

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'A' BENCH, KOLKATA**

**(Before Sri S.S. Godara, Judicial Member & Dr. A.L. Saini, Accountant Member)**

**I.T.(SS).A No. 159/Kol/2017**

Assessment Year: 2008-09

&

**I.T.(SS).A No. 160/Kol/2017**

Assessment Year: 2009-10

**Deputy Commissioner of Income Tax, Central Circle-1(4), Kolkata.....Appellant**

**Vs.**

**M/s. Samarth Fablon Pvt. Ltd.....Respondent**

**16, Ganesh Chandra Avenue**

**Kolkata - 700 013**

**[PAN : AAKCS 7663 N]**

**C.O. No. 16/Kol/2018**

Assessment Year: 2008-09

&

**C.O. No. 17/Kol/2018**

Assessment Year: 2009-10

**M/s. Samarth Fablon Pvt. Ltd.....Appellant**

**16, Ganesh Chandra Avenue**

**Kolkata - 700 013**

**[PAN : AAKCS 7663 N]**

**Vs.**

**Deputy Commissioner of Income Tax, Central Circle-1(4), Kolkata.....Respondent**

**Appearances by:**

*Shri R.P. Agarwalla, Sr. Advocate & Shri Nirav Seth, C.A., appeared on behalf of the assessee.*

*Shri Radhey Shyam, CIT D/R. appearing on behalf of the Revenue.*

Date of concluding the hearing : February 21<sup>st</sup>, 2019

Date of pronouncing the order : May 17<sup>th</sup>, 2019

**ORDER**

**Per S.S. Godara, JM :-**

These two Revenue's appeals and assessee's cross-objections for assessment years 2008-09 & 2009-10 arise against the Commissioner of Income Tax (Appeals) - 20, Kolkata's separate orders dated 02/08/2017 & 10/08/2017 passed in case nos. 97/CIT(A)-20/Kol/CC-1(4)/16-17 & 11604/CIT(A)-20/CC-1(4)/16-17, involving proceedings u/s u/s 147/143(3) and 153C/144C of the Income Tax Act, 1961 (in short 'the Act') respectively;

2. It transpires at the outset that the instant lis comprising of four cases pertains to the department's very search action dated 05/08/2014 carried out in M/s. Kushal Group of Companies. We therefore propose to decide the instant batch vide common order for the sake of convenience and brevity.

3. **Assessment year 2008-09**; Revenue's appeal in IT(SS)A No. 159/Kol/2017 and assessee's C.O. No. 16/Kol/2018.

4. The Revenue/appellant canvasses the following substantive ground in the instant appeal:-

"1. That on the facts and circumstances of the case and in law, the Ld. CIT(A)-20 erred in allowing the technical grounds of appeal, Ground No. 1 and 8 discussing wrong facts an law.

2. That on the facts and circumstances of the case and in law, the Ld CIT(A) erred in allowing the technical grounds taken by the assessee holding the reasons recorded by the AO as void ab initio and is liable to be quashed and hence, the assessment order passed is bad in law mainly discussing and relying on those case laws in which it was held that reopening of assessment was bad in law on the ground that reopening was done beyond the four years after passing of order u/s 143(3) and there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment but the Ld. CIT(A) failed to examine the facts of this case in which original assessment was done u/s 143(1)(a) and not u/s 143(3) and hence first proviso to section 147 did not apply in the instant case.

3. That on the facts and circumstances of the case and in law, the Ld CIT(A) erred in not considering the facts of the case that original assessment in this case was completed u/s 143(1)(a) and hence, requirement of first proviso to section 147 of recording of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, was not required.

4. That on the facts and circumstances of the case and in law, the Ld CIT(A) erred in allowing the appeal of the assessee only on technical grounds without examining the case on merit of addition, without examining the facts of the case and without applying the correct law on the facts of the case and hence order of CIT(A) deserves to be set aside."

5. Learned CIT D/R, reiterates the Revenue's above pleadings seeking to reverse the CIT(A)'s order quashing the impugned reopening. He places on record, the Assessing Officer's order dated 22/12/2015 dealing with the assessee's cross objections against reopening reasons as per hon'ble apex court's judgement in the case of *GKN Driveshafts (India) Ltd. vs ITO* reported in [2003] 259 ITR 19 (SC). He then refers to other

judicial precedents (a) *Home Finders Housing Ltd. vs. Income-tax officer, Corporate Ward 2(3) [2018] 94 taxmann.com 84 (SC)* & (b) *Peass Industrial Engineers (P) Ltd. vs. DCIT, [2016] 73 taxmann.com 185 (Gujarat)*, in support of the assessing officer's action taking recourse to section 148/147 proceedings against the taxpayer.

6. Learned Senior counsel representing the assessee on the other hand has filed a detailed paper book comprising of section 148 notice dated 26/3/2015, reopening reasons dated 09/07/2015, computation of income in the impugned assessment year along with income tax acknowledgement and returns, audited annual accounts, tax audit report, objections to validity of reopening dated 29/07/2015 and Assessing Officer's order thereupon dated 22/12/2015 (supra) and MCA's database of share allottees; respectively followed by a compilation of various judicial precedents to be dealt in succeeding paragraphs.

6.1. We are next taken to the assessing officers reopening reasons dated 26/03/2015 in issue at page 3 of the paper book as follows:-

*"This case belongs to Kushal Group of cases where search and seizure operation was conducted on 05.08.2014 and subsequent dates. In course of search and follow-up enquiries it has been seen that this group inflates expenses and resorts to out of book purchase and income generated in these processes is brought back in the books of accounts in the guise of bogus share capital/premium. In course of discrete enquiries made by Investigation wing it was seen that there is no real existence of the shareholders on the addresses shown in the form of allotment filed with Registrar of Companies.*

*On perusal of information received from Investigation wing of the Department and on perusal of seized books/documents it is seen that the company has resorted to raising share capital in the mode as described above during the financial year 2007-08.*

*In view of the above I have reason to believe that income has escaped assessment in respect of the assessee for the Assessment Year 2008-09. Notice u/s 148 issued on receipt of sanction from Joint Commissioner of Income Tax (Central)-Range 1, Kolkata."*

Mr. Agarwalla, states that the above reopening reasons make it clear that the Assessing Officer set section 148 process in motion based on the investigation wing's information without applying his mind independently. His case is that the impugned

reasons are based on section 132 (4) action. He quotes hon'ble Bombay high court's decision in the case of *Hindustan Lever Ltd. vs. R.B. Wadkar [2004] 268 ITR 332 (Bombay)* that the Assessing Officer's reopening reasons have to be read as it is. He has to disclose his mind through reopening reasons only that the assessee's taxable income liable to be assessed has escaped assessment.

6.2. Learned senior counsel's next plea is that the Assessing Officer has nowhere taken note section 132 (4) search statements or evidence found therein in his above extracted reopening reasons. He cites case law *Assam Co. Ltd. Vs. Union of India [2006] 150 TAXMAN 571 (GAU.)* that the Assessing Officer's reopening reasons in support of the proposed action must necessarily reveal all facts and materials not disclosed at the taxpayer's behest so as to establish a link between reasons and evidence. Learned senior counsel's contention is that the Assessing Officer's non recording of all the said material pinpointing escapement of taxable income from being assessed has defeated the assessee's is right to file its comprehensive objections in violation of hon'ble apex court's decision in the case of *GKN Driveshafts (India) Ltd. (supra)*.

Mr. Agarwalla continues his arguments against validity of the impugned reopening. He refers to the hon'ble jurisdictional high court's decision in *Equitable Investment Co. (P.) Ltd. vs. Income-tax Officer [1988] 174 ITR 714 (CAL.)*, that it is the recorded reasons only that can be taken into consideration whilst adjudicating validity of the reopening in issue. And that the Assessing Officer's additional averments in his supporting affidavit do not deserve to be accepted. He lastly refers to hon'ble delhi high court's decision in the case of *Sabh Infrastructure vs. ACIT [2017] 398 ITR 198 (Delhi)*, issuing the following guidelines to the department for necessary compliance as under: –

*“19. Before parting with the case, the Court would like to observe that on a routine basis, a large number of writ petitions are filed challenging the reopening of assessments by the Revenue under [Sections 147](#) and [148](#) of the Act and despite numerous judgments on this issue, the same errors are repeated by the concerned Revenue authorities. In this background, the Court would like the Revenue to adhere to the following guidelines in matters of reopening of assessments:*

- (i) *while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the Assessee. This would contain the comment or endorsement of the Superior Officer with his*

*name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided;*

- (ii) *the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment - especially in those cases where the first proviso to [Section 147](#) is attracted. The reasons to believe ought to also paraphrase any **investigation report which** may form the basis of the reasons and any **enquiry conducted** by the AO on the same and if so, the conclusions thereof;*
- (iii) *where the **reasons make a reference to another document**, whether as a letter or **report, such document and/ or relevant portions** of such report should be **enclosed along with the reasons**;*
- (iv) *the exercise of considering the Assessee's objections to the reopening of assessment is not a mechanical ritual. It is a quasi-udicial function. The order disposing of the objections should deal with each objection and give proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed. "*

6.3. Learned senior counsel accordingly contends that the Assessing Officer's action taking recourse to the impugned reopening has been rightly reversed in the lower appellate proceedings.

7. We have given our thoughtful consideration to the rival pleadings on the instant legal issue of the validity of the impugned reopening. There is hardly any dispute between the parties that the Assessing Officer's above stated reasons culminated in his reassessment adding assessee's share application/premium of Rs.6,92,00,000/- as unexplained cash credits. The CIT(A) has quashed the reopening in issue in light of various judicial precedents holding that it was incumbent upon the Assessing Officer to quote assessee's failure in not disclosing fully and truly all material facts as per section 147 first proviso since we are dealing with assessment year 2008 - 09 and section 148 notice had been issued on 26/03/2015 is beyond four years from the end of the relevant assessment year. He quotes hon'ble high courts judgments (supra) that the Assessing Officer's failure in not recording such reasons is fatal to the validity of the reopening in issue. The Revenue's argument is that the said statutory provision does not apply to section 143 (1) (a) but only in section 143 (3) assessment is devoid of merit as held in this tribunal's coordinate bench's decision in *Great Wall Marketing Pvt. Ltd. vs. DCIT in ITA No. 660/Kol/2011 order dt. 03/02/2016*. Coupled with this, the CIT D/R fails

to dispute the fact that the Assessing Officer had also not applied his independent mind on the investigation wing's information so as to form reasons to believe that the assessee's taxable income liable to be assessed has escaped assessment. Learned coordinate bench has accepted the concerned assessee's legal plea against a similar reopening as follows:-

*"8. We have heard the submissions of the learned counsel for the assessee both on the validity of initiation of re-assessment proceedings as well as the merits of the appeal. None appeared on behalf of the department.*

*8.1. We have considered the submissions of the learned counsel for the assessee. As far as the validity of initiation of re-assessment proceedings are concerned the reasons recorded by the AO for initiating proceedings u/s 148 are as follows :-*

*"No.DCIT/Cir-6/reasons for reopening/09-10*

*Dated 22/04/2009*

*To*

*The Principal Officer*

*Greatwall Marketing (P) Ltd.*

*c/o Sri. S.M. Daga 11, Clive Row, Room No. 2 .z-. Fir,  
 Kolkata- 700001.*

*Sir.*

*Sub: Recorded Reasons for Reopening in the case  
 of Greatwall Marketing (P) Ltd. for Asst. Yr. 02-03  
 Ref: Your letter dated 02/04/09 Please refer to the above.*

*As per information received from investigation wing New Delhi the introduced share capital during the year. had been received from corporate bodies which are non existent and whose capacity to invest ( credit worthiness ) could not be established . Therefore I have reasons to believe that unexp ained cash credit had been introduced in your books of accounts in the name of introduction of share capital and receipt of share application money. In absence of satisfactory identity and credit worthiness of the other parties. the entire introduced capital and share application money will be treated as your income for that year.*

*I will therefore continue the proceedings for reassessment of your return u/s 147. Statutory notices u/s 143(2) and 142(1) are enclosed herewith.*

*Yours faithfully.*

*Sd/-*

*( Sanjay Mukherjee) DCIT /Cir-6/Kol "*

*8.2. The submissions of the learned counsel for the assessee before us was that the reasons recorded by the AO were mere information received from D.I.T.(Investigation), New Delhi. There was no independent application of mind by the AO based on which it can be said that he arrived at the satisfaction that the income of the assessee is chargeable to tax has escaped assessment. It was submitted that information received by the AO was vague and uncertain and cannot be construed to be sufficient and relevant material on the basis of which reasonable person can form belief regarding escapement of income. Reliance was placed by the learned counsel for the assessee on the decision of the Hon'ble Delhi High Court in the case of [CIT vs Insceticides \(India\) Ltd](#) 357 ITR 330 and [CIT vs SFIL Stock Broking Ltd.](#) 325 ITR 285 (Delhi). In both the aforesaid decisions the reasons recorded by the AO for initiating*

*proceedings u/s 148 of the Act the Hon'ble Delhi High Court upheld the order of the Tribunal quashing the proceedings. Reliance was also placed on the decision of ITAT, Kolkata 'C' Bench in the case of M/s. Controlla Electrotech (P)Ltd vs DCIT in ITA Nos.1443 & 1444/Kol/2014 wherein on identical facts the Tribunal was pleased to quash the reassessment proceedings. On merits the learned counsel for the assessee relied on the order of CIT(A).*

*9. We have given a careful consideration of the submissions made by the learned counsel for the assessee. It is clear from the reasons recorded by the AO that the AO acted only on the basis of a letter received from Investigation Wing , New Delhi. The reasons recorded does not give as to who has given the bogus entries to the assessee. The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee. The reasons recorded which are extracted in the earlier part of the order does not show, what was the information given by DIT(Inv.),New Delhi. The date of the information received by the AO were not spelt out in the reasons recorded. The involvement of the assessee is also not spelt out, except mentioning the corporate bodies who had subscribed to the share capital of the assessee were non-existent and not creditworthy. On identical facts the Hon'ble Delhi High Court in the case of [CIT vs Insecticides \(India\) Ltd](#) (supra) has taken a view that the reasons recorded were vague and uncertain and cannot be construed as satisfaction on the basis of the relevant material on the basis of which a reasonable person can form a belief that income has escaped assessment. The Hon'ble Delhi High Court has also come to the conclusion that the reasons recorded did not disclose the AO's mind regarding escapement of income. The Hon'ble Delhi High Court ultimately held that initiation of proceedings u/s 148 of the Act was not valid and justified in the eyes of law. The facts and circumstances in the present case are identical to the case decided by the Hon'ble Delhi High Court. Following the said decision we hold that initiation of re-assessment proceedings is not valid. On this ground, the assessment is liable to be annulled."*

8. We wish to re-emphasise here that the Assessing Officer's reopening reasons are not different in the instant case as well as he has simply proceeded to set section 148 and 147 machinery in motion without even applying his mind to the alleged investigation wing's report. Hon'ble delhi high court's decision (supra) makes it clear that the Assessing Officer is supposed to paraphrase such investigation report forming basis of the reopening reasons along with necessary enquiry. And also that any documentary evidence referred in the reasons must also be enclosed with the reasons to the assessee. The Assessing Officer has admittedly not complied with all those legal requirements. We therefore reject the Revenue's arguments seeking to revive the impugned reopening on the former legal issue. We further make it clear that the Assessing Officer's above non-compliance to legal requirements deprived the assessee of its valuable right to file objections challenging validity of his reopening reasons as per hon'ble apex court's decision in the case of *GKN Driveshafts (India) Ltd. (supra)*. Mr. Nayak's reliance on hon'ble apex court's decision hereinabove in his arguments and the Assessing Officer's order dated 22/12/2015 disposing of the taxpayers objections are not liable to be accepted going by the preceding judicial precedents that an assessee

must be supplied reopening reasons so that it can prefer objections at the threshold. We therefore find no reason to interfere with the CIT(A)'s order in quashing the impugned reopening. The Revenue's last substantive ground that the CIT(A) has not adverted to the merits of the issue also does not carry any substance since the reopening itself stands quashed. The Revenue fails in its former appeal I.T.(SS). A. No. 159/Kol/2017 therefore.

10. The assessee does not press for the its cross-objections dealing with the merits of the case in view of our findings on the first and foremost legal issue in Revenue's appeal. We therefore decline this first cross-objection in C.O. No. 16/Kol/2018, as rendered infructuous.

11. **Assessment year 2009-10**; Revenue's appeal in IT(SS)A No. 160/Kol/2017 and assessee's C.O. No. 17/Kol/2018.

12. It transpires during the course of hearing that the CIT(A) has quashed section 153C assessment/proceedings in the instant case on the ground that there was no incriminating material found or seized during the course of search. This detailed discussion to this effect reads as under:-

4. Appeal on ground no 1, 2(a), 2(b), 3(a), 3(b) and 3(c) are against the assessment order passed u/s 153C/144 of the I T Act, 1961. The main argument of the assessee is that this is a search assessment, but during the search operation conducted u/s 132 of the I T Act, 1961 in the business premises of Kushal Polysacks Pvt. Ltd., no incriminating document was found or seized.

5. I have considered the findings of the AO in the assessment order and the written submission as well as different case laws brought on record by the AR. The main argument of the AR is that additions made by the AO in the assessment order passed u/s 153C/144 are not based on any incriminating documents/papers seized during the search operation. The



AR has brought on record many case laws decided by the Jurisdictional Kolkata bench of ITAT and Jurisdictional Calcutta High Court on this issue. Calcutta High Court has time and again reiterated its view that the additions in case of the search assessments has to be made on the basis of incriminating material. Some of the recent decision of the Hon'ble Jurisdictional High Court are discussed hereunder.

**PCIT-2, Kolkata Vs. Salasar Stock Broking Limited [ITAT No. 264 of 2016] dated 24.08.2016 ; (Calcutta) '1**

In this case, the Honorable High Court observed that the Ld. ITAT, Kolkata was of the opinion that the assessing officer had no jurisdiction u/s 153A of the I.T. Act to reopen the concluded cases when the search & seizure did not disclose any incriminating material. In taking the aforesaid view, the Ld. ITAT relied upon the judgments of Delhi High Court in the case of **CIT(A) Vs. Kabul Chawla in ITA No. 707/2014 dated 28.08.2014**. The Court also observed that more or less an identical view has been taken by this Bench in **ITA No. 661/2008 in the case of CIT Vs. Veerprabhu Marketing Limited**. Considering the above facts, the Honorable High Court did not admit the appeal filed by the Department.

**'CIT,Kolkata-III Vs. Veerprabhu Marketing Ltd.[2016] 73 taxmann.com 149 (Calcutta) :**

In this case The Honorable Calcutta High Court expressed the following views:

**"We are in agreement with the views of the Karnataka High Court that incriminating material is a pre-requisite before power could have been exercised under section 153C read with section 153A.**

**In the case before us, the assessing officer has made disallowances of the expenditure, which were already disclosed, for one reason or the other. But such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances made by the assessing officer were upheld by the CIT(A) but the learned Tribunal deleted those disallowances."**

The Hon'ble Kolkata High Court in the above cases relied on the following judgments.

**CIT Vs Kabul Chawla (2016) 380 ITR 0573( Del)**

**Search and seizure—New scheme of assessment in search cases—Search was carried out u/s 132 on a leading real estate developer operating all over India and some of its group companies—Search was also carried out in the premises of the assessee—Pursuant to the search a notice u/s 153A(1) was issued to assessee and thereafter he filed returns—As on the date of the search, no assessment proceedings were pending for relevant AYs and for said AYs, assessments was already made u/s 143(1), assessee filed an application u/s 154 seeking rectification of the assessments on the ground that the accumulated profits of the companies paying the dividend were less than the amount of loan or advance given by them to the recipient companies—AO declined to rectify the assessments—CIT also held that addition need not be restricted only to the seized material—ITAT on appeal however deleted addition on grounds that the additions made for**

*relevant AY's u/s 2(22)(e) were not based on any incriminating material found during search operation and same was not sustainable in law— Issue was whether the additions made to the income of the assessee for the said AYs u/s 2(22)(e) was not sustainable because no incriminating material concerning such additions were found during the course of search and further no assessments for such years were pending on the date of search—Held, present appeals concerned AYs, 2002-03, 2005-06 and 2006-07—On the date of the search the said assessments already stood completed—Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed—Question framed by the Court was answered in favour of the assessee and against the Revenue—Revenue's appeal dismissed.*

In order to verify the claim of the AR that notice u/s 153C was issued and assessment was completed without any incriminating documents pertaining to/related to the assessee, a letter No. CIT(A)-20/Kol/16-17/247 dated 08-08-2017 was written to the DCIT, CC-1(4), Kol to produce assessment folder along with documents and papers etc related to the assessee during the appellate proceedings. The AO has made available the assessment record along with his forwarding letter No. DCIT/CC-1(4)/Kol/Appeal-20/2017-18/548 dated 10-08-2017, I have gone through the assessment record and the satisfaction recorded by the AO before issuing notice u/s 153C. From the satisfaction recorded by the AO it is evident that the AO has not pointed out any incriminating documents pertaining to/related to the assessee found during the search operation. Even in the assessment order the AO has not discussed/mentioned/referred any incriminating documents in order to make addition. In the assessment order the AO has discussed as under:

"A search & seizure operation was conducted in the residential, office & factory premises of 'KUSHAL' Group at Kolkata & Dist-Purulia, West Bengal on 05-08-2014 and subsequent dates. Lockers belonging to the various persons of this group were also covered u/s 132 of the I T Act, 1961. Consequent upon search & seizure operation proceedings u/s 153C of the I T Act, 1961, were initiated and notice u/s 153C dt.31-05-2016 was duly served upon the assessee. In response to the said notice, return of income admitting total income at NIL was filed on 28-11-2016."

Even while making additions in the assessment order the AO has not referred to any incriminating documents related to the assessee found during the search operation. Here it is important to note that in order to issue notice u/s 153C, the very first requirement is the availability of incriminating documents related to the assessee in the hands of the AO. For clarity sake it would not be out of context to discuss here the scheme of section 153C of the I T Act, 1961, it is as under:

"[Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that-

- (a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or  
 (b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to.

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [ and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section 153A]

Thus from the very scheme of section 153C it is clear that the AO must have in his possession any books of account/documents seized or requisitioned related to the assessee before issuing notice u/s 153C. Here in this case I find from the satisfaction note that nothing as such has been mentioned there. Even in the assessment order the AO has not discussed any incriminating documents related to the assessee found and seized during the search operation.

6. I further find that in this regard the Hon'ble ITAT Kolkata has time and again reiterated its view that the additions in case of the search assessments have to be made on the basis of incriminating material and any deviation from the same would render the assessment order invalid. Some of the recent decision of the Hon'ble Jurisdictional Tribunal is discussed hereunder

**M/s Adhunik Gases Ltd. & Others vs. DCIT CC-XXX, IT(SS)A No. 47/Kol/2015, IT(SS)A No. 49/Kol/2015, IT(SS)A No. 50-2/Kol/2015, IT(SS)A No. 54/Kol/2015, IT(SS)A No. 55/Kol/2015, IT(SS)A No. 94-96/Kol/2015 order dated 06.01.2017(ITAT Kolkata)**

In this case it is held that no addition u/s 68 of the I.Tax Act for the Share Capital can be made in absence of any incriminating material. The concluding Para of the Hon'ble ITAT's order is as under

*Having heard the rival submissions, perused the material available on record, we are of the view that there is merit in the submissions of the assessee, as the propositions canvassed by the Ld. AR for the assessee are supported by the judgments of jurisdictional ITAT and Hon'ble High Courts. Ld. AR has pointed out that no incriminating documents was found either during survey or during search procedure. The statement of Shri Naresh Kumar Chhaperio should not be relied on, because he is a double speaking person. The assessment proceedings were completed before the date of search. Besides, the time limit to issue notice u/s 143(2) was also expired. In order to initiate assessment proceedings u/s 153A, there should be a*

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*new or incriminating document. The assessment which is already completed u/s 143(3)/143(1) should not be reopened. Therefore, considering the scheme of section 132 and section 153A, we are of the view that there should be some new document/incriminating document to invoke the provisions of section 153A. Ld. DR for the revenue had pointed out that there is a direct nexus among the companies, which has been established by the statement of Mr. Naresh Kumar Chhapperia, which cannot be relied on, as he was a double speaking person. Therefore, considering the factual position and the judgments cited by ld. AR, we are of the view that the additions made by the AO u/s 153A and confirmed by the ld. CIT(A) needs to be deleted. Therefore, we delete the addition.\**

Furthermore, the decision of the jurisdictional tribunal in the case of **M/s Tanuj Holdings Pvt Ltd Vs. DCIT CC-1(2), Kolkata** vide ITAT No. 360 to 363/Kol/2015 dated 20.01.2016 is important. The relevant portion of the order is reproduced as under;

*We also find that no incriminating materials were found during the search in the respect of the issue of deemed dividend. Hence it cannot be the subject matter of addition in 153C proceedings in respect of completed assessments. We hold that when an addition could not be made as per law in section 153C proceedings, then the said order cannot be construed as erroneous warranting revision jurisdiction u/s 263 of the Act.*

**Shri. Manish Mundhra Vs. ACIT-CC-XXX in ITA-469-470/Kol/2013 Dt. 16.12.2015 (ITAT Kolkata);**

*We also are of the view that in the light of the admitted fact that no incriminating material was found in the course of search the impugned addition could not have been made in the proceedings u/s 153A of the Act. The decision of the ITAT, Delhi Bench in the case of **ACIT vs M/s. Delhi Hospital Supply Pvt. Ltd.** (supra) followed the decision of Hon'ble Delhi High Court in the case of **Kabul Chawla** (supra) supports the plea of the assesee in this regard...."*

**ACIT-CC-XXVII Vs Kanchan Oil Industries Ltd. in ITA-725/Kol/2011 Dt. 09.12.2015 (ITAT Kolkata);**

*In view of the aforesaid findings and judicial precedent relied upon, we hold that the denial of deduction u/s 80IB of the Act in the assessments framed u/s 153A of the Act for the Asst Years 2003-04 and 2004-05 without any incriminating materials found during the course of search with respect to those assessment years is not warranted and held as not in accordance with law. Accordingly, the grounds raised by the revenue in this regard for the assessment years 2003-04 and 2004-05 are dismissed.*

*We hold that the same decision would be applicable for the disallowance made by the Learned AO u/s 14A of the Act and accordingly no disallowance u/s 14A of the Act could be made for the Asst Year 2004-05 by the Learned AO in the assessment framed u/s 153A of the Act in the absence of any*

incriminating materials found during the course of search with regard to the relevant assessment year and with regard to the relevant issue.

With regard to the claim of deduction u/s 80IB of the Act for the Asst Years 2007-08 and 2008-09 are concerned, we find that the same is only consequential in nature and once the assessee has been granted deduction u/s 80IB of the Act for the initial assessment year i.e. Asst Year-2003-04, the grant of deduction under the said section in respect of the same unit is only academic and hence the assessee is entitled for deduction u/s 80IB of the Act for the Asst Years 2007-08 and 2008-09.

Accordingly, the ground raised by the revenue in this regard for the assessment years 2007-08 and 2008-09 are dismissed.

Since the decisions are rendered by us on legal grounds, we refrain to give our decision on the merits of the issues."

Budhiya Marketing Pvt. Ltd. & Ors. Vs. ACIT in ITA Nos. 1545-1546/Kol/2012 [reported in (2015) 44 CCH 0344(dt. 10.07.2015) ITAT Kolkata]

"The issue whether the addition in an assessment framed under section 153A can be made on the basis of the incriminating material found during the course of the search where the assessment has not been abated, has not been considered or decided by this Tribunal. Therefore, this decision in our opinion will not assist the revenue while disposing of the plea of the assessee that since no incriminating material is found during the course of the search relating to the share capital and the share premium, therefore, no addition can be made while making an assessment under section 153A of the Income Tax Act. No contrary decision was brought to our knowledge by the M. D.R. in view of the aforesaid discussion and the decision of the Hon'ble Special Bench, Bombay High Court, as well as Hon'ble Delhi High Court, we confirm the order of the CIT(Appeals) deleting the addition made in each of the assessment years as we hold that the Assessing Officer was not correct in law in making the addition in the assessment made under section 153A read with section 143(3) when no incriminating material was found during the course of the search in respect of the addition made by him. We accordingly partly allowed the Cross Objections taken by the assessee."

ACIT Vs. Shanti Kumar Surana & Ors. in ITSSIA Nos. 12 to 20 and CO Nos. 13 to 20 [reported in 44 CCH 241] order dt. 23.06.2015 ITAT Kolkata]

"In view of the facts in entirety and the legal principles enunciated by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (MewaSheva) Ltd., supra, of Hon'ble Allahabad High Court in the case of Shailo Agarwal, supra and Mumbai Special Bench decision in the case of All Cargo Global Logistics, supra, we are of the view that there is no incriminating material found during the course of search in the present case for these assessment years, except the statement of one Shri Sambhu Kr More, as admitted by the AO in his remand report dated 23.09.2011 and despite number of opportunities revenue could not produce any incriminating material before the Bench and the assessments are already completed for these

assessment years originally, the assessments framed u/s. 153A of the Act is in valid and hence, quashed."

**Trishul Hitech Industries Ltd Vs. DCIT-CC-XI, IT(SS)A84-86/Kol/2011 dt. 24.09.2014 [ITAT Kolkata];**

From the above various discussions and precedence we are of the considered view that assessment in the impugned assessment years have been completed u/s 143(3) of the Act. Hence the assessment for the concerned assessment year does not abate. Hence dehorse any incriminating material, AO cannot made any addition in these cases. Accordingly we hold that assessment u/s 153C of the Act in these cases dehorse any incriminating material is not sustainable. Hence we set aside the orders of the authorities below and decide the issue in favor of assessee. Since we are quashing the appeals on jurisdiction we are not adjudicating the merits of the appeal as the same is now only of academic interest."

**DCIT Vs. Merlin Project Ltd. IT(SS)A No-138/Kol/2011 Dt. 14.11.2013 [ITAT Kolkata];**

"We have heard the rival submissions and perused the material available on record. The undisputed fact about this case is that the original assessment in this case was completed under section 143(3) in which deduct ion was allowed in entirety under sect ion 80IB of the Act inter al ia on the amount of interest income. It is also undisputed that no incriminating material was found during the course of search casting doubt about the allowability or otherwise of such deduction under sect ion 80IB. This fact has been fairly admitted by Id. D.R. during the course of proceedings before us as well.

The Mumbai Bench of the Tribunal in the case of ACIT vs. Pratibha Industries (2013) 141 ITD 151 (Mum.) has held, inter alia, that having done original assessment u/s 143(3), if no incriminating material is found during the course of search, then it is permissible to make any addition in the assessment under section 153A pursuant to search act ion. The Special Bench of the Tribunal in the case of All Cargo Global Logistics Limited vs. DCIT (2012) 137 ITD 217 (SB)(Mum.) has also held to the same extent . In view of the foregoing discussion, we are of the considered opinion that no exception can be found to the view taken by CIT(Appeals) for deciding this issue in assessee's favour.

Before parting with this matter, we want to make it clear that our decision is based in the backdrop of the facts that the deduct ion under sect ion 80IB could not have been tinkered with because no incriminating material was found during the course of search on this issue when original assessment granting deduct ion on this issue was completed under sect ion 143(3). We have not expressed any opinion on the merits of the case about the allow ability or otherwise of deduct ion under section 80IB on interest income arising in the present facts and circumstances.

In the result, the appeal filed by the Revenue stands dismissed."

**LMJ International Ltd Vs. DCIT(2008) 119 TTJ [Kol] 214. [ITAT Kolkata];**

***"Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed; items of regular assessment cannot be added back in the proceedings under s. 153A/153C when no incriminating documents were found in respect of the disallowed amounts in the search proceedings.***

Furthermore, The Hon'ble Supreme Court has dismissed department's special leave petition(SLP) against the judgment dt.06-07-2015 of the Delhi High Court in ITA No.369 of 2015 where the High Court held that no substantial question of law arose since there was factual findings that no incriminating evidence relate to share capital issued was found during the course of search. The AR has filed a written submission on this issue which is as under:

"Whether section 68 could be invoked where no incriminating evidence related to share capital found.

7-12-2015 : Their Lordships MADAN B LOKUR and S A BOBDE JJ dismissed the Department's special leave petition against the judgment dated July 6, 2015 of the Delhi High Court in ITA No.369 of 2015, whereby the High Court held that no substantial question of law arose since there was a factual finding that no incriminating evidence related to share capital issued was found during the course of search and that the Assessing Officer was not justified in invoking section 68 of the Act for the purposes of making additions on account of share capital. Pr. CIT v Kurele Paper Mills P Ltd, SLP (C) No.34554 of 2015".

7. The AR has also brought on record the case law of CIT, Kolkata-III vs Veerprabhu Marketing Ltd [2016] 73 taxmann 149 Kolkata In this case The Honorable Calcutta High Court expressed the following views:

***"We are in agreement with the views of the Karnataka High Court that incriminating material is a pre-requisite before power could have been exercised under section 153C read with section 153A.***

***In the case before us, the assessing officer has made disallowances of the expenditure, which were already disclosed, for one reason or the other. But such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances made by the assessing officer were upheld by the CIT(A) but the learned Tribunal deleted those disallowances."***

The Hon'ble Kolkata High Court in the above cases relied on the following judgments.

***CIT Vs Kabul Chawla (2016) 380 ITR 0573( Del)***

***Search and seizure—New scheme of assessment in search cases—Search was carried out u/s 132 on a leading real estate developer operating all over India and some of its group companies—Search was also carried out in the premises of the assessee—Pursuant to the search a notice u/s 153A(1) was issued to assessee and thereafter he filed returns—As on the date of the search, no assessment proceedings***

were pending for relevant AYs and for said AYs, assessments was already made u/s 143(1), assessee filed an application u/s 154 seeking rectification of the assessments on the ground that the accumulated profits of the companies paying the dividend were less than the amount of loan or advance given by them to the recipient companies—AO declined to rectify the assessments—CIT also held that addition need not be restricted only to the seized material—ITAT on appeal however deleted addition on grounds that the additions made for relevant AY's u/s 2(22)(e) were not based on any incriminating material found during search operation and same was not sustainable in law—Issue was whether the additions made to the income of the assessee for the said AYs u/s 2(22)(e) was not sustainable because no incriminating material concerning such additions were found during the course of search and further no assessments for such years were pending on the date of search—Held, present appeals concerned AYs, 2002-03, 2005-06 and 2006-07—On the date of the search the said assessments already stood completed—Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed—Question framed by the Court was answered in favour of the assessee and against the Revenue—Revenue's appeal dismissed

It was also informed/brought on record that the order passed by the Hon'ble Calcutta High Court has attained finality as the CBDT in its letter No.ADG(L&R)-II/EZ/Pr.CIT(Ct-1)/Kolkata/1184/2016/729 dt.07/08-02-2017 has intimated that the proposal to file SLP in above case has not been approved by the Board.

- Apart from above mentioned case laws brought on record, the AR has also filed copies of appeal orders in different cases passed by my three esteemed predecessors on the same issue wherein they have discussed in length and arrived at conclusion that additions in search assessments u/s 153A/153C cannot be made except on the basis of the incriminating material found in the search. (reference

- a) appeal no.442/CC-3(1)/CIT(A)-21/14-15, date of order 05-12-2014,
- b) appeal no.440/CC-3(1)/CIT(A)-21/14-15, date of order 15-01-2015
- c) appeal no.547/CC-3(1)/CIT(A)-21/14-15, date of order 10-04-2015
- d) appeal no.129/CC-XVII/CIT(A)-1/09-10, date of order 23-09-2010
- e) appeal no.292/CC-VI/CIT(A)-C-VI/11-12, date of order 23-10-2013.

I have considered the findings of the AO in the assessment order, different case laws brought on record and appeal orders passed by my predecessors on this legal issue. I find from the assessment order that during the search and seizure operations conducted u/s 132 of the I T Act, 1961, incriminating documents/papers were not seized. At least, additions made by the AO in the assessment order passed u/s 153C/144 are not based on any incriminating documents/papers seized during the search operation from the business premises of Kushal Polyarnks Private Limited. It would also not be out of context to mention here that in this case, on the date of



search, no assessment for this year was pending. Therefore, keeping in view the ratio decided by the Jurisdictional bench of Kolkata Tribunal in cases referred above and the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd (supra) in the light of CBDT's decision of not filing SLP in this case in the Supreme Court and keeping in view the Apex Court's decision to dismiss SLP on similar issue in the case of Pr CIT vs Kurele Paper Mills Pvt Ltd : SLP (C) No.34554 of 2015 dt.07-12-2015, I am of this view that in order to maintain judicial continuity on this issue and respectfully following the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd (supra), assessee's appeal on ground no 1, 2(a), 2(b), 3(a), 3(b) and 3(c) are allowed and as such I am not inclined to adjudicate appeal on ground no 4 to 6 on merit. Since the appeal in this case has been adjudicated on technical ground, therefore, I am not inclined to adjudicate appeals on other grounds on merit.

13. We have given our thoughtful consideration to the Revenue's pleadings/arguments that the CIT(A) has erred in law and in facts in quashing the impugned assessment for want of any incriminating evidence found or seized during the course of assessment. It has come on record that the CIT(A) has taken note of all the judicial precedent including hon'ble jurisdictional high court's decision to this effect (supra) whilst holding the impugned assessments as not sustainable in the eyes of law. We therefore see no merit in the Revenue's instant grievance in absence of any incriminating evidence found/seized during search. Revenue's main appeal I.T.(SS)A. No. 160/Kol/2018 fails therefore.

14. The assessee's latter cross-objection on merits C.O. No. 17/Kol/2018 is rendered infructuous in view of our findings against the Revenue on the preceding legal issue.

15. These two Revenue's appeals are dismissed and assessee's cross-objections are dismissed as rendered infructuous. Ordered accordingly.

***Kolkata, the 17<sup>th</sup> day of May, 2019.***

Sd/-  
**[A.L. Saini]**  
 Accountant Member  
 Dated : 17.05.2019  
 {SC SPS}

Sd/-  
**[S.S. Godara]**  
 Judicial Member

*Copy of the order forwarded to:*

**1. M/s. Samarth Fablon Pvt. Ltd**  
**16, Ganesh Chandra Avenue**  
**Kolkata – 700 013**

**2. Deputy Commissioner of Income Tax, Central Circle-1(4), Kolkata**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy  
By order

Assistant Registrar  
ITAT, Kolkata Benches

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