28.1.2019
- xii) ITA No. 5637/Del/2013 dated 01.10.2018 Rajat Export Import (India) Pvt Ltd vs ITO.,
- xiii) ITA No. 1162/Kol/2015 dated 14.6.2018 ITO v. Wiz-Tech solutions (P) Ltd.
- xiv) ITA No. 2924/Mum/2017 dated 16.5.2019 DCIT v. M/s Gladiolus Property & Inv. (P) Ltd.

xv) ITA No. 607/Mum/2019 AY 20121-3 dated 17.7.2019 Krishnaping Minerals (P) Ltd. v. DCIT

xvi) ITA No. 7006/Mum/2017 AY 2006-07 dated 18.7.2019 ITO v. Manila Gold (P) Ltd.

xvii) ITA No(s) 6315 & 6316/MOO 17 AYs 2013-14 and 2014-15 dated 8.8.2019 DCIT v. M/s DNS Spinners (P) Ltd.

xviii) ITA No. 193/Mum/2018 AY 2010-11 dated 15.5.2019 ACIT v. M/s Abani Sarbeswar Das

xx) 178 ITD 293 (Gau) DCIT v. ATC Realtors (P) Ltd.

xxi) ITA Nos 6834/D/2014 & 4713/D/2015 Assessment Years 2011-12 and 2012-13 dated 27.10.2020 DCIT v. Garg Acrylics Ltd. (pages 549-613 of Common Paper Book.

28. He accordingly submitted that even on merit also the addition cannot be made and, accordingly, the order of the CIT(A) should be upheld.

29. The ld. DR, on the other hand, heavily relied on the order of the AO. She submitted that the statement recorded on oath have got evidentiary value. She submitted that the AO in the instant case has proved that the identities and credit worthiness of such parties and genuineness of transaction regarding the amount of Rs.6,46,20,000/- towards share capital and share application money paid to the assessee company by several entities (firms/companies) are bogus, non-existent paper entities having no worth business to advance such huge share capital and share application money. Thus, the assessee company has miserably failed to prove all the three ingredients required as per the provisions of section 68 of the Act.

30. Referring to the decision in the case of CIT vs. MAF Academy (P.) Ltd. reported in 361 ITR 258, she submitted that the Hon'ble Delhi High Court in the said case has held that where assessee, a private limited company, sold its shares to unrelated parties at a huge premium and thereupon within short span of time those shares were purchased back even at a loss, share transactions in question were to be regarded as bogus and, thus, amount received from said transactions was to be added to assessee's taxable income under section 68 of the I.T. Act.

31. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Navodaya Castle Pvt. Ltd. reported in 367 ITR 306, she submitted that the Hon'ble High Court remitted the matter back to the Tribunal for fresh adjudication since the assessee was unable to produce the directors and the principal officers of the six shareholder companies and also that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer had genuine concerns about identity and creditworthiness of shareholders as well as genuineness of the transactions. She submitted that the SLP filed by the assessee was dismissed by the Hon'ble Supreme Court.

32. Referring to the decision of the Hon'ble Bombay High Court in the case of Konark Structural Engineering (P.) Ltd. vs. DCIT reported in 90 taxmann.com 56, she submitted that the Hon'ble High Court in the said decision has held that where assessee-company received certain amount as share capital from various shareholders, in view of fact that summons served to shareholders under section

131 were unserved with remark that addressees were not available and moreover those shareholders were first time assesseees and were not earning enough income to make deposits in question, impugned addition made by AO under sec. 68, was to be confirmed.

33. Referring to the decision in the case of Prem Castings (P.) Ltd. vs. CIT reported in 88 taxmann.com 189, she submitted that the Hon'ble High Court has held that where assessee company had received share capital from various contributors and admitted that alleged investors were close friends and business associates of its directors, burden was upon assessee to disclose true and correct details of said investors and since identity of alleged investors was never established additions made under section 68 was justified

34. Referring to the decision in the case of CIT vs. Nipun Builders & Developers (P.) Ltd. reported in 350 ITR 407, she submitted that the Hon'ble Delhi High Court has held that where assessee failed to prove identity and ITA No.7374/Del/2017 ITA No.7567/Del/2017 capacity of subscriber companies to pay share application money, amount so received was liable to be taxed under section 68.

35. Referring to the decision in the case of CIT vs. Nova Promoters & Finlease (P) Ltd. reported in 342 ITR 169, she submitted that the Hon'ble Delhi High Court has held that amount received by assessee from accommodation entry providers in

garb of share application money, was to be added to its taxable income under section 68.

36. Referring to the decision in the case of CIT vs. Ultra Modern Exports (P.) Ltd. reported in 40 taxmann.com 458, she submitted Hon'ble Delhi High Court has held that where in order to ascertain genuineness of assessee's claim relating to receipt of share application money, Assessing Officer sent notices to share applicants which were returned unserved, however, assessee still managed to secure documents such as their income tax returns as well as bank account particulars, in such circumstances, Assessing Officer was justified in drawing adverse inference and adding amount in question to assessee's taxable income under section 68.

37. Referring to the decision in the case of CIT vs. Frostair (P.) Ltd. reported in 26 taxmann.com 11, she submitted that the Hon'ble Delhi High Court has held that where details furnished by assessee about share applicants were incorrect, addition under section 68 was proper.

38. Referring to the decision in the case of CIT vs. N R Portfolio Pvt. Ltd. reported in 29 taxmann.com 291, she submitted that the Hon'ble Delhi High Court has held that if AO doubts the documents produced by assessee, the onus shifts on to the assessee to further substantiate the facts or produce the share applicant in assessment proceeding.

39. Referring to the decision in the case of CIT vs. Empire Builtech (P.) Ltd. reported in 366 ITR 110, she submitted that the Hon'ble Delhi High Court has held that u/s 68 it is not sufficient for assessee to merely disclose address and identities of shareholders; it has to show genuineness of such individuals or entities. She also relied on the following decisions :-

- (i) CIT vs. Focus Exports (P.) Ltd., 51 taxmann.com 46 (Delhi).
- (ii) PCIT vs. Bikram Singh, ITA No.55/2017 (Delhi).
- (iii) Rick Lunsford Trade & Investment Ltd. vs. CIT, 385 ITR 399 (Cal).

40. Referring to the decision in the case of Rick Lunsford Trade & Investment Ltd. vs. CIT [2016-TIOL-207-SC-ITJ (Supreme Court), she submitted that the Hon'ble Supreme Court has dismissed the SLP upholding the decision of the Hon'ble High Court that it is open to the Revenue Department to make addition on account of alleged share capital u/s 68, where the assessee company has failed to show genuineness of its shareholders. A.O. has categorically after making necessary inquires & after taking into consideration of investigation reports & search & seizure materials made the addition.

41. The ld. DR summarized the finding of the Assessing Officer and submitted that:

- (i) Such entities who have invested are paper-existing only without physical existence
- (ii) Such entities were never produced for examination by A.O

(iii) Such entities have no worthy business to advance such investment  
(iv) Such entities have no proper identity of existence without any creditworthiness (v) Such entities only indulged to provide accommodation entries of unaccounted/undisclosed Money routed through banking channel creation of PAN & filing of Income Tax returns etc. , thus doing only non-genuine transaction / bogus transaction (vi) Significant deficiencies/discrepancies have been established by the A.O. to prove identity as non-existent/bogus only paper entities / Creditworthiness is absent due to negligible/loss Income of such Entities / Genuineness of Transaction is only Sham/non-genuine.

42. So far as the order of the Id. CIT(A) deleting the addition on merit is concerned, the Id. CIT-DR submitted that the Id.CIT(A) has incorrectly deleted the addition made by the AO holding that the assessee has proved the identity and credit worthiness of the shareholders and genuineness of the transaction. Referring to the decision of the Honøble Delhi High Court in the case of PCIT vs. NDR Promoters (P) Ltd., reported in 410 ITR 379 and the decision of the Honøble Supreme Court in the case of PCIT vs. NRA Iron & Steel (P) Ltd., reported in 103 taxman.com 48 she submitted that mere production of certain papers do not discharge the ingredients of section 68 of the Act. She accordingly submitted that the Id.CIT(A) is not justified in deleting the addition on merit.

42.1 So far as the order of the CIT(A) in upholding the validity of assessment framed u/s 153A/143(3) of the Act is concerned, she heavily relied on the order of the CIT(A). The Id. DR also drew the attention of the Bench to the written synopsis while deciding the appeal of the assessee in the case of Moon Beverages Ltd. for A.Y. 2013-14 in ITA No.7374/Del/2017 which reads as under:-

õ32. So far as assessee company's grounds of Appeal regarding "no incriminating material is available" she filed the written synopsis and submitted that it has no merit on facts & law for following reasons:

i.Provision of section 153A of LT. Act 1961 inserted w.e.f 01.06.2003 is an OVERRIDING ( Notwithstanding) Provision if search & seizure is conducted after said date of insertion & in this case search & seizure was conducted at assessee's business/different premises covered under section 132 of the I.T. Act 1961 wherein documents/data storage devices etc. were found & seized & on examination & further Investigation on such seized details/Information it was found regarding bogus/non-existent entities who had advanced investment in assessee' company proving that Identity of such entities is not established, genuineness of transaction has been found to be NON-GENUINE & creditworthiness was never proved & such entities were only existing on paper without any physical presence as none of such entities was produced before the said A.O. being of bogus existence and as such these details/ information seized which prove bogus existence / non-genuine transaction having no creditworthiness of such parties can be treated as INCRIMINATING EVIDENCE against the said Assessee proving routing of undisclosed/unaccounted money circulated through bogus share capital & share premium invested by bogus entities & so ratios in Kabul Chawla case of Delhi High Court in 380 ITR 573 & Meeta Gutgutia reported in 395 ITR 526 are NOT applicable in this case being DISTINGUISHABLE as In this case incriminating materials in terms of name & addresses, amounts of accommodation entries etc. which in inquiry by the A.O. during assessment proceedings ultimately proved bogus / non-genuine & paper-entities etc.

ii. As search & seizure has been conducted in this case, question of assessment under other sections like 147 / 148 does not arise at all being prohibited under section 153A being OVERRIDING section under I.T. Act on the basis of materials found & seized u/s 132 of I.T. Act 1961.

iii. Bare & plain reading of provisions of section 153A of I.T. Act 1961 does not directly state any word like 'Incriminating material' in said section, however without prejudice, spirit of said provision may indicate materials



found & seized during search under section 132 which would be utilized as basic information for such assessment u/s. 153A & if on further inquiry/investigation by A.O. during assessment proceedings on such seized materials, unaccounted/undisclosed income has been found & established for said assessment. The A.O. in the said case relied on seized documents/information on prima-facie bogus share capital & share premium (valuation of which NOT as per provision of Income Tax Act 1961 as stated by Ld CIT(A) in Appeal order) and after conducting further inquiry/investigation on said seized materials/information the A.O. finally established bogus/ accommodation entries in terms of share capital & share premium as assessee miserably failed to prove identity of such Entities , genuineness of transaction found to be NON- GENUINE & creditworthiness which was never proved as such Entities were only existing on paper without any physical presence as none of such entities were produced before said A.O. for examination being bogus/paper in existence.

iv. In legal parlance, Incriminating material means materials which are used for wrongful / illegal act in violation of any law in existence. In this case the assessee company indulged in practice of avoiding genuine tax by routing undisclosed/unaccounted taxable income through bogus share capital & share premium investment by non- existent entities having no creditworthiness by non- genuine transaction thus falling under section 68 of Income Tax Act 1961. The basic information/materials obtained by seizure which were inquired/investigated further to establish by A.O. that Identity of such entities is not established, genuineness of transaction has been found to be NON-GENUINE & creditworthiness was never proved & such Entities were only existing without any physical presence as none of such entities was produced before said A.O. being bogus existence.

v. Had there been no search & seizure of such paper- documents from said Assessee, then A.O. could not have obtained basis information/details that ultimately, on further inquiry/investigation by A.O., during assessment proceedings, resulted to establish bogus share capital/share premium money as accommodation entries only for routing taxable undisclosed/unaccounted income in a wrongful manner.

vi. It is the wisdom of Legislation that no word/concept 'incriminating material' is directly incorporated in provision of section 153A of I.T. Act 1961, although spirit of said provision of section 153A indicate that search & seizure action u/s 132 has been done in the case of Assessee & panchnama has been drawn for said Assessee & that certain materials/information have been found/seized due to such search & that such found/seized materials/information have been utilized for purpose of assessment u/s 153A wherein A.O. has found or established undisclosed/unaccounted taxable income on further inquiry/investigation on such found/seized materials/information & thus such found & seized materials/information is

termed as 'Incriminating materials/information' against Assessee. Moreover A.O. is prohibited to take any action u/s 147/148 of LT. Act 1961 in case search & seizure u/s 132 has been done in the case of Assessee & certain materials/information have been found/seized in said assessee's case & assessment u/s 153A is mandated. Moreover, as on date said provision u/s 153A is valid law under Income Tax Act 1961.

vii. Any material/information found / seized u/s 132 of LT. Act 1961 is 'incriminating material' if on further inquiry/investigation by A.O., certain undisclosed/unexplained taxable income is found / established ultimately in assessment u/s 153A of LT. Act 1961.

43. She accordingly submitted that considering all facts and the cited case laws, the addition made by the AO should be sustained and the order of the CIT(A) deleting the addition should be reversed.

44. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer on the basis of various post search enquiries conducted and statement recorded of various persons u/s 132(4) and 131 made addition of Rs.6,46,20,000/-/- in the hands of the assessee u/s 68 of the I.T. Act on the ground that the assessee failed to substantiate with cogent evidence to his satisfaction regarding the identity and creditworthiness of the investor and the genuineness of the transaction. According to the Assessing Officer, since the assessee could not produce the directors/principal officers of the investor companies and since the returned income is meager considering the huge investment made by them in the shares of the assessee company with huge premium, therefore, the provisions of

section 68 are clearly attracted. We find, in appeal, ld. CIT(A) deleted the addition made by the Assessing Officer on merit, the reasons for which have already been reproduced in the preceding paragraph. He however has dismissed the ground raised by the assessee challenging the validity of assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search, reasons for which have already been reproduced in the preceding paragraphs.

45. It is the submission of the ld. counsel for the assessee that the original return was filed on 30<sup>th</sup> September, 2009 declaring income at Rs.10,21,50,894/- which was assessed u/s 143(3) at total income of Rs.10,27,91,857/-. This assessment was rectified u/s 154 of the Act determining the income at Rs.7,50,21,860/-. Thus, assessment was completed and the assessment was not pending on the date of search. Since the addition made by the Assessing Officer is not based on any incriminating material found during the course of search and addition has been made on the basis of post-search enquiry and on the basis of statements recorded u/s 132(4) of the I.T. Act, therefore, the same cannot constitute incriminating material so as to enable the Assessing Officer to assume jurisdiction u/s 153A of the I.T. Act.

45.1 So far as the finding given by the ld.CIT(A) that share certificates and counterfoils thereof were found which, according to him, is incriminating in nature, it is the submission of the ld. Counsel that in a corporate office the company is required to keep the share certificates and, therefore, the same cannot

be construed as incriminating in nature. So far as the seized document showing details of certain cash flow is concerned, it is the submission of the Id. Counsel that the said document was found and seized from the corporate office of M/s Hindustan Aqua Ltd., at 1010, Vijaya Building, Barakhamba Road, New Delhi, which is a flow chart and is not incriminating in nature. Further, it is also his submission that the said document was seized from third party premises in respect of other concerns/other assesseees and, therefore, addition, if any, could have been made u/s 153C of the Act and not u/s 153A of the Act. In any case, it is his submission that the said document is not incriminating in nature since the said chart showing details of advance for purchase of shares or refund of share application money are duly recorded in the books of account, a statement submitted before the AO and not controverted by him, and, therefore, cannot be said as incriminating in nature. So far as the statements recorded u/s 132(4) of the Act is concerned, it is also his submission that statements recorded u/s 132(4) cannot be construed as incriminating in nature in view of the various decisions cited.

46. It is also the submission of the Id. Counsel for the assessee that the investor companies have responded to the notice issued u/s 133(6) of the Act by the AO and the same has not been doubted or disputed. Further, the assessee by producing all the relevant materials, has discharged the burden cast on it in terms of section 68 of the Act i.e., the identity and credit worthiness of the share applicants and the

genuineness of the transaction. Not only this, the assessee has also proved the source of the source. Therefore, no addition u/s 68 is called for.

46.1 Before deciding the issue on merit, we would first like to decide the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search when the assessment was not pending. As mentioned earlier, the original return was filed on 30<sup>th</sup> September, 2009 declaring income at Rs.10,27,91,857/-. The assessment was completed u/s 143(3) determining the total income at Rs.10,27,91,857/-. This assessment was rectified u/s 154 of the IT Act determining the income at Rs.7,50,21,860/-. Thus, the assessment was completed and was not pending on the date of search. A perusal of the assessment order shows that the addition is not based on any incriminating material, but, based on post-search enquiries or statements recorded u/s 132(4) of the Act. The share certificates and counterfoils thereof found during the search, in our opinion, cannot be construed as incriminating in nature. Even the document appearing at page 59 of Annexure A-10 found and seized from the corporate office of M/s Hindustan Aqua Limited at 1010, Vijaya Building, Barakhamba Road, New Delhi, showing the details of advance for purchase of shares or refund of share application money in our opinion cannot be construed as incriminating since the entries are duly recorded in the books of account. The AO nowhere has disputed or challenged the above submission of the assessee before him as appears at page 43 of the

assessment order. Therefore, once the entries are recorded in the books of account, the same in our opinion cannot be construed as incriminating in nature. So far as statements u/s 132(4) is concerned, the same are also not incriminating in nature as held in various decisions. Under these circumstances, we are of the considered opinion that when the addition is not based on any incriminating material found as a result of search, no addition can be made u/s 153A/143(3) of the Act.

47. We find, identical issue had come up before the Tribunal in assessee's own case for A.Y. 2013-14. We find, the Tribunal vide ITA No.7374/Del/2017, order dated 7<sup>th</sup> June, 2018 for A.Y. 2013-14, while deciding the validity of assessment u/s 153/143(3) in absence of any incriminating material has observed as under:-

35. Before deciding the issue on merit, we would first like to decide the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search when the assessment was not pending as per ground of appeal no.1 to 1.2. It is an admitted fact that the original return of income was filed on 12.09.2013 which was accepted u/s 143(1) vide intimation dated 18.04.2014. The period for issue of notice u/s 143(2) expires on 30.09.2014 i.e. the notice u/s 143(2) could not have been served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Therefore, in absence of issue of any notice u/s 143(2) and since no other proceedings are pending, therefore, it had attained the finality much prior to the date of search on 28.03.2015. Under these circumstances, the finding of the Id. CIT(A) that the assessment proceedings were pending at the time of search and was abated is factually incorrect.

36. We find the Id. CIT(A) at para 5 page 11 of his order has observed as under :-

"The basis of addition as taken by the A.O. was statement recorded of Shri Sanjeev Agarwal during the course of search wherein he has surrendered an amount of Rs.88.52 crore out of which a sum of Rs. 30.78 crores were referred to for the assessment year 2008-09 and rest of amount was non descriptive and vague and surrendered subject to cross checking of the facts and to explain

after access to the books of accounts. The said statement was retracted by said Shri Sanjeev Agarwal on 18.05.2015 within two months from the date of original statement. Though the appellant has stated to have recorded all the transactions under appeal in its books of account and offered all the necessary and relevant proof thereof as such. Since the assessment proceedings were pending at the time of search and was abated, the legal ground objected as such by the appellant was not valid as such the same is bound to be rejected."

37. We further find from the order of the Id. CIT(A) that there was no surrender of income for the impugned assessment year and the surrender was only for the assessment year 2008-09 which too was retracted within two months. He has also observed that the statement was non descriptive and vague and subject to cross checking of fact to be explained after access to books of accounts. We, therefore, find merit in the submissions of the Id. counsel for the assessee that the addition made by the Assessing Officer u/s 68 of the I.T. Act is not based on any incriminating material and is based on statements recorded during search u/s 132(4) and post-search enquiries.

38. The Hon'ble Delhi High Court in the case of CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82 has held that statements recorded u/s 132(4) of the I.T. Act do not by themselves constitute incriminating material. The relevant observation of the Hon'ble High Court reads as under :-

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

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law."

39. We find the Hon'ble Delhi High Court in the case of CIT vs. Harjeev Aggarwal reported in 290 CTR 263 has observed as under :-

"23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the

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

40. The Co-ordinate Bench of the Tribunal in the case of Brahmputra Finlease (P) Ltd. vide ITA No.3332/Del/2017 order dated 29.12.2017, following the above decision of the Hon'ble Delhi High Court, has observed as under :-

"4.19 We find that in the case of best infrastructure (India) private limited (supra), despite the admission of accommodation entry in statements under section 132(4) of the Act, the court held that the statement do not constitute as incriminating material. In the instant case, neither is there any statement of any accommodation entry operator claiming that any entry was not provided nor any director has admitted that assessee obtained accommodation entry. Thus, the case of the assessee is on better footing then the case of Best Infrastructure (I) P. Ltd (supra). In such facts and circumstances, respectfully following the decision of the Hon'ble Delhi High Court in the case of best infrastructure (India) private limited (supra), we do not have any hesitation to hold that the statement under section 132(4) of Sh. Sampat Sharma cannot be treated as incriminating material found during the course of search. In the result, we hold that addition of share capital in the year under consideration has been made without relying on any incriminating material found during the course of search."

41. In the light of the above decisions, statements recorded u/s 132(4) of the I.T. Act, 1961 cannot constitute as incriminating material.

42. As mentioned earlier, the addition of Rs.11,85,00,000/- was not made on the basis of any incriminating material but is based on statements recorded during the search u/s 132(4) and post-search enquiries. It has been held in various decisions that completed assessments cannot be disturbed u/s 153A in absence of any incriminating material.

43. The Hon'ble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573 has held that the completed assessment can be interfered with by the Assessing Officer while making the assessment u/s 153A only on the basis of some incriminating material found on or 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 not



known in the course of original assessment. Following the above decision, the Hon'ble Jurisdictional High Court in the case of CIT vs. Meeta Gutgutia reported in 395 ITR 526 has taken a similar view and has held that once the assessment has attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings u/s 153A of the I.T. Act. This of course would not apply if incriminating materials are gathered in the course of search or during the proceedings u/s 153A which are contrary to and/or not disclosed during the regular assessment proceedings.

44. The Hon'ble Delhi High Court again in the case of Pr.CIT vs. Lata Jain reported in 384 ITR 543 has held that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A was not in accordance with law. The various other decisions relied on by the Id. counsel for the assessee also supports his case. The Hon'ble Supreme Court in the case of CIT vs. Sinhgad Technical Education Society reported in 397 ITR 344 has upheld the decision of Hon'ble Bombay High Court wherein the Hon'ble High Court had upheld the decision of the Tribunal holding that the incriminating material which was seized has to pertain to the assessment years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four assessment years.

45. Since in the instant case addition of Rs.11,85,00,000/- was made on the basis of statements recorded u/s 132(4) and post-search enquiry and no incriminating material was found/seized during the course of search, therefore, following the decisions cited (supra), we hold that no addition could have been ITA No.7374/Del/2017 ITA No.7567/Del/2017 made u/s 153A since the assessment was not abated in the instant case. In view of the above, we hold that the Id. CIT(A) was not justified in upholding the action of the Assessing Officer in assuming jurisdiction u/s 153A of the I.T. Act. Accordingly, the addition made by the Assessing Officer and upheld by the Id. CIT(A) in the 153A assessment proceedings being void ab-initio are deleted.

46. Since the assessee succeeds on this legal ground, arguments made by the Id. counsel for the assessee on merit are not adjudicated being academic in nature.ö

48. We find, the Honøble Delhi High Court in the case of PCIT vs. SMC Power Generation Ltd., ITA 406/2019, order dated 23<sup>rd</sup> July, 2019, copy of which is placed at pages 429 to 432 of the paper book, has observed as under:-

ö3. The question sought to be raised by the Revenue is whether the ITAT was justified in quashing the assessment order framed under Section 153A of the Income Tax Act, 1961 (Act) on the ground that there is no incriminating

material found qua the addition made on account of share application money in the course of the search?

4. The facts in brief are that a search and seizure operation under Section 132 of the Act was initiated in the case of the SMC Group on 4th August, 2011. Thereafter a notice dated 11th January, 2013 under Section 153A of the Act was issued to the Assessee to file return of income for the relevant year. The allegation was that the Assessee had not established the genuineness, identity and creditworthiness of the three entities from whom it had received share premium in the sum of Rs.3.00 crore, Rs.35 lakhs and Rs.2.65 crores during the AY in consideration. In the assessment order dated 31st March, 2014 under Section 143 (3) read with Section 153A of the Act, the AO made an addition of Rs.3.00 crores to the income of the Assessee disbelieving the contentions of the Assessee.

5. The appeal by the Assessee was allowed by the Commissioner of Income Tax (Appeals) [CIT (A)] by an order dated 21st May, 2015. The CIT (A) once again examined the documents produced by the Assessee and came to the conclusion that in the assessment framed earlier under Section 143(3) of the Act, the Revenue had accepted the amount received by the Assessee as share capital. It was held that there was no evidence to take a different view in the matter.

6. Aggrieved by the above order, the Revenue filed an appeal before the ITAT and the Assessee filed its cross objections. The cross-objections were on the basis of the decision of this Court in CIT v. Kabul Chawla 2015(380) ITR 573 wherein it was held that if no incriminating material was found at the time of search the addition would be unjustified.

7. At the outset it is required to be noticed that the Revenue's appeal against the decision of this Court in Kabul Chawla (supra) has been dismissed by the Supreme Court on account of the low tax effect. However, learned counsel for the Revenue states that there are other appeals of the Revenue pending in the Supreme Court questioning the correctness of the said decision. Nevertheless the fact remains that there is no stay of the operation of the decision of this Court in Kabul Chawla (supra) and it continues to hold the field.

8. Learned counsel for the Revenue submitted that the observations of the ITAT in the impugned order that there was no incriminating material in respect of the share capital and therefore the addition was unjustified, was not warranted. According to her this was beyond the judgment of this Court in Kabul Chawla (supra).

9. The fact remains that the Revenue itself is not disputing that in respect of the share capital no incriminating documents were found in the search proceedings. The Court's attention has been drawn to the decision of the Supreme Court in CIT v. Singhad Technical Education Society (2017) 397

ITR 344 (SC) where in the context of Section 153C of the Act it was held that the incriminating material which was seized had to pertain to the AY in question. It is further held that documents seized had to establish a co- relation documents wise with the assessment years for which the addition was sought to be made.

10. The requirement that the incriminating material to have the co-relation to the particular addition sought to be made is a logic that will hold good not only for Section 153 C of the Act but in relation to Section 153A of the Act as well. Consequently, this Court does not find any error having been committed by the ITAT in accepting the plea of the Assessee that there is no incriminating document which was seized in the course of search relating to the addition sought to be made on account of the share capital. Therefore, the jurisdictional requirement of Section 153 A of the Act was not satisfied.ö

49. We find, the coordinate Bench of the Tribunal in the case of ACIT vs. Versatile Polytech P. Ltd. vide ITA No.2257/Del/2018 and ITA No.1088/Del/2018 for A.Y.s 2009-10 and 2014-15 respectively, vide order dated 15<sup>th</sup> March, 2019, has held that no addition can be made u/s 153A in absence of any incriminating material found during the course of search. The relevant observation of the Tribunal from para 20 onwards read as under:-

ö20. We have considered the rival arguments made by both the sides and perused the relevant material available on record. We have also considered the various decisions cited before us. We find the original return of income in the instant case was filed on 29<sup>th</sup> September, 2009 and the assessment was completed u/s 143(3) on 26<sup>th</sup> December, 2011 at a loss of Rs.1,06,53,140/- and income u/s 115JB at Rs.1,19,22,760/-. We find the search took place in the instant case on 28<sup>th</sup> March, 2015 and on the date of search, the assessment was not pending. It is also an admitted fact that no incriminating material relating to the share application money was found during the course of search and the entire addition of Rs.3,66,00,200/- is based on pre-search verification or post-search enquiries and statements recorded u/s 132(4) of the Act. It is also pertinent to mention that the statements recorded u/s 132(4) relates to either MSG Finance India Pvt. Ltd. or Heritage Beverages Pvt. Ltd. and does not relate to the assessee, i.e., M/s Versatile Polytech P. Ltd. Therefore, the question that has to be answered is as to whether the addition u/s 153A in absence of any incriminating material found during the course of search can be sustained.

21. We find an identical issue had come up before the Tribunal in the case of the sister concern, namely, Moon Beverages Ltd. (supra). We find the Tribunal, relying on various decisions held that no addition could have been made u/s 153A since the assessment was not abated and the addition was made on the basis of statements recorded u/s 132(4) and post search enquiry and no incriminating material was found/seized during the course of search. While doing so, the Tribunal has relied on the decisions of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla reported in 380 ITR 573 (Del)*, *CIT vs. Meeta Gutgutia reported in 395 ITR 526*, *CIT vs. Harjeev Aggarwal reported in 290 CTR 263*, *CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82* and various other decisions. The relevant observations of the Tribunal from para 35 onwards read as under:-

35. Before deciding the issue on merit, we would first like to decide the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search when the assessment was not pending as per ground of appeal no.1 to 1.2. It is an admitted fact that the original return of income was filed on 12.09.2013 which was accepted u/s 143(1) vide intimation dated 18.04.2014. The period for issue of notice u/s 143(2) expires on 30.09.2014 i.e. the notice u/s 143(2) could not have been served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Therefore, in absence of issue of any notice u/s 143(2) and since no other proceedings are pending, therefore, it had attained the finality much prior to the date of search on 28.03.2015. Under these circumstances, the finding of the Id. CIT(A) that the assessment proceedings were pending at the time of search and was abated is factually incorrect.

36. We find the Id. CIT(A) at para 5 page 11 of his order has observed as under :-

"The basis of addition as taken by the A.O. was statement recorded of Shri Sanjeev Agarwal during the course of search wherein he has surrendered an amount of Rs.88.52 crore out of which a sum of Rs. 30.78 crores were referred to for the assessment year 2008-09 and rest of amount was non descriptive and vague and was ITA No.7374/Del/2017 ITA No.7567/Del/2017 surrendered subject to cross checking of the facts and to explain after access to the books of accounts. The said statement was retracted by said Shri Sanjeev Agarwal on 18.05.2015 within two months from the date of original statement. Though the appellant has stated to have recorded all the transactions under appeal in its books of account and offered all the necessary and relevant proof thereof as such. Since the assessment proceedings were pending at the time of search and was abated, the legal ground objected as such by the appellant was not valid as such the same is bound to be rejected."

37. We further find from the order of the Id. CIT(A) that there was no surrender of income for the impugned assessment year and the surrender was only for the assessment year 2008-09 which too was retracted within two months. He has also observed that the statement was non descriptive and vague and subject to cross checking of fact to be explained after access to books of accounts. We, therefore, find merit in the submissions of the Id. counsel for the assessee that the addition made by the Assessing Officer u/s 68 of the I.T. Act is not based on any incriminating material and is based on statements recorded during search u/s 132(4) and post-search enquiries.

38. The Hon'ble Delhi High Court in the case of CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82 has held that statements recorded u/s 132(4) of the I.T. Act do not by themselves constitute incriminating material. The relevant observation of the Hon'ble High Court reads as under :-

"38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts ITA No.7374/Del/2017 ITA No.7567/Del/2017 in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law."

39. We find the Hon'ble Delhi High Court in the case of CIT vs. Harjeev Aggarwal reported in 290 CTR 263 has observed as under :-

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

40. The Co-ordinate Bench of the Tribunal in the case of Brahmaputra Finlease (P) Ltd. vide ITA No.3332/Del/2017 order dated 29.12.2017, following the above decision of the Hon'ble Delhi High Court, has observed as under :-

"4.19 We find that in the case of best infrastructure (India) private limited (supra), despite the admission of accommodation entry in statements under section 132(4) of the Act, the court held that the statement do not constitute as incriminating material. In the instant case, neither is there any statement of any accommodation entry operator claiming that any entry was not provided nor any director has admitted that assessee obtained accommodation entry. Thus, the case of the assessee is on better footing then the case of Best Infrastructure (I) P. Ltd (supra). In such facts and ITA No.7374/Del/2017 ITA No.7567/Del/2017 circumstances, respectfully following the decision of the Hon'ble Delhi High Court in the case of best infrastructure (India) private limited (supra), we do not have any hesitation to hold that the statement under section 132(4) of Sh. Sampat Sharma cannot be treated as incriminating material found during the course of search. In the result, we hold that addition of share capital in the year under consideration has been made without relying on any incriminating material found during the course of search."

41. In the light of the above decisions, statements recorded u/s 132(4) of the I.T. Act, 1961 cannot constitute as incriminating material.

42. As mentioned earlier, the addition of Rs.11,85,00,000/- was not made on the basis of any incriminating material but is based on statements recorded during the search u/s 132(4) and post-search enquiries. It has been held in various decisions that completed assessments cannot be disturbed u/s 153A in absence of any incriminating material.

43. The Hon'ble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573 has held that the completed assessment can be interfered with by the Assessing Officer while making the assessment u/s 153A only on the basis of some incriminating material found on or 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 not known in the course of original assessment. Following the above decision, the Hon'ble Jurisdictional High Court in the case of CIT vs. Meeta Gutgutia reported in 395 ITR 526 has taken a similar view and has held that once the assessment has ITA No.7374/Del/2017 ITA No.7567/Del/2017 attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings u/s 153A of the I.T. Act. This of course would not apply if incriminating materials are gathered in the course of search or during the proceedings u/s 153A which are contrary to and/or not disclosed during the regular assessment proceedings.

44. The Hon'ble Delhi High Court again in the case of Pr.CIT vs. Lata Jain reported in 384 ITR 543 has held that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A was not in accordance with law. The various other decisions relied on by the Id. counsel for the assessee also supports his case. The Hon'ble Supreme Court in the case of CIT vs. Sinhgad Technical Education Society reported in 397 ITR 344 has upheld the decision of Hon'ble Bombay High Court wherein the Hon'ble High Court had upheld the decision of the Tribunal holding that the incriminating material which was seized has to pertain to the assessment years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four assessment years.

45. Since in the instant case addition of Rs.11,85,00,000/- was made on the basis of statements recorded u/s 132(4) and post-search enquiry and no incriminating material was found/seized during the course of search, therefore, following the decisions cited (supra), we hold that no addition could have been ITA No.7374/Del/2017 ITA No.7567/Del/2017 made u/s 153A since the assessment was not abated in the instant case. In view of the above, we hold that the Id. CIT(A) was not justified in upholding the action of the Assessing Officer in assuming jurisdiction u/s 153A of the I.T. Act. Accordingly, the addition made by the Assessing Officer and upheld by the Id. CIT(A) in the 153A assessment proceedings being void ab-initio are deleted.ö

22. Therefore, we do not find any infirmity in the order of the CIT(A) in deleting the addition made by the Assessing Officer in the absence of any incriminating material found during the course of search. Even though the Revenue has filed an appeal, the grounds of which are already reproduced in the preceding paragraphs, however, the Revenue has not challenged the order of the CIT(A) deleting the addition in absence of any incriminating material found during the course of search. Therefore, the order of the CIT(A) is upheld on the legal ground. Since the order of the CIT(A) deleting the addition on legal ground is upheld, therefore, the grounds raised by the Revenue on merit become infructuous being merely academic in nature. The appeal filed by the Revenue is accordingly dismissed.ö

49.1 We find, the coordinate Bench of the Tribunal in the case of M/s Metbrass Plassim India Ltd. vs. ACIT, ITA No.7532/Del/2017, order dated 17<sup>th</sup> September, 2018 (one of the group concerns and one of the assesseees here) for A.Y. 2013-14, has observed as under:-

36. We have considered the rival arguments made by both the sides in the light of the orders of the authorities below. We have also considered the case law that is brought to our notice. Ld. Assessing Officer made addition of Rs.39 lacs in the hands of the assessee u/s 68 of the Act basing on various enquiries conducted and statements recorded of various persons u/s 132(4) and 131, stating that the assessee failed to substantiate to his satisfaction the identity and creditworthiness of the investor and the genuineness of the transaction with cogent evidence. According to the Assessing Officer, since the assessee could not produce the investor company and since its returned income is meager considering the huge investment made by it in the shares of the assessee company with huge premium, therefore, the provisions of section 68 are clearly attracted.

37. Ld. CIT(A) also upheld the action of the Assessing Officer on merit in the appeal preferred by the assessee. He has also dismissed the ground raised by the assessee challenging the validity of assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search. Ld. CIT(A) alternatively also held that the addition is sustainable on account of mischief of provisions of section 56(2)(viib) read with Rule 11UA(1)cb, the reasons for which have already been reproduced in the preceding paragraph.

38. It is the submission of the ld. AR that the original return was filed on 26.09.2013 declaring income at Rs.1,84,981/- which was assessed u/s 143(1) of the Act. He further submitted that the period for issue of notice u/s 143(2) expired by 30.9.2014 since such notice cannot be served on the assessee after the expiry of six months from the end of the financial year in which the returns was furnished and thereby the assessment proceedings reached finality and there was no pending proceedings. It is not the case of the revenue that any notice u/s 143(2) of the Act was issued or served before the prescribed time limit and, therefore, the assessment on the date of search was not pending. Since the addition made by the Assessing Officer is not based on any incriminating material found during the course of search and addition has been made on the basis of post-search enquiry and on the basis of statements recorded u/s 132(4) of the Act, therefore, the same cannot constitute incriminating material so as to enable the Assessing Officer to assume jurisdiction u/s 153A of the Act.

39. Before advertng to the merits of the case, we deem it necessary to deal with the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A of the Act, in absence of any incriminating material found during the course of search when the assessment was not pending. It is an admitted fact that the original return of income was filed on 26.09.2013 which was processed u/s 143(1) of the Act. The period for issue of notice u/s 143(2) expired by 30.09.2014 i.e. the notice u/s 143(2) could not have been served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Therefore, in



absence of issue of any notice u/s 143(2) and since no other proceedings are pending, therefore, it had attained the finality much prior to the date of search on 28.03.2015. Under these circumstances, the finding of the Id. CIT(A) that the assessment proceedings were pending at the time of search and was abated is factually incorrect.

40. Para 5 page 11 of the impugned order reads that,-

“The basis of addition as taken by the A.O. was statement recorded of Shri Sanjeev Agarwal during the course of search wherein he has surrendered an amount of Rs.88.52 crore out of which a sum of Rs. 30.78 crores were referred to for the assessment year 2008-09 and rest of amount was non descriptive and vague and was surrendered subject to cross checking of the facts and to explain after access to the books of accounts. The said statement was retracted by said Shri Sanjeev Agarwal on 18.05.2015 within two months from the date of original statement. Though the appellant has stated to have recorded all the transactions under appeal in its books of account and offered all the necessary and relevant proof thereof as such. Since the assessment proceedings were pending at the time of search and was abated, the legal ground objected as such by the appellant was not valid as such the same is bound to be rejected.”

41. At this juncture reference to the case law relied upon by the Ld. AR becomes necessary. In CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82 the Hon'ble jurisdictional High Court has held that statements recorded u/s 132(4) of the Act do not by themselves constitute incriminating material, with the following observations:-

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

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law.”

42. Further in CIT vs. Harjeev Aggarwal reported in 290 CTR 263 (Del) Honøble Court observed that,-

ö23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.ö

43. The Co-ordinate Bench of the Tribunal in the case of Brahmaputra Finlease (P) Ltd. vide ITA No.3332/Del/2017 order dated 29.12.2017, following the above decision of the Honøble Delhi High Court, has observed as under :-

ö4.19 We find that in the case of best infrastructure (India) private limited (supra), despite the admission of accommodation entry in statements under section 132(4) of the Act, the court held that the statement do not constitute as incriminating material. In the instant case, neither is there any statement of any accommodation entry operator claiming that any entry was not provided nor any director has admitted that assessee obtained accommodation entry. Thus, the case of the assessee is on better footing then the case of Best Infrastructure (I) P. Ltd (supra). In such facts and circumstances, respectfully following the decision of the Hon'ble Delhi High Court in the case of best infrastructure (India) private limited (supra), we do not have any hesitation to hold that the statement under section 132(4) of Sh. Sampat Sharma cannot be treated as incriminating material found during the course of search. In the result, we hold that addition of share capital in the year under consideration has been made without relying on any incriminating material found during the course of search.ö

44. In the light of the above decisions, statements recorded u/s 132(4) of the Act, 1961 cannot constitute as incriminating material.

45. In this context, it could be seen from the order of the Id. CIT(A) that there was no surrender of income for the impugned assessment year and the surrender was only for the assessment year 2008-09 which too was retracted within two months. He has also observed that the statement was non descriptive and vague and subject to cross checking of fact to be explained after access to books of accounts. We, therefore, find merit in the submissions of the Id. counsel for the assessee that the addition made by the Assessing

Officer u/s 68 of the Act is not based on any incriminating material and is based on statements recorded during search u/s 132(4) and post-search enquiries.

46. As has been stated above, the addition of Rs.39 lacs was not made on the basis of any incriminating material, but is based on statements recorded during the search u/s 132(4) and post-search enquiries. It has been held in various decisions that completed assessments cannot be disturbed u/s 153A in absence of any incriminating material. We shall refer to the leading cases on this aspect.

47. The Honøble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573 has held that the completed assessment can be interfered with by the Assessing Officer while making the assessment u/s 153A only on the basis of some incriminating material found on or 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 not known in the course of original assessment. Following the above decision, the Honøble Jurisdictional High Court in the case of CIT vs. Meeta Gutgutia reported in 395 ITR 526 has taken a similar view and has held that once the assessment has attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings u/s 153A of the Act. This, of course, would not apply if incriminating materials are gathered in the course of search or during the proceedings u/s 153A which are contrary to and/or not disclosed during the regular assessment proceedings.

48. Again in the case of Pr.CIT vs. Lata Jain reported in 384 ITR 543 the Honøble Delhi High Court has held that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A was not in accordance with law. The various other decisions relied on by the Id. counsel for the assessee also supports his case.

49. In the case of CIT vs. Sinhgad Technical Education Society reported in 397 ITR 344 Honøble Supreme Court upheld the decision of Honøble Bombay High Court wherein the Hon'ble High Court had upheld the decision of the Tribunal holding that the incriminating material which was seized has to pertain to the assessment years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four assessment years.

50. Since in the instant case addition of Rs.39 lacs was made on the basis of statements recorded u/s 132(4) and post-search enquiry and no incriminating material was found/seized during the course of search, therefore, following the decisions cited (supra), we hold that no addition could have been made u/s 153A since the assessment was not abated in the instant case. In view of the above, we hold that the Id. CIT(A) was not justified in upholding the action of

the Assessing Officer in assuming jurisdiction u/s 153A of the Act. Accordingly, the addition made by the Assessing Officer and upheld by the Id. CIT(A) in the 153A assessment proceedings being void ab-initio are deleted.

51. Inasmuch as the assessee succeeds on the legal ground, we deem it not necessary to delve deeper into the arguments made by the Id. counsel for the assessee on merit since such adjudication would be academic in nature.ö

49.2 In view of the above discussion, we are of the considered opinion that since the addition is not based on any incriminating material found during the course of search, therefore, such assessments framed u/s 153A/143(3) is not in accordance with law and is liable to be quashed. Our above view is fortified by the recent decision of the Honöble Delhi High Court in the case of PCIT vs. M/s L.T. Foods Pvt. Ltd., vide ITA No.67/2020 and CM No.4576-77/2020, order dated 4<sup>th</sup> February, 2020 wherein the Honöble High Court has observed as under:-

ö The Revenue appeals against the order dated 03.07.2019 passed by the Income Tax Appellate Tribunal, Delhi Bench -Dø, New Delhi in ITA No.4162/Del/2013 and ITA No.4044/Del/2013. The first was an appeal preferred by the assessee and the second was an appeal preferred by the Revenue in relation to the Assessment Year 2005-06. The Tribunal allowed the appeal of the assessee and disallowed the appeal of the Revenue on the premise that the Revenue had not been able to establish that any of the additions made during the course of the assessment proceedings were premised on any incriminating material found during the search of the Dawat Group of Companies ó to which the assessee belongs. The Tribunal has held in paragraph 40 of the impugned order as follows:

*“40. We have carefully considered the rival contention and perused the orders of the lower authorities. It is apparent that on the date of initiation of search on 10/2/2009 the assessment proceedings u/s 143 (3) of the income tax act was completed on 18/12/2007. Therefore on the date of search no assessment proceedings were pending for the impugned assessment year. Therefore if any addition is required to be made by the learned assessing officer should have been made on the basis of the seized material found during the course of search. We have perused the various additions/disallowances made by the learned assessing officer and found that there is no discretion of any seized material found during the course of search based on which these disallowances/additions have been made. The learned departmental*

*representative also could not show us any seized material based on which the said additions have been made. Therefore, respectfully following the decision of the honourable Delhi High Court in CIT vs Kabul Chawla (supra) the above additions deserve to be deleted. Accordingly we direct the learned assessing officer to delete the disallowance of payment in contravention is of provisions of section 40A (3) of the income tax act, disallowance of expenses on account of nondeduction and short deduction of tax at source and addition on account of personal expenditure. In the result, we reverse the order of the learned CIT - A income from the above disallowances and allow the appeal of the assessee to these extent. ”*

The Assessing Officer, while passing the assessment order, has not clearly stated as to what is the incriminating material on the basis of which the additions were sought to be made. The co-relation between the so-called incriminating material ó which has not even been disclosed, and the additions made, should have been established by the Assessing Officer, which had not been done.

In these circumstances, in our view, no substantial question of law arises for our consideration.

Dismissed.ö

49.3 In view of the above discussion, we allow the ground of cross objection No.1 and hold that since no incriminating material was found as a result of the search conducted on the assessee, therefore, the notice issued for initiation of proceedings u/s 153A and the assessment framed subsequently are without jurisdiction and deserves to be quashed. We hold and direct accordingly.

50. Since the assessee succeeds on this first legal ground, therefore, the validity of the assessment in absence of any proper approval u/s 153D does not require any separate adjudication being academic in nature. Similarly, since the assessee succeeds on the first legal ground, the order of the CIT(A) deleting the addition on merit also become academic in nature and does not require any adjudication. The

CO filed by the assessee is accordingly allowed and the appeal filed by the Revenue is dismissed.

51. Identical grounds have been taken by the Revenue in the remaining appeals and identical grounds have been raised by the assessee in the cross objections. Since the additions in the other appeals also are not based on any incriminating material found during the course of search and since we have already held that statements recorded u/s 132(4) are not incriminating in nature, therefore, the addition made by the AO being not based on any incriminating material, the addition cannot be sustained in the orders passed u/s 153A/143(3) of the Act. Therefore, the first legal ground in all these cross objections are allowed and all the appeals filed by the Revenue being academic in nature are dismissed.

52. In the result, all the Cross Objections filed by the assesseees are allowed and all the appeals filed by the Revenue are dismissed..

Order pronounced in the open court through video conferencing on 27<sup>th</sup> November, 2020.

Sd/-

(SUCHITRA KAMBLE)  
JUDICIAL MEMBER

Dated: 27<sup>th</sup> November, 2020.

dk

Sd/-

(R.K. PANDA)  
ACCOUNTANT MEMBER

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi