In the Income-Tax Appellate Tribunal,
Delhi Bench 'E', New Delhi

Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA Nos. 4964, 4965 & 4966/Del./2012
Assessment Years: 2005-06, 2006-07 & 2007-08

B.R. Associates Pvt. Ltd., 10, Essel House, Asaf Ali Road, New Delhi. PAN-AAACB 1067H **(Appellant)**	**vs.**	ACIT, Central Circle 16, New Delhi. **(Respondent)**

Appellant by	Sh. Rajiv Saxena, Advocate Sh. Shyam Sunder, A.R.
Respondent by	Sh. Rajesh Kumar Gupta, CIT/DR

Date of Hearing	26.11.2018
Date of Pronouncement	10.01.2019

ORDER

Per L.P. Sahu A.M.:

All these appeals have been filed by the assessee against separate orders passed by the ld. CIT(A)XXXII, New Delhi dated 13.08.2012 for the assessment years 2005-06 to 2007-08 on the following grounds :

Grounds raised in A.Y. 2005-06:

1. On the facts and in the circumstances of the case, Id. CIT (A) erred:-

i) in holding that there was no infirmity in the action of the A.O. assuming jurisdiction and passing order u/s 153A/143 (3) of the Income-tax Act despite the fact that there was no undisclosed income and no materials found during the search showing undisclosed income;

ii) in declining to justly and fairly adjudicate Appellant's contention that since there was no separate search warrant in Appellant's case the search operation u/s 132 was illegal;

iii) in holding that there was no violation of the principles of natural justice by the A.O in completing the assessment without giving adequate opportunity and issuing show cause regarding the additions made;

iv) in confirming the addition of Rs.2,05,00,742/- as unexplained cash credit u/s 68 of the I.T. Act ignoring the facts and material evidences to the effect that the amount was long term capital gain exempt u/s 10 (38) of the Act;

v) in confirming the interest charged by the AO u/s 234A and 234B of the Act.

Above actions being arbitrary, erroneous and unjust be quashed with directions for relief.

Grounds raised in A.Y. 2006-07:

1. On the facts and in the circumstances of the case, Id. CIT (A) erred:-

i) in holding that there was no infirmity in the action of the A.O. assuming jurisdiction and passing order u/s 153A/143 (3) of the Income-tax Act despite the fact that

there was no undisclosed income and no materials found during the search showing undisclosed income;

ii) in declining to justly and fairly adjudicate Appellant's contention that since there was no separate search warrant in Appellant's case the search operation u/s 132 was illegal;

iii) in holding that there was no violation of the principles of natural justice by the A.O in completing the assessment without giving adequate opportunity and issuing show cause regarding the additions made;

iv) in confirming the addition of Rs 86,15,583/- as unexplained cash credit u/s 68 of the I.T Act ignoring the facts and material evidences to the effect that the amount was long term capital gain exempt u/s 10 (38) of the Act;

v) in confirming the interest charged by the AO u/s 234A and 234B of the Act;

Above actions being arbitrary, erroneous and unjust be quashed with directions for relief.

Grounds raised in A.Y. 2007-08:

1. On the facts and in the circumstances of the case, Id. CIT (A) erred:-

i) In holding that there was no infirmity in the action of the A.O. assuming jurisdiction and passing order u/s 153A/143 (3) of the Income-tax Act despite the fact that there was no undisclosed income and no materials found during the search showing undisclosed income;

ii) in declining to justly and fairly adjudicate Appellant's contention that since there was no separate search warrant in Appellant's case the search operation u/s 132 was illegal;

iii) in holding that there was no violation of the principles of natural justice by the A.O in completing the assessment without giving adequate opportunity and issuing show cause regarding the additions made;

iv) in confirming the addition of Rs.5,21,88,167/- as unexplained cash credit u/s 68 of the I.T. Act ignoring the facts and material evidences to the effect that the amount was long term capital gain exempt u/s 10 (38) of the Act;

v) in confirming the disallowance of set off of short term capital loss of Rs. 1,42,66,800/-against the short term and long term capital gains ignoring the facts and material evidences proving the genuineness of the claims;

vi) in confirming the addition of Rs.43,25,000/-on account of deemed dividend u/s 2(22) (e) of the Act ignoring the facts and material to the effect that amount was advance for purchase of its manufacturing unit and was not loan or advance as such;

vii) in confirming the interest charged by the AO u/s 234A and 234B of the Act;

Above actions being arbitrary, erroneous and unjust be quashed with directions for relief.

2. Since most of the grounds are common in all the three appeals, the same are considered together and are disposed of by this common order.

3. The brief facts of the case are that the a search and seizure operation u/s. 132 of the Act was conducted in assessee's case on 26.03.2010 Accordingly, notice u/s. 153A of the Act was issued on 20.04 2011 and other statutory notices were issued to the assessee. The returns were filed in compliance of the notice. The assessee was engaged in the business of hardware and steel goods. The assessee had shown income from business or profession and capital gains. During the course of assessment proceedings, it was noticed by the Assessing Officer that the assessee has shown Long-term capital gains on sale of shares of Rs.2,05,00,742/- and has claimed it exempt u/s. 10(38) of the IT Act. The details of long-term capital gains shown by the assessee are as under :

<u>A.Y. 2005-06 :</u>

Name	Purchase	Cost (Rs.)	Sold	Amount (Rs.)
Konark Commerce & Industries Ltd.	14.04.2003	1,21,200	3.11.2004	1,42,04,366
Limtex Investment Ltd.	23.06.2003	10,69,200	14.01.2005	74,86,776
	Total	**Rs.11,90,400/-**		**Rs. 2,16,91,142/-**

A.Y. 2006-07:

Name	Purchase	Cost (Rs.)	Sold	Amount (Rs.)
Sudama Trading & Investment Ltd.	15.04.2004	1,95,600/-	24.11.2005	47,03,772/-
			29.11.2005	**41**,07,409/-
	Total	**Rs. 1,95,600/-**		**Rs.88,11,181/-**

A.Y. 2007-08:

Name	Purchase	Cost (Rs.)	Sold	Amount (Rs.)
Basukinath Coal Pvt. Ltd. Amalgamated into Blue Print Securities Ltd. 152000 shares issued in lieu of 19000 shares	04.05.2005	1,91,046/-	13.02.2007 to 05.03.2007	4,66,75,800/-
Konark Commerce & Invest. Ltd.	23.05.2005	17,46,562/-	13.02.2007 to 21.02.2007	48,73,500/-
Konark Commerce & Invest. Ltd.	24.05.2005	17,46,562/-	22.02.2007 to 05.03.2007	43,84,700/-
	Total	**36,84,170/-**		**5,59,34,000/-**

Accordingly, the assessee was required to furnish the following information:

(i). Copy of D-mat account

(ii). Proof of purchase price and sale consideration

(iii). Date of purchase and date of sale

(iv). Physical delivery of shares

(v). Payment of Security Transaction Tax

(vi). Proof of the fact that the transaction was entered at recognized stock exchange and proof of payment of purchase price and receipt of sale proceeds.

4. In this regard, the assessee filed written reply on 02.11.2011 and stated that the shares were sold through recognized Stock Exchange and Security Transaction Tax has been paid. The submissions of the assessee are as under :

The assesses company has earned long term capital gain of Rs.2,05,00,742/ - and claimed exemption u/s 10(38) of the Income Tax Act as the shares were transacted through the recognized stock exchange and STT was paid in respect of the said transactions. Further the assesses has earned long term capital gain of Rs. 1 7,33,789/- on the sale of 22000 equity shares of Suma Finance and Investment Ltd. which was not claimed exempted u/s 10(38) of Income Tax Act as the same were not transacted through recognized stock exchange The assessee has purchased the said shares on 6/3/2003 for the value of Rs.2,00,310/-. The amount of investment of such shares has been shown in the Balance Sheet as on 31/3/2003 filed along with the income tax return. The assesses has now sold the said shares on 2/4/2004 for the value of Rs. 19,34,099/- and had declared long term capital gain of Rs. 1 7,33,789/-. The payment for the purchases of said shares was made through the bank account maintained in the regular course of the business. Similarly the assessee has shown long term capital gain of Rs. 1,40,83,166/- and Rs. 64,17,575/- on the sale of 60,000 equity shares each of M/s Konark Commercial Industries Ltd. and Lemtex Investment Ltd. The detailed chart showing the name of the script, date of purchase, number

of shares, amount of purchases, date of sale and the closing stock are enclosed for your perusal and ready reference. Further assesses is filing herewith the copies of the contract notes issued by the registered share brokers for the sale and purchase of securities and Investment Ledger Account.

The Demat Account Statement would show the receipt of the various securities sold during the year under assessment Certificate in respect of the Security Transaction Tax paid is also enclosed herewith. The purchase and sale consideration of the securities was duly shown in the books of account maintained in the regular course of business. The books of account and bank statement showing the purchase and sale are being produced."

5. From the above submissions, the Assessing Officer observed that the assessee has not given reply of specific questions. He has submitted general reply. The Assessing Officer also referred the case to the DIT (Inv.) Unit-IV, Kolkata with request to verify the genuineness of share transactions entered into by the assessee through M/s. P.K. Agarwal & Co. The DIT submitted that on the given address, M/s. P.K. Agarwal & Co. was not in existence. Thereafter, a letter was issued to P.K. Agarwal & Co. as per address given in the contract note regarding the transactions done on behalf of the assessee but no reply was received. On perusal of the contract notes, the Assessing Officer observed that there are entries of payment of service tax and entry pertaining to payment of Security Transaction Tax. The Assessing Officer drew inference that

these all transactions are in the nature of bogus share transactions as a penny stock. On the basis of sale of shares, the assessee has shown long term capital gains on the bogus sale of shares, thereby converting his own black money into white through P.K. Agarwal and Co. and claimed the same as exempt u/s. 10(38) of the IT Act. It was further noticed by the Assessing Officer from the report of DDIT (Inv.) that M/s. P.K. Agarwal & Co. has been penalized many a times and debarred/restrained from associating with/accessing capital market for doing irregularities in trading and price manipulation through cross deals in scrips. After considering all the submissions of the assessee and investigation report and statements recorded on 26/27.03.2010, the Assessing Officer concluded as under :

> *"6.7 This conclusion is not a long drawn one as this has been substantiated during the search and seizure operation in the case of entry operator Aseem Kumar Gupta & Group of which assessee was also one of beneficiary. In his statement recorded u/s 132(4) of the Act of Sh. I.C. Jindal on 26/27.03.2010 was confronted to Sh. Aseem Kumar Gupta. Sh. Aseem Kumar Gupta has admitted to have arranged entries of bogus capital gain to the assess group by arranging entries of purchases in back dates. He has admitted before Sh. I.C. Jindal that he had arranged entries of capital gain for the assessee group through stock broker Sh. P.K. Aggarwal of Kolkata. This fact was not denied by Sh. I.C. Jindal. This fact is also a proof that the assessee and its other group companies were involved in taking accommodation entries of long*

term capital gain in shares to evade tax and to bring to books their undisclosed income in the garb of exempt income."

"6.10 In view of the above discussion, it can be easily concluded that the share broker M/s P.K. Aggarwal & Co. was involved in cross trading and price manipulation of shares of M/s Konark Commerce and Industries Ltd. and M/s Limtex Investment Ltd. as found by the SEBI. The broker manipulated the price of above mentioned shares and provided entries of bogus capital gain o the assessee. Subsequently assessee with the help of the share broker tried to give impression that transactions were genuine and STT was paid on them by furnishing brokers bill in respect of STT payment. The fact is contrary to day to day experience as STT is deducted/paid at the time of execution of transaction at the trading platform and amount of STT paid is always mentioned on the Settlement note. There is no provision for payment of STT in the off market transactions. Therefore, in totality of the circumstances it is concluded that the long term capital gain of Rs.2,05,00,742/- shown by the assessees in its return of income and claimed exempt u/s 10(38) of the Act is accommodation entries taken in the garb of capital gain. Therefore, the same is treated as assessee's undisclosed income found debited in the assessee's books of accounts and accordingly an addition of Rs.2,05,00,742/- is made to the assessee's return income u/s 68 of the Act on account of unexplained cash credit."

Accordingly, the Assessing Officer made addition u/s. 68 of the IT Act of a sum of Rs.2,05,00,742/-. Aggrieved from the above additions, the assessee appealed before the ld. CIT(A), who after considering the detailed submissions of the assessee and

the order of the Assessing Officer and relying on the decision of co-ordinate Bench of Tribunal in the case of Mahesh Prasad Agarwal in ITA No. 230/CTK/2008 and in the case of DCIT vs. Pawan Kumar Malhotra dated 08.01.2010 of ITAT Delhi Bench-F, confirmed the order of the Assessing Officer. Aggrieved, the assessee is in appeal before the ITAT.

6. The ld. AR has submitted a written synopsis which reads as under :

1. Ground No. l(iv) of Grounds of Appeal: Without prejudice to the aforesaid, it is submitted that in the assessment years 2005-2006, 2006-07 and 2007-08, the learned Assessing Officer has made additions of Rs. 2,05,00,742/-, Rs. 86,15,583/ and Rs. 5,21,88,167/- under section 68 of the Act treating the long term capital gain accrued to the assessee from sale of the shares which was claimed as exempt under section 10(38) of the Act.

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1.2 It is submitted that during the course of the assessment, appellant has duly submitted that purchase and sale of shares were through banking channels and, appellant had also produced complete documentary evidence in support of genuineness of sale and purchase of the shares. It is further submitted that aforesaid sale of the shares were through a broker M/s P.K. Aggarwal & Co., who is registered with Calcutta Stock Exchange. Further the shares which were sold were also traded in stock exchange and, in respect of which STT has also been paid. It is submitted that the evidences furnished by the appellant during the course of the assessment proceedings in respect of the purchase and sale of the shares is tabulated hereunder:

Sr. No.	Particulars	Assessment year		
		2005-06	2006-07	2007-08
i)	Details of Gain	8	8	8
ii)	Ledger Account of investment in shares	9	9	9
iii)	Ledger account of the broker (M/s P.K. Aggarwal & Co) in the books of the assessee	10	10-12	10-11
iv)	Ledger account of the assessee in the books of the Broker (M/s P.K. Aggarwal & Co)	11	13	12
v)	Letter confirming issue of the shares of Bluepring in lieu of shares of Basuknath Coal Pvt. Ltd. on account of amalgamations			13
vi)	Purchase Bill and contract note	12-15	14-15	14-21
vii)	Ledger Account of the sale of the shares	17-18	17	24-25
viii)	Ledger account of the broker in respect of the gain earned from the sale of the shares	19-21	18	26
ix)	Sale Bill and contract notes	22-54	19-22	30-42
x)	Ledger account of the assessee in the books of the Broker (M/s P.K Aggarwal & Co)	55-57	23	27-29
xi)	Bank account of the assessee	58-76	24	43-54
xii)	Ledger account of capital gain	16	16	

1.3 From the perusal of the aforesaid tabulated evidences, it would be seen that appellant has produced complete documentary evidences in respect of the purchase and sale of the shares. It would also be seen from the sale bill, contract notes and ledger account that the Broker has duly paid the STT and as such learned Assessing Officer could not have validly held that transaction to the unexplained cash credit u/s 68 of the Act.

1.4 It is submitted that despite the aforesaid evidences, the learned Assessing Officer on the basis of the statement of the appellant and also adverse action taken by the SEBI against the stock broker held that appellant had obtained accommodation entry from M/s P.K. Aggarwal & CO. and has introduced money in the garb of the capital gain. It is submitted that merely because the share broker was indulged in malpractices, would not ipso facto lead to a conclusion that sale and purchase of shares through such stock broker is not genuine. It is submitted that M/s P.K. Aggarwal & CO. has not stated that sale and purchase of the shares on behalf of the appellant company is not genuine nor the share broker has ever stated that he has provided any accommodation entry to the appellant company. It is further submitted that before drawing the adverse conclusion, the learned Assessing Officer has placed reliance on the action taken by the SEBI against the share broker. It is further submitted that it is not in dispute the such share broker is registered with the stock exchange and was trading in shares on behalf of the clients. In the instant case, learned AO has also not doubted the sale of the shares to the independent parties. It is therefore submitted that because the share broker is allegedly involved in price manipulation and cross trading, same would not affect the genuineness of the purchase and sale of the shares.

1.5 The Calcutta High Court in the case of CIT vs. Korlay Trading Co. Ltd. reported in 232 ITR 820 (Cal) (pages 306-308 of JPB) has held that "Once the assessee has furnished the name of the company, number of shares purchased, date of sale, amount of purchase money, amount of sale money, etc. The assessee had discharged its initial burden and if the broker did not maintain any accounts, the transaction could not be doubted for no fault of the assessee. Once the assessee had discharged its initial burden, no investigation or proper steps had been taken by the ITO to bring on record the materials to controvert the claim of the assessee."

1.6 It is submitted that while making the aforesaid addition, the learned Assessing Officer has sought to place reliance on the statement of Shri. I.C. Jindal recorded during the course of the search. It is most humbly submitted that aforesaid statement which was recorded during the course of the search has no connection with the appellant company and in any since the same was recorded under pressure and,the same was not acted upon.

1.7 It is submitted that since the appellant has not acted upon such a statement, as such, unless some corroborative evidence is brought on record, reliance placed on the such statement is unsustainable in law. It is a settled rule of evidence that unless a retracted

confession is corroborated in material particulars it is not prudent to base the decision on the confessional statement alone, (A.I.R. 1953 SC 459). It is submitted that, in Instruction No. F no. 286/2/2003- IT (Inv) dated 10.03.2003 (copy enclosed), the CBDT has directed that,

> "Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of search & seizure and survey operations. Such confessions, if not based upon reliable evidence, are later retracted by the concerned assessees while filing return of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before Income Tax Departments. Similarly, while statement during the course of search & seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.
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> Further in respect of pending assessment proceedings also, assessing officer should be rely upon the evidences/material gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders." [Emphasis Suppl ed]

1.8 It is thus evident that, it has been directed by the Board that, no addition should be made on the basis of confessions but on the basis of evidences/material gathered during the course of search or thereafter. It is settled law that every officer and person employed in the execution of the Act shall observe and follow the orders, instructions and directions of the Board and as such benevolent circulars are binding on the Income Tax Authorities even if it is deviating from the provisions contained in the Act.

1.9 It is further submitted that even otherwise the reliance placed by the learned officer on the surrender made by the assessee company is entirely unwarranted, particularly when there is no material or basis both in law and on facts to make the arbitrary addition and, particularly when the appellant has never acted upon such surrender, which in any case did not pertain to the assessee.

1.10 It is respectfully submitted that, it is settled law that, an admission or acquiescence cannot be foundation for assessment, as has been held in the judgment of Hon'ble Allahabad High Court in the case of Abdul Qayum v CIT reported in 184 ITR 404. It is further submitted that, admission made by the assessee is an important piece of

evidence, but it cannot be held to be conclusive. It is open to the assessee who made the admission to show that it is incorrect as has been held in the case of Pullangode Rubber Produce Co. Ltd. vs. Swift of Kerala by Apex Court reported in 91 ITR 18..

1.11 Further, the Hon'ble Madras High Court in the case of M. Narayanan & Bros, vs. ACIT, Special Investigation Circle, Salem reported in 13 taxmann.com 49 (Mad.) has held that "Whether when assessee had explained his statement as not correct in context of materials produced, amount of Rs 4 lakhs could be added to assessee's income on basis of his statement - held, no". Similarly, in the case of ACIT vs. Jorawar Singh M. Rathod reported in 148 taxman 35 (Ahd.) (Mag.), it has been held by ITAT, Ahmedabad 'B' Bench that "addition made by the Assessing Officer merely on the basis of retracted statement u/s 132(4) could not be sustained in the absence of any evidence, material or recovery of any movable or immovable assets at the time of s arch to corroborate the disclosure made by the assessee." It is also added that that no assessing authority can proceed the assessment on the basis of surrender made at the time of search when corroboration through an independent source is a must which has not been done by Assessing Authority as has been held in the following cases:

i) 1956 (SC) 9 Pangamban Kalanjoy Singh vs. State of Manipur
ii) 109 ITR 324 (Cal) CIT vs. Chrestin Vies Industries Ltd.
iii) 96 ITR 646 (ker) CIT vs. Ms. Dris S. Luiz
iv) 108 TTJ 575 (Nag) S. K. Jain vs. JCIT

1.12 Reliance is placed on the following judicial pronouncements:

i) 299 ITR 179 (P&H) CIT vs. Anupam Kapuur (pages 294-296 of JPB)
ii) 43 DTR 149 (Agr) Baijnath Agarwal vs. ACIT (pages309-326of JPB)

1.13 Further, it is submitted that, in the instant case, transaction of sale of shares have been confirmed by all the seven parties and in such circumstances no addition under section 68 of the Act can be made in the hands of the assessee appellant as has been held by the Apex Court in the case of CIT vs. K. Chinnathamban reported in 292 ITR 682, where it has been held by their Lordships of the Apex Court “where a transaction stands confirmed by the third party of an investment no addition could possibly be made u/s 68 of the Act, in the hands of the assessee in whose, books of accounts credit appears”.

1.14 It is submitted that the aforesaid judgment is applicable with greater force on the facts of the instant case since all the parties are independent parties, and are tax payee. It has not been found that the parties are not existent. In fact even the bank account shows the existence of the parties. There is no evidence to establish that any money flew from the assessee. The A.O. has not brought any material on record to prove and establish that the aforesaid sum were originated directly or indirectly from the coffers of the assessee company. In support of the aforesaid, the

appellant seeks to place reliance on the judgment of the High Court of Delhi in the case of CIT vs Value capital Services (P) Ltd. reported in 307 ITR 334, wherein their lordship's have held as under:

> "Learned counsel for the Revenue submits that the creditworthiness of the applicants can nevertheless be examined by the Assessing Officer. It is quite obvious that is very difficult for the Assessee to show the creditworthiness of strangers. If the Revenue has any doubt with regard to their ability to make the investment, their returns may be re-opened by the department.
>
> In any case, what is clinching is the additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the Assessee so as to enable it to be treated as the undisclosed income of the Assessee. This has not been shown insofar as the present case is concerned and that has been noted by the Tribunal also." [Emphasis Supplied]

1.15 Infact, Hon'ble Delhi High Court in the case of CIT v Real Time Marketing (P) Ltd reported in 306 ITR 35 has held as under:

> "8. There is a finding of fact given by the two authorities namely C T(A) and the Tribunal to the effect that:- The confirmation of M/s. ACL has been filed by the Assessee. The said company was assessed to tax. The source of ACL had been explained as out of transfer of funds from the accounts of M/s. BTL. Thus, the Assessee discharged its burden of proving identity, capacity and genuineness of the transaction.
>
> The Assessing Officer has not brought any material to show that the funds to ACL were provided by the Assessee. Under the circumstances, it cannot be said that the cash credit in question has remained unexplained. There is absolutely no material to link the Assessee with the sum of Rs.22,97,000/- deposited in cash in the bank account of M/s. FBSL.

9. In view of the concurrent findings of the fact given by the two authorities that there is no material to link the Assessee with a sum of Rs.22,97.000/- deposited in cash in the bank account of M/s. FBSL. as such, no case is made out for making addition under Section 68 of the Act, since there was no material with the Assessing Officer to come to the conclusion regarding any genuineness or fictitious identity of the entries or non capacity[7] of the lender.

10. Under these circumstances, we do not find any infirmity or perversity in the order passed by the Tribunal and in our opinion no substantial question of law arises in this case. With the result, the present appeal is not maintainable and the same is hereby dismissed." [Emphasis Supplied]

1.16 The appellant also seeks to place reliance on the case of DCIT Vs Rohini Builders reported in 256 ITR 360 (Guj) wherein it has been held as under:

"Thus it is clear that the assessee had discharged the initial onus which lays on it terms of section 68 by p oving the identity of the creditors by giving their complete addresses, GIR numbers/permanent accounts numbers and the copies of assessment orders wherever readily available. It has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee is not expected to prove the genuineness of the cash deposited n the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source as held by the Bombay High Court in the case of Orient Trading Co. Ltd. v. CIT [1963] 49 ITR 723. The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the depositors is made by account payee cheques and the interest is also paid by the assessee to the creditors by account payee cheques. Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to

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the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non- compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw an adverse inference against the assessee.." [Emphasis Supplied]

1.17 It was thus submitted that, since the money has originated from the account of appellant, no addition can be made u/s 68 in the hands of the appellant. It is submitted that, the learned officer has failed to appreciate that, entire monies originated from the bank account of parties who are income tax assessee's and therefore no adverse inference can be drawn.

1.18 It is settled law that no addition can be made on the basis of surmises, suspicion and conjectures. Reliance for this proposition is placed on 37 ITR 271 (SC) Uma Charan Shaw & Bros. Co. v. CIT. It has been further held in the following cases that suspicion howsoever strong cannot take the place of proof:

i) 37 ITR 151(SC) Omar Salay Mohammad Sait v CIT
The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicious, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this Court.

ii) 26 ITR 736 (SC) Dhirajlal Girdharilal v CIT, Bombay
When a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material

iii) 26 ITR 775 (SC) Dhakeshwari Cotton Mills ltd. v CIT
The estimate of the gross rate of profit on sales, both by the Income-tax Officer and the Tribunal, seems to be based on surmises, suspicions and conjectures. It is somewhat surprising that the Tribunal took from the representative of the department a statement of gross profit rates of other cotton mills without showing that statement to the assessee and without giving him an opportunity

to show that that statement had no relevancy whatsoever to the case of the mill in question. Both the Income-tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion.

iv) 37 ITR 288 (SC) Lai Chand Bhagat Ambica Ram v CIT

The Tribunal in arriving at the conclusion it did in the present case indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was, in other words, perverse and the Court is entitled to interfere.

2. In view of the aforesaid, it is submitted that the addition made by the learned AO and sustained by the learned CIT(A) is wholly unsustainable and deserves to be deleted.

3. Ground No. l(v) and (vi) of Grounds of Appeal for Assessment Year 2007-08:

Next issue pertains to the disallowance of the short term capital loss of Rs. 1,42,66,800/- and addition made of Rs. 43,25,000/- under section 2(22)(e) of the Act in assessment year 2007-2008.

3.1 At the outset it is submitted that the both the aforesaid additions/disallowances made by the learned Assessing Officer and sustained by the learned C1T(A) is not based on any material detected as a resu t of search on the appellant. It is therefore submitted that aforesaid addition/disallowance are outside the scope of section 153A of the Act as on the date of search on 26.03.2010, assessment for AY 2007- 2008 has become final and in such circumstances, while framing the assessment under section 153A of the Act, addition made should be restricted to the material gathered during the course of the search. The aforesaid submission is supported by the various judgments which has already been mentioned in para 3.4 to 3.6 hereinabove which for the sake of brevity is not repeated here.

4. Without prejudice to the aforesaid, it is submitted that the appellant has purchased 2.58.520 shares of M/s NR Sponge Pvt. Ltd. @ Rs. 100/- per share. Out of the aforesaid shares, appellant sold 1.58.520 shares to M/s Magnum Steels Ltd. @Rs. 10 per share and thereby incurred a short term capital loss of Rs. 1.42.66.800/-. It is submitted that the learned Assessing Officer has disallowed the said sum on the ground that assessee did not file the documentary evidences in support of the aforesaid transaction. It is most respectfully submitted that in support of the aforesaid transaction, appellant has produced the following documentary evidences:

Sr. No.	Particulars	Pages (pages of Paper Book)
i)	Ledger Account of investment in shares	55-56
ii)	Share Transfer forms and certificates	58-74
iii)	Bank statement of the assessee	75-76
iv)	Ledger account of Magnum Steel in the books of the	77
v)	Ledger account of assessee in the books of the Magnum Steel	78

4.1 The aforesaid tabulated details clearly establish that the appellant has produced complete documentary evidences in respect o the loss of the shares. It is however submitted that learned CIT(A) without any evidence or material, and merely on the basis of the suspicion has held that there is no commercial prudence involved in selling the unquoted at a loss to sister concern and has held that the transaction being a colorable device to avoid tax and hence cannot be said to genuine transaction.

4.2 It is most humbly submitted that merely because the director of the appellant company is also the director of the M/s Magnum Steel Ltd., the transaction of the sale of the shares by the appellant company cannot be doubted. It is submitted that revenue cannot decide the commercial prudence of the assessee and same has to be judged from the point of view of the assessee. It is therefore submitted that disallowance made by the learned AO and sustained by the learned CIT(A) deserves to be deleted.

5 In respect of the addition made of Rs. 43,25,000/- under section 2(22)(e) of the Act, it is most respectfully submitted that aforesaid addition has been made protectively in the hands of the appellant and substantive addition has been made in the hands of Shri. I.C. Jindal being the beneficial shareholder, which addition has also been sustained on the protective basis. It is submitted that the CIT (A) could not confirm an addition on protective basis, though the Id AO can make the addition protectively, but CIT(A) has to adjudicate the validity of such addition independently by holding in whose hand addition has to be made on substantiate basis and as such the addition made has to be deleted. Reliance is placed on the judgment of the High Court of Allahabad in the case of Smt. Hemlata Agarwal vs CIT U.P. reported in 64 ITR 428. In any case, no addition can be sustained in the hands of the concern but

has to be taxed in the hands of shareholder as has held by Delhi High Court in the case of CIT vs. Ankitech (P) Ltd. reported in 340 ITR 14

5.1 It is next submitted that appellant has received the aforesaid sum as advance from M/s Courage Financial Services Pvt. Ltd. for the purchase of the manufacturing unit as the appellant was looking for the potential buyer to sell the manufacturing unit. It is submitted that aforesaid manufacturing unit was ultimately sold to M/s Magnum Steels Ltd. as the better price was offered by the aforesaid company. It is submitted that since the appellant has received the sum as advance and was for the purchase of the manufacturing unit as such, same cannot be treated deemed dividend as envisaged under section 2(22)(e) of the Act. In support of the aforesaid submissions appellant seeks to place reliance on the following judicial pronouncements:

i) 318 ITR 476 (Del) CIT vs. Creative Dyeing and Printing (P) Ltd
ii) 318 ITR 376 (Del) CIT vs. Amabassador Travels (P) Ltd
iii) 318 ITR 462 (Del) CIT vs. Raj Kumar
iv) ITA No.569/2009(Del) dated 3.2.2010 CIT vs. Sunil Sethi
v) ITA NO. 589/2011 (Del) dated 30.09.2011 CIT vs. Arvind Kumar Jain
vi) ITA No. 1296, 1297/2011 (Del) dated 2.2.2012 CIT vs. International Land Development Pvt. Ltd.

5.2 Lastly the nomenclature by the assessee or the opinion of the auditor cannot be a conclusive basis to disregard and overlook the true nature of the transaction. Reliance is placed on the following judicial pronouncements:

i) 82 ITR 363 (SC) Kedarnath Jute Mfg. Co. Ltd.
227 ITR 172 (SC) Tuticorn Alkali Chemicals and Fertilizers Ltd. vs. CIT
ii) 285 ITR 221 (Mad) CIT vs. Idhayam Publications Ltd

6 In view of the aforesaid, it is submitted that since the amount received is for the commercial consideration as such same is outside the purview of section 2(22)(e) of the Act.

The ld. AR of the assessee also filed a supplementary synopsis in continuation to the above submissions, which reads as under :

1. That captioned appeals are filed by the assessee appellant against the consolidated order of the learned CIT(A) dated 13.08.2014 for the AY 2005-06 to AY 2007-08, whereby learned CIT(A) has substantially upheld the order of assessment.
2. Before the Hon'ble Tribunal, appellant has filed three paper books for each of the aforesaid assessment years containing the documentary evidences and

replies/submissions filed before the learned AO/CIT(A). Appellant has also filed two common paper books, i.e. PB-II (containing the orders of assessment for the AY 2004-05, 2008-09, 2009-10, 2010-11, order of Hon'ble Tribunal for the AY 2010-11 and statement of Shri. I.C. Jindal) and PB-III (containing the enquiries made by the AO from the stock exchange, excerpt of monthly update of NEST for the month of January, 2005, copy of demat account of the assessee and also copy of the confirmation from M/s P.K. Aggarwal & CO). In addition to the aforesaid paper books, appellant has filed its synopsis dated 01.09.2014 before the Hon'ble Tribunal wherein appellant has made its submission contending that additions/disallowances made in the order of assessment, and sustained by the learned CIT(A) are unsustainable in law.

3. In addition to the aforesaid synopsis, appellant seeks to supplement its submissions that the assessment framed by the learned AO u/s 153 A of the Act and sustained by the learned CIT(A) is legally unsustainable. In support of the aforesaid contention, appellant seeks to submit as under:

4.1 The appellant is a private limited company and was incorporated in the year 1987 with main object of doing business of chemicals and bake lite power. This project did not get through and company acquired land during the year 1987-1988 at Banmore, Distt. Morena, MP near Gwalior for putting up steel plant. The steel plant started its production in August, 1989 and since then the appellant was carrying on the business of hardware and steel goods.

4.2 For the aforesaid three assessment years, appellant has filed its return of income under section 139(1) of the Act, details of which are as under:

S. No.	AY	Date of Filing of retjrfrn of Income	/income declared	Returned processed under section
i.	2005-06	/ 24.10.2005 . / /	/ Rs. 21,36,130/- (see Page 86 of PB)	143(1) _
ii.	2006-07	[29.11.2006/	Rs. 13,51,603/- (see Page 40 of PB)	143(1) Assessment u/s 143(3/ of the Act was made on 15.12.2008 (see page 66-67 of PB)
iii.	2007-08	01.11.2007	Rs. 11,86,760/- (see Page 117 of PB)	143(1)

r?

4.3 From the perusal of the aforesaid table, it would be seen that the returns filed by the assessee for AY 2005-06 and 2007-08 had become final as no notice u/s 143(2) of the Act was issued within the prescribed period of limitation and further for the AY 2006- 07, return was scrutinized and assessment was also framed u/s 143(3) of the Act on 15.12.2008, wherein returned income was accepted.

4.4 26.03.2010: However, a comprehensive search u/s 132(1) of the Act was conducted on 26.03.2010 at the appellant group of companies namely:

i. M/s B.R. Associates Ltd.
ii. M/s Magnum Steel Limited
iii. M/s Magnum Iron and Steel Ltd.
iv. M/s N.R. Sponge Pvt. Ltd.
v. M/s Deluxe Alloys Pvt. Ltd.M/s Magnum International Ltd.
vi. M/s Triple Stock Shares Pvt. Ltd.
vii. M/s Courage Financial Services Pvt. Ltd.
viii. M/s Jeevan Jyoti Society.

4.5 It is respectfully submitted that during the course of the search on the appellant company no incriminating material was found from the premises of the appellant. Infact, from the whole group, and from all the place i.e. Delhi. Gwalior, Raipur, Indore, Banmore, only a total cash of Rs.5,62,635(Rs.5,07,485 from Gwalior and Rs.55,150 from Delhi Office) was found, out of which only Rs.5,00,000 was seized. Chart giving analysis of the cash found during search at various places in enclosed as annexure to the synopsis as 'Annexure-A'.

4.6 That on the same date, search was also conducted at the premises of the Shri. I. C. Jindal, and during the course of the search, his statement was also recorded. It is submitted that search commenced around 8.00AM in the morning of 26.03.2010 and authorized officer started the recording of statement of Shri. I. C. Jindal then aged about 54 years at 8.40 PM (as is evident from the statement) in the evening and was concluded in the late morning of 27.03.2010. (Copy of the statement has been placed at pages 137-148 of PB-II) As such, evidently his statement was recorded for more than 12 hours which started in the evening and was concluded in the morning and he was not even allowed to sleep whole night. That from the perusal of the copy of the statement, it would be seen that total 21 questions was put to him. and out of 21 questions, 7 questions were put to him on 26.03.2010 whereas remaining 14 questions were put to him on 27.03.2010. Infact, in the early morning of 27.03.2010, when Shri. Jmdal was totally exhausted because

of the ordeal which started in the morning of 26.03.2010 and continued whole night, Shri. Jindal who was wholly exhausted till morning, in the early morning of 27.03.2010 was confronted with Shri. Aseem Kumar Gupta, who in his statement under duress has alleged that he has arranged capital gain of Rs. 20 crores for M/s magnum Steel Limited. After recording of the aforesaid statement, Shri. Jindal was allegedly asked to cross examine and in reply he made contradictory statements. It is submitted that since the revenue officials put pressure on Shri. Jindal to surrender, and he was also fully exhausted as search commenced in the early morning of 26.03.2010, and he was not even allowed to sleep whole night,
as such, whatever was dictated by the revenue officials, Shri. Jindal signed on the statement. It is submitted that he has forcefully been made to surrender in respect of following companies:

i. M/s Magnum Steels Ltd.
ii. M/s Magnum InternationalLtd.
iii. M/s Courage Financial Services Pvt. Ltd.
iv. M/s N.R. Sponge Pvt. Ltd.

4.7 It is submitted that in the statement of Shri. Jindal no reference of the appellant was made and even in the statement of Shri. Aseem Kumar Gupta, there is no mention of the appellant at all. As such, neither the statement of Shri. Jindal nor the statement of Shri. Aseem Guota is incriminating qua the assessee. as in whole statement, nothing incriminating was stated against the appellant.

4.8 In any case and without prejudice to the aforesaid that statement of Shri. Jindal and Shri. Aseem Kumar Gupta is not incriminating against the assessee, it is respectfully submitted that immediately after the search i.e. on 29.03.2010, (as 27-03-2010 was Saturday and 28-03-2010 was Sunday), aforesaid statement of Shri. Jindal was retracted when Shri. Jindal met with the DGIT(Inv) stating the circumstances under which statement was recorded and retracted the statement recorded during the course of search and also requested to not to deposit the cheques in respect of alleged surrender. The Shri. Jindal on the same date also met with ACIT (Inv) and stating the aforesaid facts, requested to return the cheques, and learned ACIT(Inv) assured not to use the cheques, but did not return the cheques. It is submitted that because of the aforesaid retraction, the cheques given by Shri. Jindal in respect of the tax liability on account of surrendered sum were never deposited.

4.9 In pursuance to the aforesaid search, learned AO issued notices under section

153A of the Act on 20.04.2011 and framed the assessments under section 153 A of the Act vide orders dated 30.12.2011, interalia making following additions disallowances:

S.No	Particulars of the addition	Assessment years		
		2005-06	2006-07	2007-08
I	Unexplained cash credit under section 68 of the Act	2,08,80,997	86,15,583	5,21,88,167
II	Disallowance under section 14 A of the Act	-	9,980	34,740
III	Disallowance of Short Term capital loss	-		1,42,66,800
IV	Addition on account of deemed dividend	-	-	43,25,000

4.10 It is submitted that from the perusal of the orders of assessment, it would be seen that while making the impugned additions, except the reference made of statement of Shri. Jindal and statement of Shri. Aseem Kumar Gupta, no incriminating material what so ever has been referred to in the order of assessment which has been found as a result of search of the appellant. It is submitted that in para 6 7 at page 6 of the order of assessment for the AY 2005-06. learned AO has observed as under:

> *"6.7 This conclusion is not a long drawn one as this has been* substantiated during the search and seizure operation in the case of entry operator Aseem Kumar Gupta and group *of which* assessee was also one of beneficiary. *In his statement recorded u/s 132(4) of the act of Shri. I.C. Jinal on 26/27.03.2010 was confronted to Sh. Aseem Kumar Gupta.* Sh. Aseem Kumar Gupta has admitted to have arranged entries of bogus capitaI gain to the assessee sroup by arranging entries of purchase in back dates. **He has admitted before Sh. I.C. Jindal that he had arranged entries of capital sain *for the assessee sroup* through stock broker Sh. P.K. Aggarwal of Kolkata. *This fact was not denied by Sh. Jindal.* This fact is also a proof that the assessee and its other group companies were involved in taking accommodation entires of**

long term capital gain in shares to evade tax and to bring to books their undisclosed income in the garb of exempt income. "

4. 11 It is submitted that aforesaid observation of the learned AO is factually incorrect. As in so far the statement of Sh. Aseem Kumar Gupta recorded on 27.03.2010 is concerned, he has not made any statement with regard to the assessee. For the sake of convenience, same is reproduced hereinbelow:

"I have given Rs. 2 crores from M/'s Moderate Credit Corporation Ltd. to M/s Magnum Steel Limited and another Rs. 80 lakhs through Ravnet Solutions Pvt. Ltd. in lieu of cash received on his instruction from his office. I arranged a deal of capital gain amounting to Rs. 20 crores between Magnum Steel Limited and Shri. Santosh Shah r/o Lai Bazar, Kolkata (Mobile no. 09830053858) in lieu of cash received from his office. This money was handed over to me by employees of M/s Magnum Steel limited whose name are Shri. Som Nath. Shri Som Nath was introduced me by Shri. I.C. Jindal, MD Magnum Steel Limited. I gave Rs. 20 crores to Shri Santosh Shah who arranged capital gain for Shr . I.C. Jindal and his company through stock broker Sh. P.K Agg rwal resident of Kolkata. "

4.12 From the perusal of the aforesaid statement of Shri. Aseem Kumar Gupta, it would be seen that there is no reference of the assessee at all. Further in respect of statement of Shri. Jindal is concerned, in fact in the whole statement, no statement has been made in respect of the assessee. And further observation of the AO that the allegation of Shri Aseem Kumar Gupta was not denied by Sh. Jindal, is again factually incorrect as immediately after the search, i.e. on 29.03.2010, aforesaid statement dated 26/27.03.2010 was retracted. Infact, when the proceedings u/s 153A of the Act was initiated by issuance of notice u/s 153A of the Act dated 20.04.2011, Shri. Jindal filed a letter dated 15.09.2011 (copy annexed as Annexure-B), wherein it was submitted as under:

" The recording of statement was started at 8:40 p, on 26-03-2010 and continued till 27-03-2010 up to 10:00 AM in which merely 20 questions have been asked and I was regularly forced to surrender income. I finally have to surrender Rs.51 crores as additional undisclosed income for buying peace of mind and in respect of the following:

1. Magnum Steels Ltd. - Rs.2.80 crores asintroduction in share capital

2. Other flagship concerns - Rs.48.20 crores asincome from

operations of group companies i.e.

i) *M/s Magnum Steel Ltd.*
ii) *M/s Magnum International Ltd.*
iii) *M/s Courage Financial Services Pvt. Ltd.*
iv) *M/s N.R. Sponge Pvt. Ltd.*

It was also stated by me that the details of above mentioned surrender company wise will be submitted later on. I also presented 2 cheques towards payment of tax on surrendered additional undisclosed income of Rs.51 crores, of Rs.3.40 crores dated on 30-04-2010 and Rs. 12.91 crores dated 31-07-2010 bearing no.252775 and 252776 respectively drawn on AXIS Bank Ltd., Gwalior.

It is submitted that the summons have been issued in the name of the undersigned and other to appear perso ally at various places on 26-03-2010 and 27-03-2010 to appear on 29-03-2010 and 30-03-2010. That on 28-03-2010 it was Sunday and so on 29-03-2010 I personally met D.G.IT(Inv.) at Delhi and narrated to her all facts and circumstances under which statements were recorded due to which I was forced to surrender and I requested D.G.IT(Inv.) that I wanted to retract from the statement because the surrender was made under forced circumstances and also requested her to give suitable directions for not depositing cheques. She immediately called the concerned officials and asked them not to deposit and cheque. On the same date I also met ACIT(inv.) in response to summon and asked him to return the cheques as I stated that neither I am surrendering any income nor depositing any tax because it was forceful surrender and statement was not recorded with free will. Your good self are aware that due to retraction no cheque was deposited.

It is thus submitted that no adverse inference be drawn in our case in view of aforesaid forceful surrender and statement of Shri Aseem Gupta, CA and Shri Somnath, employee of M/s Magnum Steel Ltd be taken in my presence by giving opportunity to cross examining them before drawing any adverse view on the basis of forced surrender made by me as well as forced statement taken from Shri Aseem Gupta as neither any money transacted between Shri Somnath my employee and Shri Aseem Guota nor any dealings of shares were made through Shri Aseem Gupta. In fact, Aseem Gupta already denied having any

relationship with P.K. Aggarwal & Co. during the course of statement recorded during search. The shares were purchased and sold only through broker P.K. Aggarwal & Co., Kolkata"

4.13 It would be seen from the aforesaid reply that it has specifically been submitted that statement made during the course of search was not voluntary and statement of Shri. Aseem Kumar Gupta and Shri. Somnath be taken in the presence of the assessee by giving opportunity to cross examining them before drawing any adverse inference on the basis of forced surrender made by Shri. Jindal as well as forced statement taken from Shri Aseem Gupta. It is also relevant to state that no corroborative material was found from the premises of the appellant nor any corroborative material has been brought on record by the r venue.

4.14 It is further submitted that before the learned C1T(A), appellant filed its written submission wherein again it was stated that statement made by the Shri. Jindal has immediately been retracted. For the sake of convenience, aforesaid relevant para of written submission field before CIT(A) (see page 5 of PB) is extracted hereunder:

"6.2 The statement of I.C Jindal r corded during the search operation on 27.03.2010 was not valid in law because it was given under pressure, threat and coercion. I C. Jindal was also not in proper state of mind at that time. The surrender of amount of Rs. 51 crores was obtained under pressure, threat and coercion and as such it was not valid in law. I.C. Jindal had retracted the statement as well as the surrender immediately after the search. No incriminating nuiterial was found during the search which could indicate so much undisclosed income. *Such surrender is not valid in law as held by the Hon 'ble Supreme Court in Pullangode Rubber Produce Co. Limited 91 ITR 18, Nagubai Annal* v *Shama Rao (AIR) 1956 SC 100.*

6.3 Similarly, the statement of Aseem Gupta is not valid in law as the same was also obtained under pressure, threat and coercion..... "

4.15 It is submitted that despite the aforesaid factual position, and without there being any incriminating material found as a result of search, learned AO framed the assessment by making impugned additions as if it is a case of normal assessment. Against the order of assessment, assessee preferred appeal before the learned CIT(A) and it was specifically contended that addition made in the order of assessment without any reference to the incriminating material found as a result of

search is unsustainable in law' and learned CIT(A) in his order dated 13.08.2012 rejected the contention of the appellant by holding that provisions of section 153A of the Act is mandatory even where no incriminating material is found in the course of search.

5. From the perusal of the facts stated hereinabove, it is evident and infact admitted by the learned CIT(A), that in the, case of the appellant no incriminating material has been found as a result of search. In so far as the statement of Shri. I.C. Jindal is concerned, it is submitted that such statement is not incriminating qua the assessee and in any case, such statement was recorded under duress and same has also been retracted immediately after the search, as such, such statement cannot be made the basis of making the addition.

5.1 It is submitted that statement of Shri. Jidnal was recorded whole night and next day in the morning he was made to surrender, which itself shows that such statement is not voluntary and was recorded under duress. Aforesaid submission is supported by the judgment of the High Court of Gujarat in the case of Kailashben Manharlal Chokshi vs. CIT reported in [2010] 328 ITR 411 (Gujarat), wherein also statement of the assessee had been recorded under section 132(4) at mid night, and such statement was also retrac ed after a lapse of two months and learned AO did not accept the retraction and accordingly, made an addition representing income disclosed by the assessee under section 132(4). On appeal, the Commissioner (Appeals) and the Tribunal upheld the impugned addition. However, the Hon'ble High Court reversed the finding by holding as under:

"22. *We have heard learned counsels appearing for the respective parties at great length and considered the submissions. We have also gone through the orders passed by the authorities below. It is true that in normal circumstances this Court would not interfere in the finding of fact arrived at by the authorities. It is, however, to be seen as to whether the explanation tendered by the assessee would be considered by the authorities below. It is also to be seen as to whether an addition made is merely based on the statement recorded by the Assessing Officer under section 132(4) of the Act and whether any cognizance may be taken of the retracted statement. So far as case on hand is concerned, the glaring fact required to be noted is that the statement of the assessee was recorded under section 132(4) of the Act at mid night In normal circumstances, it is too much to give any credit to the statement recorded at such odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours. Moreover. this*

statement was retracted after two months.

26. *In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities belolv and additions were made and/or confirmed merely on the basis of statement recorded under section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority. We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission. We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence there is no reason not to disbelieve the retraction made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lakhs on the basis of statement recorded by the Assessing Officer under section 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee. "*

5.2 In view of the aforesaid since the statement of the Shri. Jindal has been recorded in the night, which has immediately been retracted same cannot be treated as incriminating material. It is submitted that in the instant case, apart from the retracted statement of Shri. IC Jindal, and unsubstantiated allegation of Shri. Aseem Kumar Gupta, no material was found from the premises of the appellant. It is submitted that in fact in the case of CIT vs. Harjeev Aggarwal reported in [2016] 70 taNmann.com 95 (Delhi), it has been held that statements recorded during search and seizure operations are not evidence found as a result of search. However, it was held that the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

5.3 Further in the case of Commissioner of Income-tax v. Naresh Kumar Agarwal reported in [2015] 53 taxmann.com 306, Hon'ble High Court of Andhra Pradesh has held as under:

> *"24.....In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section!32(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under Section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."*

5.4 Further in respect of the Mr. Assem Kumar Gupta, as has been submitted hereinabove, in his statement there is no allegation whatsoever qua the assessee and further his statement is factually incorrect and also his statement was also recorded in the forced circumstances and lastly despite the specific requested he has not been confronted for the cross examination. In fact, on the basis of the independent enquiry conducted by the learned AO, aforesaid broker has confirmed the factum of sale and purchase of the shares, in such circumstances the statement of Shri. Aseem Kumar Gupta is of no much credence, more so when he has also not been confronted for the cross examination of the assessee, despite specific request It is submitted that AO also loosely referred the search and seizure operation in the case of Sh. Aseem Kumar Gupta, however neither any material was referred in respect of the aforesaid search nor any such material was confronted to the appellant before drawing any adverse inference. It is therefore submitted that neither the statement of Shri. Aseem Kumar Gupta nor any alleged material found from his premises can form the basis of the addition. In support of the same, reliance is placed upon the following judgments,:

a. Andaman Timber Industries Vs. Commissioner of Central Excise (2015) 281 CTR (SC) 241
b. Vinod Solanki Vs. Union of India (2008) 16 SCC 535 (SC)
c. Kishni Chand Chella Ram v CIT 125 ITR 713 (SC)
d. CIT V SMC Share Stock Brokers 288 ITR 345 (Del)
e. CIT V S M Aggarwal 293 ITR 43 (Del)
f. CIT vs Dharam Pal Prem Chand Ltd 295 ITR 105(Del)

g- CIT Vs Pradeep Kumar Gupta 207 CTR 115

5.5 It is further submitted that it is settled law that where addition of undisclosed income was made on basis of mere statement under section 132(4) which was not corroborated by any material evidence, neither such statement would be a conclusive evidence, nor any addition could be made. It is submitted that in Instruction No. F no. 286/2/2003- IT (Inv) dated 10.03.2003), the CBDT has directed that,

> *"Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of search & seizure and survey operations. Such confessions, if not based upon reliable evidence, are later retracted by the concerned assessees while filing return of income. In these circumstances, on confessions during the. course of search & seizure and survey operations do not serve any useful purpose. It is, therefore advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before Income Tax Departments. Similarly, while statement during the course of search & seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.*
>
> *Further in respect of pending assessment proceedings also, assessing officer should be rely upon the evidences/material gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders. "*

5.6 Infact, CBDT in instruction no. F.No. 286/98/2013-IT (Inv.II) dated 18.12.2014 has again stated as under:

> *"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during search/surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such action defeat the very purpose of search/survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further such actions show the department as a whole and officers concerned in poor light.*
>
> *2 I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred*

above, through which the Board has emphasized upon the need to focus on gathering evidences during search/survey and to stiictly avoid obtaining admission of undisclosed income under coercion/undue influence

3 In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during search/survey/other proceedings under the IT. Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board of adversely.'"

5.7 It would be evident from the aforesaid instruction that statement/surrender by itself cannot be made a basis to make addition. In the instant case, since the surrender was made under pressure which was immediately retracted, and except the aforesaid, no adverse material has been found from the premises of the appellant, as such, such statement cannot be made the basis for the assessment. Furthermore in the case of G. Chinna Yelllappa vs ITO in ITA No. 268 of 2003 dated 6.11.2014, Hon'ble Andhra Pradesh High Court has held as under:

"It is not as if the retraction from a statement by an assessee would put an end to the procedure that ensued on account of survey or search. The Assessing Officer can very well support his findings on the basis of other material. If he did not have any other material, in a way, it reflects upon the very perfunctory nature of the survey. We find that the appellate authority and the Tribunal did not apply the correct parameters, while adjudicating the appeals filed before them. On the undisputed facts of the case, there was absolutely no basis for the Assessing Officer to fasten the liability upon the appellants. Our conclusion find support from the Circular dated 10.03.2003 issued by the Central Board of Direct Taxes, which took exception to the initiation of the proceedings on the basis of retracted statements. "

5.8 In the case of CIT vs. Sint. S. Jayalakshmi Ammal reported in [2016] 74 taxmann.com 35 (Madras), Hon'ble High Court has held as under:

"20. In the case on hand, statement recorded on 29.12.1999 from the son of the assessee under Section 132(4) of the Act is not corroborated by any material document. Admittedly, Revenue has also not confronted the assessee, with the said statement of his son. If that be the case, it can be safely concluded that, there was no material

documentary evidence, to substantiate and corroborate the statement of Mr. Natarajan, son of the assessee. If the assessee makes a statement under Section 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere statement made under Section 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. Considering the nature of the order of assessment, in the instant case characterised as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence, should not be treated as conclusive evidence against the maker of the statement. "

Same viewhasbeen taken in the following judicial pronouncements:

a) CIT vs. M.P. Scrap Traders [2015] 372 ITR 507 (Gujarat)
b) CIT vs. Vivek Aggarwal [2015] 231 Taxman 392 (Delhi)
c) CIT vs. Tara Chand Mahipal [2016] 65 taxmann.com 29 (Calcutta)
d) CIT vs. Sunil Aggarwal [2015] 379 ITR 367 (Delhi)

5.9 It is also submitted that statement recorded under section 132(4) of the Act does not constitute incriminating material found as a result of search. Aforesaid submissions is supported by the order of the Tribunal in the case of DCIT vs. Pratap Singh Rajendra Hamola & Co. reported in 19 DTR (Chd) 182, wherein it has been held that "statements" recorded by itself cannot constitute evidence found as a result of search for purpose of determining undisclosed income under Chapter XIV-B of the Act. The Jodhpur Bench of the Tribunal in the case of Shree Chand Soni vs. Dy. CIT reported in 101 TTJ has held as under:

"47. This addition is based on the statement alone and no such income was disclosed in the returns filed for the block period. Admittedly no incriminating document was found to support the impugned addition.
This Bench has been continuously taking the view that a statement recorded under s. 132(4) of the Act does not tantamount to unearthing any incriminating evidence during the course of search, therefore, no addition can be made on that score alone. Therefore, in our opinion, the impugned addition cannot survive, and the same has to be deleted." [Emphasis supplied[

Reliance is placed on the following judgments:

i) 247 ITR 448 (Bom) CIT vs. Vinod Danchand Ghodawat
ii) 185 Taxman 18 (Chd) Jagdish Chander Bajaj vs. ACIT

5.10 In view' of the aforesaid, the submission of the appellant is that, the additioncan be made only qua the incriminating material found as a result of search;which is none in the instant case. Reliance is placed on the judgment of Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla reported in 380 ITR 573 wherein their Lordships have held as under:

> "37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
>
> i. Once a search takes place under Section 132 of the Act notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
>
> ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.
>
> iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place.
>
> The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".
>
> iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.
>
> v. In absence of any incriminating material, the completed assessment

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

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

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

5.11 Infact, in the subsequent judgment in the case of Pr. CIT v. Lata Jain reported in 384 ITR 543 (Del)), it was also held that in absence of any incriminating material found as a result of search, assumption of jurisdiction was also not in accordance with law. Reliance is also placed on the following judgments:

i) ITA No. 369/2015 CIT vs. Kurele Paper Mills P Ltd. dated 06.07.2015
ii) 63 taxmann.com 137 (Del) CIT vs. MGF Automobiles Ltd.
iii) ITA No 634/2015 Pr. CIT vs. Smt. Kusum Gupta dated 01.09.201
iv) 49 taxmann.com 172 (Bom) CIT vs. M/s Murli Agro Products Ltd.
v) ITA No. 1969 of 2013 CIT vs. All Cargo Gobal Logistics Ltd.
vi) 58 taxmann.com 78 (Bom) CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd.
vii) 259 CTR 281 (Raj) Jai Steel India vs ACIT
viii) 120 DTR 79 (Bom) CIT vs. Sinhgad Technical Education Society

ix) W.P. (C) 8721/2014 & CM No. 20052/2014 Praveen Kumar Jolly

5.12 Recently Hon'ble Delhi High Court on 25-05-2017 held in ITA No. 306 to 310 of 2017 in the case of Pr.CIT V. Meeta Gutgutia Prop. Ferns N Petals, again analyzed all the aspects and the decisions laid down and held at para 71 that "invocation of section 153A by the revenue for AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs".

6 In view of the aforesaid, it is submitted that since while making the additions in the orders of assessment for the AY 2005-06, 2006-07 and 2007-08, no incriminating material which can be said to be found from the premises of the appellant has even been referred to as such, addition made is outside the scope of section 153A of the Act as such, additions made are liable to be deleted."

7. On the other hand, the ld. Departmental Representative relied on the order of the lower authorities and submitted that during the course of search proceedings, the statements of IC Jindal was recorded on 26/27.03.2010 was confronted to Shri Aseem Gupta and he has admitted to have arranged entries of bogus capital gains to the assessee group by arranging entries of purchases in back dates. The assessee did not submit complete reply as required by the Assessing Officer for verification of genuineness of transactions for generation of bogus capital gains.

8. After hearing both the sides and perusing the entire materials available on record and case laws cited by both the parties, the ld. AR drew our attention that the case is covered by the decision of co-ordinate Bench of Tribunal in group case of assessee of M/s. Magnum Steels Limited vs. ACIT dated 18.08.2017 (ITA No. 1342, 1343 & 2004/Del/2013- A. Yrs. 2005-06 to 2007-08), which is as under :

33. Now we shall examine the additions made by the AO in each of three assessment years separately.

34. In AY 2005-06, the additions were made on account of unexplained cash credit u/s 68 of the Act (i) Rs. 5 crores relates to share capital allotted to 7 companies and (ii) Rs. 6,59,04,383/- relating to long term capital gain declared by the assessee as undisclosed income. Apart from this there is a disallowance of R. 74,741/- u/s 14A of the Act. After examining the order of assessment, on the aforesaid additions, we find that there were a lot of discussion but no material has been referred to which was relied upon and found during the search. In fact, share capital and long-term capital gain were declared by the assessee in the books of account and along with the return all the necessary detail were filed. Further this assessment was specifically taken under scrutiny to examine the investments.

35. In AY 2006-07 also assessee has declared long term capital gain in the return of income and the AO while making the assessment u/s 143(3), has made disallowance of LTCG by treating them as STCG and addition of Rs. 36,72,01,641/- was made. In the assessment made u/s 153A of the Act, the AO has treated the same figure that was already added during the 143(3) assessment as undisclosed income. It is not understood the income already disclosed, how can be treated as undisclosed. Here again Revenue has failed to refer to any material unearthed during the search which could led ld. Assessing Officer to such conclusion. This assessment can only be disturbed as we discussed in the preceding paragraphs above, if any incriminating material is found during the course of search, but not otherwise.

36. In AY 2007-08, originally the Assessing Officer framed assessment also u/s 143(3) of the Act by making a disallowance of Rs. 3,06,421/- u/s 14A of the Act r/w Rule 8D. in the assessment u/s 153A AO has merely repeated the disallowance without referring to any incriminating material unearthed during the search.

37. In making assessment u/s 153A of the Act, the AO has to bring an incriminating material, which is contrary to declaration made by the assessee. The reliance in making assessment for the AY 2005- 06 and 2006-07 was made on the surrender made in the statement recorded during the search u/s 132(4) of the Act and the statement of one Shri. Aseem Gupta but no discussion has been made of the proceedings after the statement on the encashment of cheques taken towards tax payment referred to in that statement. The Ld DR vehemently objected that deposition of cheques is the sole discretion of the ld AO and revenue can only deposit cheques against the tax demanded which event has happened later on. We

do not see any reason why these cheques which have been part of the statement were not encashed when they have been taken., When they have been taken those cheques could have been deposited on account of advance tax also, in any case if the revenue is not authorized to take those cheques or deposit it, we see no reasons why the search party has accepted those cheques. Hon Delhi High court in case of Digipro Import & Export Pvt Limited V Union of India W.P. (C) 3070/2017 & CM No. 13393/2017 dated 15/5/2017 has condemned such an act , which is without authority of law. Similar view is also expressed by the Hon. High court in Capri Bathaid Private Limited v. Commissioner of Trade & Taxes 2016 (155) DRJ 526 . Further no orders were also passed u/s 210(3) of the act, or any other action has been taken to recover the demand on the income surrendered by Shri. IC Jindal in relation to aforesaid assessee. This action itself proves that the assessee was under financial threat for payment of such taxes , which may have dire consequences. The assessment proceedings were initiated after one and half year later but during this period, there is no proceedings or action by ld AO or fresh statements recorded as the same was retracted if cheques were not encahsed

38. Now we have to examine whether such statement of Shri. IC Jindal, MD of the assessee company recorded on 26/-27 03 2010 can be treated as incriminating material, specifically when it was retracted and no other incriminating material supporting the statement was found. This statement of Shri. I.C. Jindal was made the basis for making the addition in AY 2005-06 and 2006-07, however same was not referred to at all in AY 2007-08.

39. Ld AR has claimed that the examination of Shri. IC Jindal was started after the search whole day at all the places at late evening hours of 26.03.2010 at 8.40 PM, which continued for whole night, and merely 7 questions were asked till midnight on the investment of properties and also investment in shares of various companies. Question no. 7 was in relation to details of various immovable properties as per details furnished by Smt. Shashi Prabha Jindal, wife of Shri. IC Jindal to income tax department who assessee claimed, had strained relationship with Shri. IC Jindal as she had filed civil and criminal cases against him. Other few questions were asked in the night till morning, as date was mentioned 27.03.2010 thereafter. Shri. Aseem Gupta was called in the morning of 27.03.2010 when he stated that he has given Rs. 2 crores from M/s Moderate Credit Corporation Ltd. and Rs. 80 Lacs from M/s Ravnet Solutions Pvt. Ltd. in lieu of cash to the assessee. He further stated that he has received Rs. 20 crores in cash for arranging capital gain. He stated cash was received by him from Shri Somnath, employee of the assessee company. It was stated by him that cash was paid to Shri. Santosh Shah who arranged capital gain through stock broker M/s P.K. Aggarwal & Co. On cross examination by Shri. Jindal, he confirmed that he had not received any cash from him. He also confirmed that he had never introduced M/s P.K. Aggarwal & Co. and Shri. Santosh Shah to the assessee. And at the end, Shri. I.C. Jindal surrendered Rupees fifty one crores in the

hands of four companies and paid cheques in respect of tax demand arising on account of surrender.

40. As submitted, Shri IC Jindal retracted this statement on 29.03.2010 before the DGIT (Inv) and ADIT (Inv) as 28th March, 2010 was Sunday. The assessee further submitted a detailed letter on 15/09/2010 of which certified copy is produced before us, where in such claim is made.

41. The argument of the learned CIT DR of finding no evidence on record cannot be accepted in view of the assessee submitting a copy of letter before us which is certified by the ld AO. It is also confirmed before us that above letter are part of the record of the assessment and ld CIT (A) has mentioned it in his order. It is surprising that revenue authorities were sitting on cheques collec ed and not encashing them even after one and half year without pursuing whether assessee or related persons has accepted the disclosure or not. In the letter dated 15.09.2010, assessee had stated the circumstances in which the statement was recorded and asked the revenue authorities to examine Shri. Aseem Gupta and Shri. Somnath and also insisted to verify each and every transaction before drawing any conclusion. It was stated that no adverse inference be drawn in view of forced surrender. The Assessing Officer has neither examined Shri. Somnath nor Shri. Aseem Gupta, despite the request of the assessee and relied upon the statement of Shri Aseem Gupta that too in his assessment proceedings. Such evidence which was taken at the back of the assessee and no opportunity was provided to cross examine them cannot be a piece of evidence which can be relied upon for making the addition. Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Central Excise (2015) 281 CTR (SC) 241, has again reiterated their earlier view and expressed their opinion that the evidence/statement relied upon by the Assessing Officer for making addition which was not confronted cannot be used against the assessee. The Hon. SC has held that :

"6.According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt

with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

42. In the present case, the statement of Shri. Assem Gupta recorded in his assessment was never confronted and after retraction by Shri. IC Jindal, despite specific request, Shri. Aseem Gupta was not confronted for cross examination. Therefore, Such statement cannot be held to be an evidence for making the addition. Even otherwise, no supporting material was brought on record despite highlighting that the statement of Shri. Aseem Gupta is factually incorrect.

43. Regarding the authenticity of the retraction statement the arguments of the revenue fails when the same is available on the file of the ld AO and ld AO himself has issued certified copy of that retraction letter, same letter is also referred to in the order of ld CIT (A). Revenue before us could not submit any evidences that the retraction statement is not authentic. Further revenue has no answer why it took the cheques for taxes when it is so sure of the undisclosed income and further not

deposited the same at all leave aside on time. All these cumulative factors go strongly in favour of the assessee about its timely retraction of the admission.

44. We find that the statement was recorded at odd hours and nothing concrete related to any other evidence in support arrived at. The figures of investment made by the companies were not matching with the statement of Shri. Aseem Gupta as assessee has not received any sum from M/s Moderate Credit Corporation Ltd. and further only a sum of Rs. 71 lakhs as against Rs. 80 lakhs (stated by Shri. Aseem Gupta) has been received from M/s Ravnet Solutions Pvt. Ltd. as share application money. Despite referring name of Shri. Somnath and Shri. Santosh Shah and the broker Shri. P.K. Aggarwal & Co. in the statement, nobody was ever examined by the revenue despite time and again Shri P.K. Aggarwal confirm ng th transactions. The revenue cannot make allegation unless prove them by brining tangible material on record. The statement, which was recorded in mid night, cannot be said to be voluntary as recording of statement in the midnight itself shows that the statement was recorded when the person was not in a fit state of mind and would be fully exhausted. From the questions raised and answered, whole night it is evident that the statement was made under forceful circumstances and hence cannot be treated as voluntary. In fact in the identical circumstances, the Hon'ble High Court of Gujarat in the case of Kailashben Manharlal Chokshi vs. CIT reported in [2010] 328 ITR 411 (Gujarat) has been pleased to hold that the statement recorded at odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission. In this case also, assessee has immediately retracted the statement and furnished complete documentary evidences in support of the transactions.

45. The CBDT in instruction no. F.No. 286/98/2013-IT (Inv.II) dated 18.12.2014 and Instruction No. F no. 286/2/2003- IT (Inv) dated 10.03.2003) has emphasized upon the need to focus on gathering evidences during search/survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence. The reason behind is that in case of retraction, the case of Revenue should not fail. In the present case also, apart from the statement, no efforts were made by the Revenue to gather evidence during the search.

46. Ld DR has relied up on the decision of PCIT V Bhagirath Agarwal 351 ITR 143. We have carefully perused that decision. In that decision the facts were that it was not a case of retracted confession but in fact statement was further confirmed by the assessee vide letter dated 9/1/2006. In the present case there is retraction of the statement, which is by way of stated meeting with the higher official as well as before ld AO reiterated before CIT (A). In view of this, reliance on the above decision is misplaced.

47. Second decision relied up on by revenue is in the case PCIT vs. Avinash Kumar Setia 81 Taxmann.com 486. In this case, statement was recorded during the survey and not during the search. Assessee made a statement after two months of survey on his own and assessee waited for two years to retract it. Assessee in that case pleaded that non-disclosure of sum in the return of income is a retraction by the assessee and retraction in writing was only on 16/12/2010. Therefore Hon high court held that retraction is too much delayed and not bonafide. Facts in that case were as under :-

"11. The facts of the case on hand are plainly different. Here, there was no statement of the assessee recorded during the survey under section 133A of the Act. As observed by the Commissioner of Income-tax (Appeals), the asse see voluntarily made a declaration two months after the survey. There was absolutely no compulsion on the assessee to make such a declaration. The assessee waited for two years to resile from the said declaration. The submission of learned counsel for the assessee that since he had filed a return on September 26, 2009 without disclosing the sum of Rs. 1.25 crores, he should be deemed to have resiled from the said declaration cannot be accepted. The retraction in writing happened only on December 16, 2010. It was much too delayed to be taken to be bona fide. The circumstances under which the retraction was made has also not been explained. The court finds that the above retraction, without any explanation whatsoever, and without mentioning the offer of surrender of Rs. 1.25 crores made earlier on December 8, 2008 is not a retraction at all in the eyes of law. The above decision of this court, therefore, does not come to the assistance of the assessee.

12. Learned counsel for the assessee next relied upon the decision of this court dated October 4, 2010 in I. T. A. No. 1111 of 2010 (CIT v. Dhingra Metal Works [2010] 328 ITR 384 (Delhi)). Here again, during the course of the survey conducted on September 14, 2004, the respondent-assessee surrendered an amount of Rs. 99.5 lakhs and offered it to tax. Within a period of slightly over two months thereafter, on November 29, 2004, he gave a letter stating that the statement was incorrect and that no discrepancy had to be reconciled as it was only a mistake.

13. Again, the distinguishing feature is that the retraction was within a short period of two months. This singular fact is sufficient to distinguish the said case from the case on hand."

48. In the present case, the facts are quite different, as in that case the facts relating to retraction were also not disclosed. In the present case, assessee has submitted that he has approached the higher authority at the first available instances, agitating the retraction before ld AO, before CIT (A) also. The statement of facts made by the assessee before lower authorities that he immediately met the higher official stating his retraction and which was also mentioned before the ld AO and CIT (A) also mentioning this fact in his appellate order, it is not correct to say that assessee has not retracted the statement in time. Further, the facts recorded in the statement are also not matching with the others sums mentioned in the transaction. The retraction letter is also part of the record of the ld AO who has issued the certified copy of that letter , therefore, in view of the above facts, reliance on the above decision by the revenue is misplaced.

49. In view of the aforesaid, we hereby hold that statement of Shri. I C. Jindal is not incriminating material once the same has been retracted and the statement of Shri. Aseem Gupta recorded on the same date is also not incriminating material as after the retraction, no efforts have been made by the AO to bring any other material in support of that statement. Moreover, facts and figures stated by Shri. Aseem Gupta are totally incorrect as per record The additions had already been made in the original assessment u/s 143(3) in AY 2006-07 and 2007-08 and which were merely repeated in the order u/s 153A of the Act. In AY 2005-06, additions made also are not related to incriminating material. We have repeatedly held that no addition can be made in the absence of incriminating material and our view was further strengthened by the Hon ble jurisdictional High Court in the case of CIT v. Kabul Chawla reported in 380 ITR 573 (Del.) which was further followed in subsequent decisions. All these decisions propounded the law that no additions can be made in absences of incriminating material for each of the years and on that basis, addition u/s 153A by the revenue for AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs. We therefore hold that additions made u/s 153A of the Act, in the absence of incriminating material found as a result of search is outside the scope of section 153A of the Act and the additions in all these three assessments framed u/s. 153A of the Act i.e. ITA No. 1342/Del/2013, 1343/Del/2013 & 2004/Del/2013, do not stand and directed to be deleted. In result, appeals are allowed."

Since the facts and circumstances involved in the present case are identical to those involved in the aforesaid decision of C0-ordinate Bench, the same statements were taken adverse against the assessee, there is complete absence of any reference to incriminating material found in the course of

search and there being no contrary material on record from the side of Revenue to take a different view, we respectfully follow the decision of Co-ordinate Bench as reproduced above. Accordingly, the appeals of the assessee deserve to be allowed on the legal aspect of the case in the same line as done by the co-ordinate Bench. We accordingly, need not to enter into the merits of the additions made by the authorities below.

9. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the open court on 10.01.2019.

Sd/- Sd/-

(Amit Shukla) **(L.P. Sahu)**
Judicial member **Accountant Member**

Dated: 10.01.2019
aks

Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi