

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

**ITA No.7374/Del/2017
Assessment Year : 2013-14**

Moon Beverages Ltd., 25, Bazar Lane, Bangali Market, New Delhi.	Vs.	ACIT, Central Circle- 15, New Delhi.
PAN : AAACM1635J		
(Appellant)		(Respondent)

**ITA No.7567/Del/2017
Assessment Year : 2013-14**

Hindustan Aqua Ltd., 25, Bazar Lane, Bangali Market, New Delhi.	Vs	ACIT, Central Circle- 15, New Delhi.
PAN : AAACH3298J		
(Appellant)		(Respondent)

Assessee by : Shri Gautam Jain, Adv.
Shri Lalit Mohan, Adv.
Department by : Ms. Shefali Swaroop, CIT-DR
Date of hearing : 03-04-2018
Date of pronouncement : 07-06-2018

ORDER

PER R. K. PANDA, AM :

The above two appeals filed by the respective assesseees are directed against the separate orders of the CIT(A)- XXVI, New Delhi relating to assessment year 2013-14. Since identical grounds have been taken by the

respective assesseees in their appeals, therefore, for the sake of convenience, these were heard together and are being disposed of by this common order.

ITA No.7374/Del/2017 (Moon Beverages Ltd.) :

2. 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 procure 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.. 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 I.T. Act, 1961 issued to the assessee on 10.05.2016, the assessee filed the return of income on 29.06.2016 declaring a total income of Rs.7,42,51,690/-.

2.1 During the course of assessment proceedings, the Assessing Officer observed that the assessee has raised share capital of Rs.11,85,00,000/- from Superior Industrial Enterprises Ltd. on account of issue of 3,16,000 shares of Rs.10/- each with premium of Rs.365/-. 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. 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 confident 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.11,85,00,000/- 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.

3. Before the Id. CIT(A), the assessee apart from challenging the addition on merit challenged the assumption of jurisdiction u/s 153A of the I.T. Act. It was submitted that the original return was filed on 29.08.2013 declaring an income of Rs.7,42,51,690/- which was processed u/s 143(1) on 18.04.2014. 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) on various persons, therefore, the Assessing Officer has no power to assume jurisdiction under the provisions of section 153A of the I.T. Act.

4. 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 Superior Industrial Enterprises Ltd. towards share capital and share premium. It was submitted that the assessee has furnished the complete address and PAN number of the investor company 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 2013 14, 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.

5. However, the ld. 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 :-

"I have carefully considered the submission of the Ld. AR., assessment order and cases law cited by him. I have also perused the assessment order and find that the A.O. proceeded to frame assessment u/s 153A after the search on appellant group on 28.03.2015 and on receipt of appraisal report from the DI (Investigation) that the

appellant company has received an unexplained credit in its books u/s 68 of the IT Act.

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. 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 153A 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. 153A 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*

These merit examination of the case under 153A of the I T 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. Hon'ble Delhi High court has also reiterated in many rulings that action u/s 153A is bound to be initiated in such situations. Therefore, this action of the AO is in tune with judgment of Hon'ble 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 Hon'ble Delhi High Court in the case of Dayawanti Gupta vs CIT in 'ITA Nos 357,358,359/2015 and other' 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 153A 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.

6. So far as the addition on merit is concerned, ld. CIT(A) also dismissed the said ground by observing as under :-

“B. As far as the merits of the case are concerned, I have gone through the assessment order passed by and A.O. and verified the material placed on paper book and was part of the assessment records also. The summon was issued but the same was not delivered also the following information and documents were requisitioned by issuing notice u/s 133(6) of the Act

- 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.*

B1. It is required to refer to here the section 68 as amended from AY 2013-14 onwards. The section confers enhanced onus on the investing entity in the assessee by virtue of the proviso.

This reads as under-

"Cash credits.

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

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

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

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

The appellant has neither produced the investor nor arranged to provide the requisite information and documents directly from it as such failed to substantiate its contention. The onus to prove its contentions has not been discharged by the assessee appellant. Concept of Onus is dynamic no doubt, but the assessee is required to first discharge the onus cast upon by way of information in possession of the department based on the seizure of such documents that create prima facie basis for the AO to arrive at his conclusions. The assessee has presented a whole series of jurisprudence without substantively discharging its onus. Such onus does not shift back by the mere act of the assessee in plainly denying the imputations without really offering corroborative data or any substantive contentions to establish its case to rebut the imputation. The appellant fails on this count as the primary onus is yet not discharged. I find no substantive basis to accept the contentions of the assessee. The addition in this regard is has to be confirmed as the available jurisprudence is clearly distinguishable on the facts of the case. Accordingly the addition made by A.O. u/s 68 of the Act [as applicable for A Y 2013-14 onwards] is sustainable."

7. The ld. CIT(A) further observed that effect from assessment year 2013-14 onwards, the provisions of section 56(2)(viib) are attracted to the case of the assessee. He observed that the share premium charged by the assessee clearly falls within the mischief of this section in absence of assessee furnishing a

reliable and robust basis of valuation of such equity shares as per Rule 11UA(1)cb of the I.T. Act. The relevant observation of the Id. CIT(A reads as under :-

“C. There is another aspect to such transactions with effect from AY 2013-14 onwards. In this regard, it is also pertinent to refer to section 56 (2) vii b, which reads as under:

“56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely:-

(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares: Provided that this clause shall not apply where the consideration for issue of shares is received- (i) by a venture capital undertaking from a venture capital company or a venture capital fund; or (ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation.-For the purposes of this clause,-

(a) the fair market value of the shares shall be the value- (i) as may be determined in accordance with such method as may be prescribed; or (ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher;

(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of 94[Explanation] to clause (23FB) of section 10;]" [emphasis supplied]

C1. The share premium charged by the appellant clearly falls within the mischief of this section in absence of assessee furnishing a reliable and robust basis of valuation of such equity. The relevant rule in this regard is rule 11 A(1) cb. The assessee is in clear mischief of the same, hence the premium charged by the assessee is to be subjected to the provisions of section 56 (2) viib read with rule 11UA (1)cb. It

is bounden on the assessee to furnish reliable valuation determining such share premium as in its case for the AY 2013-14, from a qualified valuer. The assessee has not done the same, nor has any submission filed before me in this regard. The share premium so charged for this year falls in clear mischief of the provisions of law as discussed above. The same premia are, therefore, to be brought to tax. As the addition in case of the assessee has been upheld for this period, the addition here above will get subsumed in the quantum added by the AO u/s 68, However, in case of any alterations in income computations later on, the provisions as discussed above shall get invoked. The AO is directed to make a note of the same in the file also.

8. Aggrieved with such order of the Id. CIT(A), the assessee is in appeal before the Tribunal by raising 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 153A of the Act and, framing of assessment u/s 153A/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 and upheld of Rs. 11,85,00,000- 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.

1.2 That finding off the learned Commissioner of Income Tax (Appeals) that it is a case of abated assessment is factually incorrect and, thus in absence of jurisdiction the action is entirely vitiated.

2 That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining an addition made by learned Deputy Commissioner of Income of Rs. 11,85,00,000/- (Rs. 31,60,000/- + Rs. 11,53,40,000/-) on account of sum received from M/s Superior Industrial Enterprises Ltd. as share capital and share premium and erroneously held as unexplained cash credits under section 68 of the Act particularly when no incriminating material either in the shape of unexplained cash or investment or document had been detected as a result of search on the appellant company or even gathered in the instant assessment proceedings:

2.1 That while sustaining the aforesaid addition the learned Commissioner of Income Tax (Appeals) has completely overlooked that there was no adverse material brought on record by the learned Assessing Officer to assume that credits by way of share capital represents unexplained cash credit and, burden which lay upon the assessee in terms of section 68 of the Act had not been discharged.

2.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that once the aforesaid share holder had duly confirmed the investment made, he could not have upheld the addition on arbitrary grounds and that too

without bringing any evidence or even alleging that aforesaid credits by way of share capital emanated from the source of funds provided by the appellant company.

2.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the shareholder was a corporate entity, duly assessed to tax and, had subscribed to share-capital through banking channels and supported by necessary documents, share capital received could not in law or on fact be brought to tax u/s 68 of the Act.

2.4 That the learned Commissioner of Income Tax (Appeals) has also failed to appreciate that appellant had placed on record voluminous evidences to discharge the burden with regard to both genuineness of the transactions and creditworthiness of the share applicants and therefore, in absence of any whisper to rebut the said evidence, the credits could not arbitrarily be regarded as unexplained cash credit under section 68 of the Act.

2.5 That reliance placed on section 56(2)(vii)(b) of the Act and, various judgments to bring to tax a credit duly recorded and, explained is based on complete misconception and, thus unsustainable.

2.6 That various adverse findings by the learned Commissioner of Income Tax (Appeals) to sustain the addition is factually incorrect, contrary to record and are not based on proper appreciation of law and therefore, untenable.

3. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding the levy of interest under section 234A, u/s 234B, u/s 234C and u/s 234D of the Act which are not leviable on the facts and circumstances of the case of the appellant company.

It is therefore, prayed that, it be held that assessment made by the learned Assessing Officer and sustained by the learned Commissioner of Income Tax (Appeals) be quashed and further addition so upheld by the learned Commissioner of Income Tax (Appeals) along with interest levied be deleted and appeal of the appellant company be allowed.”

9. Ld. counsel for the assessee at the outset strongly objected to the order of the Id. CIT(A) dismissing the appeal of the assessee. So far as ground relating to the validity of assumption of jurisdiction u/s 153A is concerned, he submitted that the addition made by the Assessing Officer and sustained by the Id. CIT(A) is illegal and beyond the scope of provisions of section 153A/143(3) of the I.T. Act. He submitted that on the date of search on 28.03.2015 no incriminating material was found in respect of the addition made by the Assessing Officer and

the assessment was not pending. Neither the Assessing Officer nor the Id. CIT(A) has referred to any incriminating material found as a result of search while making/sustaining the addition. He submitted that the sum offered by Mr. Sanjeev Aggarwal in his statement recorded u/s 132(4) amounting to Rs.88.52 crores comprised of two components i.e. pertaining to assessment year 2008-09 – Rs.30.78 crores and balance – Rs.57.74 crores. He submitted that Shri Sanjeev Aggarwal has retracted from his statement regarding surrender of income to the extent of 30.78 crores pertaining to assessment year 2008-09 which is evident from pages 30 to 35 of the Paper Book.

9.1 Referring to the decision of the Delhi Bench of the Tribunal in the case of *Brahmaputra Finlease (P) Ltd vs. DCIT* vide ITA No.332/Del/2017 order dated 29.12.2017 for assessment year 2007-08, 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 and the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Harjeev Aggarwal* reported in 290 CTR 263, he submitted that the statements recorded u/s 133(4) do not by themselves constitute incriminating material.

10. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla* reported in 380 ITR 573, the decision in the case of *Pr.CIT vs. Meeta Gutgutia* reported in 395 ITR 526 and various other decisions,

he submitted that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A is not in accordance with law. He also relied on the following decisions :-

- (i) Pr.CIT vs. Lata Jain, 384 ITR 543.
- (ii) 211 Taxman 61 (Del) CIT v. Chetan Das Laxhman Das.
- (iii) 352 ITR 493 (Del) CIT vs. Anil Kumar Bhatia.
- (iv) 380 ITR 571 (Del) CIT vs. Kurele Paper Mills P. Ltd. dated 06.07.2015.
- (v) 241 Taxman 440 (Del) CIT vs. MGF Automobiles Ltd.
- (vi) ITA No.634/2015 Pr. CIT vs. Smt. Kusum Gupta.
- (vii) W.P. (C) 8721/2014 & CM No 20052/2014 Praveen Kumar Jolly.
- (viii) IT Appeal No.810/2016 Pr CIT vs. Mahesh Kumar.
- (ix) IT Appeal Nos.61 & 62/2017 Pr. CIT vs. Ram Avtar Verma.
- (x) 397 ITR 82 Pr CIT vs. Best Infrastructure (India) (P) Ltd.

11. So far as merit of the case is concerned, he submitted that the assessee for the impugned assessment year has received an amount of Rs.11,85,00,000/- on account of issue of 3,16,000 shares of Rs.10/- with a premium of Rs.365 each from M/s Superior Industrial Enterprises Ltd.. The assessee had given details of the said company such as Complete Address with PAN numbers, List of Directors, distinct cheques numbers of different dates for purchase of shares, copy of confirmation of the investor company, their bank statement, copy of

annual return of the said company, list of shareholders of the investor company, copy of company master data of the investor company and various other details to substantiate the identity and creditworthiness of the investor company and the genuineness of the transaction.

12. Referring to the copy of the assessment order in the case of M/s Superior Industrial Enterprises Ltd., copy of which is placed at page 33 and 34 of the Paper Book, he submitted that the Assessing Officer in the order passed u/s 143(3) on 15.03.2016 has assessed the income of that company at Rs.29,90,617/-. Referring to pages 187 to 349 of the Paper Book, ld. counsel for the assessee drew the attention of the Bench to the copy of notices issued by the Assessing Officer on various dates and replies filed by M/s Superior Industrial Enterprises Ltd during the course of assessment proceedings. He submitted that during 143(3) assessment proceeding in the case of M/s Superior Industrial Enterprises Ltd., the Assessing Officer of the said company had issued notice u/s 133(6) to various persons who had purchased shares in the said company. Therefore, once the return of the said investor company has been accepted and no addition has been made on account issue of share capital by that company, addition cannot be made in the hands of the assessee company on account of purchase of shares by M/s Superior Industrial Enterprises Ltd. in the

assessee company. Relying on various decisions, he submitted that source of source cannot be a basis to make the addition.

13. He submitted that the burden of the assessee was discharged since the investor is a listed group company and copy of audited financial statement, acknowledgement of return of income, confirmations of investor, bank statements, memorandum of article or association were filed. Further, assessment was completed u/s 143(3) in the case of the said investor company. There is no evidence on record to suggest that the money received as share capital and share premium has originated from the coffers of the assessee company.

14. Referring to various decisions, he submitted that non-production of shareholder/director by the assessee cannot be a ground for making addition u/s 68 if assessee discharged the initial onus cast on it. He submitted that the Assessing Officer has not established that the particulars furnished by the assessee are false especially when no enquiries were made either from the shareholder by issuing notice u/s 133(6) or enquiry from the Assessing Officer of the investor company or banker of investor or registrar of company.

15. Referring to page 59K of the Paper Book, he submitted that the assessee had requested specific date for production in respect of general questionnaire dated 16.08.2016, copy of which is placed at page 596 of the Paper Book, and,

thereafter, filed reply dated 21.11.2016, copy of which is available at page 60 and 61 of the Paper Book. However, no enquiry was conducted from the shareholder and also no show-cause notice issued to the assessee.

16. So far as the allegation of the Assessing Officer that the investor company had low income is concerned, he submitted that low income of shareholder is not a relevant consideration and only net worth is relevant to determine the creditworthiness of the shareholder. He submitted that since the assessment has been completed u/s 143(3) in the case of the investor company which is a group company and a listed company, therefore, the Assessing Officer, without making proper enquiry could not have made addition on flimsy ground. He submitted that the assessee company has also made investment of Rs.4,30,00,000/- in M/s Superior Industrial Enterprises Ltd. and the Assessing Officer has not made any addition on account of this. This clearly establishes that M/s Superior Industrial Enterprises Ltd. is not a non-descript or non-existent or paper company. In view of the above, he submitted that the addition is uncalled for.

17. So far as the order of the Id. CIT(A) invoking the provisions of section 56(2)(viib) read with Rule 11UA(1)(cb) is concerned, he submitted that the Id. CIT(A) without giving any opportunity to the assessee held that the share premium charged by the assessee falls within the mischief of the said

provisions. He submitted that the Id. CIT(A) cannot sustain an addition on the basis of new source of income which was not there in the assessment order. In any case he submitted that the book value of the shares is much more than the share premium charged by the company. He accordingly submitted that in absence of any incriminating material, no addition could have been made by disturbing a completed assessment. Further, the assessee has discharged the initial burden cast on it by furnishing sufficient details to prove the identity and capacity of the investor company and genuineness of the transaction. Since the investor company has been assessed u/s 143(3) and since the investment of the assessee in the investor company has also not been doubted by the Assessing Officer, therefore, under the facts and circumstances of the case no addition is sustainable legally and factually.

18. Ld. DR on the other hand heavily relied on the order of the Id. CIT(A). She submitted that the A.O. has extensively and exhaustively proved that identities and creditworthiness of such parties & genuineness of transactions regarding amount of Rs.11.85 crores as share capital & share application money paid to the Assessee company by several entities/firms/companies are bogus, non-existent paper entities having no worthy business to advance such share capital & share application money. Thus said assessee company has miserably

failed to prove all three ingredients required for provision of section 68 of I. T .Act, 1961.

19. 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.

20. 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.

21. 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.

22. 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

23. 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

capacity of subscriber companies to pay share application money, amount so received was liable to be taxed under section 68.

24. 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.

25. 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.

26. 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.

27. 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 assessee to further substantiate the facts or produce the share applicant in assessment proceeding.

28. Referring to the decision in the case of CIT vs. Empire Bulitech (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).

29. 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 inquiries & after taking into consideration of investigation reports & search & seizure materials made the addition.

30. The Id. 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 said 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.

31. Referring to the order of the Id. CIT(A), she submitted that the Id. CIT(A) has correctly in fact & in Law has dismissed the appeal of assessee holding that Assessee has failed to prove Identity, Creditworthiness & genuineness of Transaction & burden of proving such ingredients of provision of section 68 of

I.T. Act was never discharged from Assessee due to utter failure to produce substantive corroborative evidence to prove such. He has categorically held that Assessee has not done a reliable & robust valuation of share premium charges strictly as per Rule 11 UA(1)cb r.w.s. 56(2)(viib) & Ld. CIT(A) has dismissed the Appeal of the Assessee which is justified under the facts and circumstances of the case.

32. 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 materia ' 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 material 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.

33. She accordingly submitted that considering all facts and the cited case laws, the Appeal of assessee deserves to be dismissed since the grounds of appeal are devoid of any merit.

34. We have considered the rival arguments made by both the sides, perused the orders of the authorities below 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 enquiries conducted and statement recorded of various persons u/s 132(4) and 131 made addition of Rs.11,85,00,000/- 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 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. We find, in appeal, ld. CIT(A) upheld the action of the Assessing Officer on merit, the reasons for which have already been reproduced in the preceding paragraph. 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, the

reasons for which have already been reproduced in the preceding paragraphs. 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. It is the submission of the ld. counsel for the assessee that the original return was filed on 12.09.2013 declaring income at Rs.7,42,51,693/ which was assessed u/s 143(1) on 18.04.2014. The notice u/s 143(2) was not issued 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 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. It is also the submission of the ld. counsel for the assessee that the investment of Rs.4,34,00,000/- made by the assessee company in M/s Superior Industrial Enterprises Ltd. has not been doubted by the Assessing Officer and the same has been accepted in the order passed u/s 143(3) for the impugned assessment year. Further, the assessment of M/s Superior Industrial Enterprises Ltd. was completed u/s 143(3) on 15.03.2016 by the ITO, Ward-24(4), New Delhi wherein the Assessing Officer after verifying

the details filed by the assessee has accepted the investment made by the said company towards purchase of shares in the assessee company.

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

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 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 than 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

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.

47. The appeal filed by the assessee is accordingly allowed.

ITA No.7567/Del/2017 (Hindustan Aqua Ltd.) :

48. Grounds raised by the assessee in this appeal are as under :-

“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 153A of the Act and, framing of assessment u/s 153A/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 and upheld of Rs. 13,10,00,000/- 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.

1.2 That finding of the learned Commissioner of Income Tax (Appeals) that it is a case of abated assessment is also factually incorrect and, thus in absence of jurisdiction the action is entirely vitiated.

2 That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining an addition made by learned Deputy Commissioner of Income of Rs. 13,10,00,000/- (Rs. 3,27,50,000/- + Rs. 9,82,50,000/-) on account of

sum received from M/s Superior Industrial Enterprises Ltd. as share capital and share premium and erroneously held as unexplained cash credits under section 68 of the Act particularly when no incriminating material either in the shape of unexplained cash or investment or document had been detected as a result of search on the appellant company or even gathered in the instant assessment proceedings.

2.1 That while sustaining the aforesaid addition the learned Commissioner of Income Tax (Appeals) has completely overlooked that there was no adverse material brought on record by the learned Assessing Officer to assume that credits by way of share capital represents unexplained cash credit and, burden which lay upon the assessee in terms of section 68 of the Act had not been discharged.

2.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that once the aforesaid share holder had duly confirmed the investment made, he could not have upheld the addition on arbitrary grounds and that too without bringing any evidence or even alleging that aforesaid credits by way of share capital emanated from the source of funds provided by the appellant company.

2.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the shareholder was a corporate entity, duly assessed to tax and, had subscribed to share-capital through banking channels and supported by necessary documents, share capital received could not in law or on fact be brought to tax u/s 68 of the Act.

2.4 That the learned Commissioner of Income Tax (Appeals) has also failed to appreciate that appellant had placed on record voluminous evidences to discharge the burden with regard to both genuineness of the transactions and creditworthiness of the share applicants and therefore, in absence of any whisper to rebut the said evidence, the credits could not arbitrarily be regarded as unexplained cash credit under section 68 of the Act.

2.5 That reliance placed on section 56(2)(vii)(b) of the Act and, various judgments without opportunity to bring to tax a credit duly recorded and, explained is based on complete misconception and, thus unsustainable.

2.6 That various adverse findings by the learned Commissioner of Income Tax (Appeals) to sustain the addition is factually incorrect, contrary to record and are not based on proper appreciation of law and therefore, untenable.

3. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding the levy of interest under section 234A, u/s 234B, u/s 234C and u/s 234D of the Act which are not leviable on the facts and circumstances of the case of the appellant company.

It is therefore, prayed that, it be held that assessment made by the learned Assessing Officer and sustained by the learned Commissioner of Income Tax (Appeals) be quashed and, further addition so upheld by the learned Commissioner of Income Tax (Appeals) along with interest levied be deleted and appeal of the appellant company be allowed.”

49. After hearing both the sides, we find the grounds raised by the assessee in the instant case are identical to grounds raised in ITA No.7374/Del/2017. We have already decided the issue and the appeal filed by the assessee has been allowed. Following similar reasoning, the appeal filed by the assessee is allowed.

50. In the result, both the appeals filed by the respective assesseees are allowed.

Order pronounced in the open Court on this 07th June, 2018.

Sd/-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 07-06-2018.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi