IN THE INCOME TAX APPELLATE TRIBUNAL
"RAIPUR" BENCH, RAIPUR

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI PAWAN SINGH, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. Nos. 37 to 42/RPR/2020

(**निर्धारण वर्ष /** Assessment Years : 2009-10 to 2014-15)

Dy. Commissioner of Income Tax (Central)-2 Raipur (C.G.)	**बनाम**/ Vs.	**M/s. Shree Jagdamba Construction Co.** Flat No.222, 2nd Floor, Krishna Arcade, Lodhipara Chowk, Raipur-492001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABIFS7788L		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri R. K. Singh, CIT.DR
प्रत्यर्थी की ओर से/**Respondent by :**	Shri R. B. Doshi, C.A.

सुनवाई की तारीख / **Date of Hearing**	09/08/2021
घोषणा की तारीख /**Date of Pronouncement**	02/09/2021

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned six appeals have been filed at the instance of the Revenue against the common order of the Commissioner of Income Tax (Appeals)-II, Raipur ('CIT(A)' in short), dated 11.10.2019 arising in the common assessment order dated 29.12.2016 passed by the Assessing Officer (AO) under s. 153A/ 143(3) of the Income Tax Act, 1961 (the Act) concerning AYs. 2009-10 to 2015-16.

2. In its appeal for A.Ys. 2009-10 to 2012-13, the Revenue has challenged the reversal of additions made by the AO under s.40A(iii) of the Act by the CIT(A). The facts and issue being identical, we first take up ITA No. 37/RPR/2020 for A.Y. 2009-10 for appreciation of facts and adjudication thereon.

ITA No. 37/RPR/2020 – A.Y. 2009-10

3. The ground of appeal raised by Revenue concerning A.Y. 2009-10 reads as under:

> *"1. On the facts and in the circumstances of the case, the ld.CIT(A) erred in deleting the addition of Rs.6,42,06,726/- made by the Assessing Officer u/s 40A(3) of the Income Tax Act, 1961."*

4. Briefly stated, a search and seizure action under s.132 of the Act was conducted on the business premises of the assessee firm on 16.10.2014. As a consequence, the assessment was framed under s.153A r.w.s. 143(3) of the Act for A.Y. 2009-10 to 2014-15. The order for A.Y. 2015-16 was framed under s.143(3) of the Act. In the course of the assessment pursuant to search, the AO *inter alia* disallowed expenditure claimed amounting to Rs.6,42,06,726/- in A.Y. 2009-10 alleging cash payments above Rs.20,000/- and breach of Section 40A(3) of the Act. It was noted by the AO that search party retrieved the tally accounts of the assessee firm from hard disk and same was seized. The file of the tally was compared with the data of audit report and consequently, the AO was of the opinion that the assessee has incurred expenditure and made payments in cash in excess of Rs.20,000/- to various parties, as per entries shown on the last date of the fiscal year i.e. 31.03.2009. Similar expenses were found to have been claimed in violation of provisions of Section 40A(3) of the Act in other assessment years also. A tabulated statement was reproduced in the assessment order. In response to the show cause notice for disallowance under s.40A(3)

of the Act by the AO, the assessee took a stand vide reply dated 26.12.2016 that no payment in excess of Rs.20,000/- has been made by the assessee to any of the parties and the sum shown against parties are at the end of the respective year whereas the payments were staggered over the period as per entries recorded in audited accounts. It was, thus, further requested to the AO that details of relevant seized materials and copy thereof may be provided for submitting comprehensive reply. No copy of seized data as alleged was however provided to assessee to appreciate the facts despite repeated requests. In essence, it was claimed that the amount referred in tabulation was not claimed as expense. The actual expenses incurred towards various sub-contractors, labour expenses etc. were claimed to be paid within the limit of Rs.20,000/- and therefore, such expenses are outside the purview of Section 40A(3) of the Act.

5. The AO was, however, not satisfied with the explanations of the assessee and consequently disallowed the expenses incurred amounting to Rs.6,42,06,726/- and accordingly assessed the income at Rs.7,70,23,280/- as against the returned income of Rs.1,28,16,550/-.

6. Aggrieved, the assessee preferred appeal before the CIT(A) challenging the additions so made under s.40A(3) of the Act. The CIT(A) took note of the submissions made by the assessee and several case laws and found merit in various pleas raised on behalf of the assessee for inapplicability of Section 40A(3) of the Act in the facts of the case. The relevant operative para of the order of the CIT(A) is reproduced hereunder:

> *"2.3 I have perused the assessment order and the submissions made by the appellant. On going through the facts of the case it is seen that*

the AO has made disallowance u/s. 40A(3) of the Act in the AYs. 2009-10 to 2012-13 stating that cash payments have been made in excess of the limit of Rs 20000/-. Alternately the AO has also relied on Section 40(a)(ia) of the Act stating that the appellant has not made TDS from the payments. During the survey proceedings certain tally accounts were found from assessee's computers and in the tally account details of payments of various parties were found which has been treated by the AO as cash payment. The material relied upon by the AO is a tabulation which contains details of name of payee person and amount. As per the AO these details were available in the computer data retrieved from TALLY software. The heading on the payments is "on 31.3.2009", "on 31.3.2010" and "on 31.3.2011". AO has inferred that the payments were made on a single day which was 31st of March of the year. The AO has stated that only the print out which has been reproduced in the assessment year was available in the Tally data. Vide letter dated 28.2.2019 working copy of the seized hard disk mentioned as HDD-1 was sent. It was learnt that the hard drive was not working. The same was therefore not received and returned immediately.

Appellant has objected to making of addition on the basis of this chart without affording any opportunity to the assessee to contradict its contents. Raipur office of appellant is neither administrative office nor accounts office and accounts are not maintained at Raipur office. Raipur office is mere liasoning office. The head office of appellant is at Surajpur where the accounts are maintained. Surjapur office was not searched. Vide various letters dt. 29.11.2016, 15.12.2016, 16.12.2016 and 24.12.2016 AO was requested to provide copy of the tally data and of the hard disk but the AO did not provide it and proceeded to make addition. Inspite of repeated requests, the AO failed to provide the basis of allegation of cash payments and the evidence, if any, available on his record. In the assessment order, vide para no. 8.2 AO observed that the appellant was appraised about the nature of data retrieved from the tally data on the hard disc. Appellant has contended that it was never appraised about the nature of data available with the AO. Neither copy of the hard disc, nor of the alleged data available therein was provided to the appellant inspite of repeated requests. The AO has only mentioned that the appellant was appraised, but he has not given details or instance of having provided the same to appellant. During the assessment, only the chart was provided to appellant. The data from which the chart was prepared and the copy of impugned seized material was never provided to appellant. Without verifying the source of data, it was not possible for appellant to submit any explanation whatsoever. The AO has based his assessment/addition on a material which was never confronted to the appellant. Such material could not have been used against appellant. Appellant has alleged that the AO has violated principles of natural justice. It is established law that such violation renders the assessment order to be illegal, ab intio void and not sustainable. We rely on the decision in following cases. The Delhi HC in the case of CIT vs Ashwani Gupta (2010) 322 ITR 396 (Del.) the facts were that the AO passed the assessment order in violation of principles of natural justice inasmuch as he neither provided copy of the seized material to the assessee nor did he allow the assessee to cross examine the person on the basis of whose statement the addition was made. The CIT(A) held the entire addition to be invalid which was confirmed by ITAT. Hon'ble High Court observed that violation of

principles of natural justice remains undisputed. Such deficiency amounted to denial of opportunity and consequently would be fatal to the proceedings. The High Court upheld the order of ITAT. In another case of H. R. Mehta vs ACIT in Income Tax Appeal no. 58 of 2001, judgment dt. 30.06.2016, Justice M. S. Sankhlecha & Justice A. K. Menon the High Court observed that the least that Revenue should have done was to provide opportunity to the assessee to meet the case by providing the material sought to be used against the assessee. The assessee was bound to be provided with the material used against him. This not having been done, it goes to the root of the matter and strikes at the very foundation of the reassessment and therefore, renders the order passed by the AO vulnerable.

The print out which has been produced in the assessment order is not supported by any independent documents. For the AY 2009-10, the allegation of the AO is that the payment of Rs. 6,42,06,726/- was made on a single day i.e. on 31.3.2009. Similarly for the AY 2010-11, the allegation of the AO is that the payment of Rs. 4,47,55,792/- was made on a single day i.e. on 31.3.2010 and for AY 2011-12, the allegation of the AO is that the payment of Rs. 8,87,87,368/- was made on a single day i.e. on 31.3.2012 and lastly for the AY 2012-13, the allegation of the AO is that the payment of Rs. 6,11,71,888/- was made on a single day i.e. on 31.3.2013.

These allegations, made on the basis of the above chart for these assessment years are not supported by any documents. On the contrary the assessee has vehemently opposed the AO's allegation and has stated that figures of payments are not for the single day on the last day of the year but are for the whole year. Thus the payment of Rs. 4,47,55,792/- is not payment made on 31.3.2010 but the payments were made during the year 2009-10. Same is true for the other assessment years also. AO has not denied that the payments did not relate to the business of the firm. The contention of the assessee is that the payment was not made in single day but was made over the entire year.

Assessee has vehemently contested the conclusion of the AO that all the payments were made on a single day. It was stated that the assessee is a contractor and the payee are subcontractors. The payments were made for various expenses during the year such as labour payments and material. Assessee has furnished account copies of payees. The total payment as per the table tallies with the audited accounts of the assessee for assessment years 2009-10, 10-11, 11-12 and 12-13. The first name is Ajit Jaiswal to whom Rs 4,13,000/- was paid from 12.5.200 to 12.01.2009 in the FY 2008-09. AO has treated the whole payment to be made on 31.3.2009 whereas the payment had started with the first payment of Rs 19,700/- on 12.05.2008 and last payment of Rs 16,500/- on 12.1.2009. In FY 2009-10 total payment of Rs 4,10,000/- was made between 10.6.2009 to 30.3.2010. AO has treated the whole payment of Rs 4,10,000/- to be on 31.3.2010 where as the first payment of Rs 17000/- was made of 10.6.2009 and last payment of Rs 17500/- was made on 30.3.2010. Similarly in FY 2010-11 Rs 4,70,000/was made between 5.4.2010 to 25.3.2011 whereas AO has treated the entire payment to be made on 31.3.2011.

The assessee has stated that several payments have been made in cheque also. In case of many payments TDS has also been made. AO has not provided any material on the basis of which the addition has been made. On these facts the information obtained from seized hard drive in the tabulation format is nothing but a statement of consolidated payments for the whole year. The heading on the table is "Cash payment on 31.3.2009", "Cash payment on 31.3.2010." etc. However on going through audited accounts and ledger it shows that the tabulation in respect of cash payment 'as on' 31.03.2009, 31.03.2010 etc and not 'on' 31.03.09, 31.03.10 etc. Further the word 'cash payments' is erroneous since in several cases the payments are in cheque. The payments per se are in amounts less than Rs. 20,000/- in each case. Also the payments are not on consecutive days but there is a gap of about a week between two payments. Thus it cannot be alleged that the payments have been deliberately broken into small accounts. In any case there is no material on record which was the last date of the year.
In the case of several payees like Amit Agarwal to whom Rs. 5,06,541/- was paid between 02.04.2011 to 26.03.2012, TDS @ 1% have been made. Similar TDS have been made in the case of other payees like Chhatrapal Dewangan, Dilip Soni, Ibran Ahmed, Nalin Jindal, Nitin Sahu Vivek Agrawal etc the assessee has made TDS and few others.
The AO has not enquired and established that payments made by the assessee are not genuine. Purpose of section 40A(3) of the Act is to ensure that the payments which are not genuine are not allowed. The AO was also sent the set of account confirmation from all the recipients and his report was called for. The AO has opposed furnishing of any additional evidences. No comments have been made on the merit of the case.

If payments are genuine, the disallowance u/s 40A(3) cannot be made as held been held in the case of [1986] 179 ITR 122 (CAL.) Giridharilal Goenka v. Commissioner of Income-tax. In this case the AO has made addition under this section in respect of cash payments. The h'ble High Court held that w here assessee had satisfied Assessing Officer as to genuineness of payment and identity of payee, mere fact that there was time-gap between dates of bills and dates of payment would not take out assessee's case out of ambit of exceptional or unavoidable circumstances.

The assessment of the assessce's case for AY 2009-10 to 2012-13 were completed u/s 143(3) and during which the account copies of subcontractors were filed to whom the payment were related. Therefore now at this stage the allegation of the AO of making payments on single day is without any basis.

The conclusion made by the AO is not borne out from any facts on record or as a result of any inquiry. No recipient has denied having received the payment as reflected in assessees books as per the above chart. Neither there is any evidence that the payments were not made on the dates as per the ledger accounts of respective recipients but were made on the last date of the year. Assessee has filed copy of ledgers and confirmations from all recipients.

Provision of section 40A(3) of the Act has been inserted to ensure that bogus payments are not claimed as expenses. When the

payments have been confirmed by recipients there is not ground for addition. In the case of 179 ITR 122 (CAL.) Giridharilal Goenka v. Commissioner of Income-tax where assessee had established genuineness of payment and identity of payee, mere fact that there was time-gap between dates of bills and dates of payment would not take out assessee's case out of ambit of unavoidable circumstances and deduction of expenditure which was otherwise allowable to him could not be denied. Not only the above, but also where the payments have been made in cash to maintain harmonious business relation with the payees such payments have been held as allowable.

In the case of 263 ITR 145 2003 CAL Goenka Agencies v. Commissioner of Income-tax in order to keep harmonious business relationship with its supplier, made some payment to him in cash - Assessee claimed that cash payment had been made under unavoidable circumstances and as such same should be deducted from his income. Assessing Officer, however, rejected assessee's claim and added said cash payment in assessee's income. Commissioner (Appeals) set aside order of Assessing Officer. On further appeal, Tribunal held that requirements mentioned in rule 6DD(j) were only subsidiary requirements in addition to the main requirement of proving exceptional circumstances and genuine difficulties which had not been fulfilled by assessee and set aside order of Commissioner (Appeals). Honourable High Court held that since Commissioner (Appeals) had observed that payments had been made to keep harmonious relationship with supplier under unavoidable circumstances, cash payment made by assessee clearly satisfied requirement under provisions of rule 6DD(j)(1). In a similar case of 249 ITR 113 2001 Allahabad Commissioner-of Income-tax v. Suresh Kumar Agarwal the Tribunal deleted disallowance made under section 40A(3) holding that assessee's case fell under second proviso to section 40A(3). Honourable High Court held that in view of Supreme Court's observations that terms of section 40A(3) are not absolute, that consideration of business expediency and other relevant factors are not to be excluded and that genuine and bona fide transactions are not taken out of sweep of section, no substantial question of law arose from Tribunal's order. In fine, the circumstances under which cash payment has been made must be considered and particularly in the line of transport business, where the payment per se is not doubtful and parties have not been found to be non-genuine, the payment cannot be disallowed.

In view of above, considering the legal position of disallowance u/s 40A(3) and in view of there being no supporting document to substantiate the claim of the AO of making payment on a single day the addition is hereby deleted."

The CIT(A) accordingly reversed the action of the AO and deleted the additions so made under s.40A(3) of the Act.

7. Further aggrieved, the Revenue is in appeal before the Tribunal.

8. We have carefully considered the rival submission on the issue. The disallowance of expenses incurred is in controversy having regard to provisions of Section 40A(3) of the Act. On perusal of the assessment order and the first appellate order together with various submissions of the assessee and the evidences placed on record, we observe following key points raised on behalf of the assessee to defend the correctness of the returned income;

8.1 A search was carried out in the premises of the assessee under s.132 of the Act on 16.10.2014 and as a consequence thereof, the return of income was filed under s.153A of the Act for A.Ys. 2009-10 to 2014-15 by the assessee. The assessment was carried out for A.Ys. 2009-10 to 2014-15 under s. 153A r.w.s. 143(3) of the Act, whereas the assessment order of A.Y. 2015-16 was passed under s.143(3) of the Act. It is the case of the assessee that the assessment for A.Y. 2009-10 to 2012-13 had stood completed and concluded under s.143(3) of the Act prior to initiation of search and therefore remains unabated. It is thus submitted that the assessment for A.Ys. 2009-10 to 2012-13 having been concluded and not pending at the time of search, the additions/disallowances in respect of such assessment could be carried out only with reference to incriminating material found in the course of search and not otherwise. The AO has invoked provisions of Section 40A(3) of the Act alleging cash payments to the contractors/sub-contractors towards business expenses in excess of threshold limit on the basis of a tabular statement as reproduced in para 8.1 of the assessment order. In this context, it is the case of the assessee that tabular statement merely provides the name of the parties and the payments made as at the end of the respective F.Ys. 2008-09 to 2011-12 concerning A.Ys. 2009-10 to 2012-13. The copy of tally data and that of hard disk culminating in such tabulation was never provided to the assessee

despite multiple requests. It is thus contended that the chart / tabulation provided to the assessee in itself is not a seized material. It at best can be said to have been extracted out of seized material. The right of the assessee to verify the original contents of the seized material, if any, has been frustrated. The tabular statement reflects the consolidated figure at the end of the financial year which cannot be regarded as any incriminating material under s.40A(3) of the Act. The tabulation relied upon by the AO is invalid, incomplete and an unauthentic in the absence of any underline material. Such tabulated chart cannot constitute incriminating material. The additions made *dehors* the incriminating material is unsustainable in 153A assessment particularly when the assessments are already completed and concluded. No enquiry was made with the respective parties by the AO neither during the search nor thereafter. The assessee was never appraised of the so called huge payments to individual contractors in one day. The inference of payments at the end of the year to all parties apparently smacks of superfluous approach and gross irrationality. The alleged content of hard disk was never confronted to the assessee nor was the assessee ever interrogated on the same. It is not even the case that authorized officer had taken the print of the alleged data and such print was authenticated by the assessee. The hard disk was not even opened by the authorized officer as the assessee was never called for any enquiry on its contents. No reference was made in Panchanama on such hard disk. Any conclusion drawn by the DDIT(Inv.)/AO on the basis of contents of such a hard disk thus remains grossly unauthentic and totally unreliable and cannot be utilized to fasten tax liability on the assessee.

8.2 Second and in the alternative, the assessee himself estimated the profits from the business @ 8% after rejection of books and

disclosed the same in the return of income. It is thus contended that once books of accounts are rejected and income has been estimated separate disallowance under s.40A(3) of the Act is not justified at all.

8.3 It is further contended that the disallowance made by the AO under s.40A(3) of the Act would result in net profit ranging between 35.58% to 55.11% which is not only phenomenal but is beyond any logical comprehension. It was claimed that the net profit rate of 8% declared by the assessee is much higher than peers in the same business. The AO has proceeded for assessment on the estimated income declared @ 8% and is thus not justified in making separate disallowance to increase the business profits further.

8.4 The assessee has produced supporting evidences and confirmations from the various parties, whose name appears in the tabular statement reproduced by the AO for all the years in appeal. The confirmed copy of accounts would show that no such payments were made to the sub-contractors as alleged & assigned in the chart and hence, no violation of Section 40A(3) of the Act can be envisaged. It was reiterated that tabular chart only contains some consolidated figure against the name of the parties while staggered date-wise entries are appearing in the regular books. The reliance placed by the AO on such aggregated data at the end of the year is thus totally misplaced and misconceived.

8.5 As regards alternate ground of the AO for making disallowance with the aid of Section 40(a)(ia) of the Act in itself is outside the ambit of Section 153A of the Act. Furthermore, alleged payments of amount specified in the tabular chart was not made by the assessee and no evidence of such payments have been found by

the AO. The amounts specified in the chart have also not been claimed by the assessee as expense. The amounts debited in the books are altogether different. The assessment under s.143(3) of the Act was carried out earlier and compliance of Section 40A(3) of the Act was examined in the original proceedings. In A.Y. 2009-10, the AO in the original assessment proceedings carried out certain disallowance under s.40(a)(ia) of the Act. In A.Y. 2010-11, certain lumpsum disallowances were carried out by the AO. In A.Ys. 2011-12 & 2012-13, the profit was estimated @ 5% without rejecting books in the original assessment proceedings. In the instant case, where the assessee itself has rejected the books of account and offered profit @ 8% in such returns under s.153A of the Act, no separate disallowance under s.40(a)(ia) of the Act is justifiable.

9. It is evident that the assessment was earlier completed and concluded prior to search in respect of A.Ys. 2009-10 to 2012-13 in question. We find merit in the plea that a tabular statement narrating the name of the party and amount and certain amount assigned against their name cannot be regarded as incriminating material in departure with regular books of accounts in the absence of any underlying evidences. No reference and details of seized documents is found in the assessment order. In the absence of incriminating material, the AO is not empowered to reassess the returned income in an arbitrary manner without any relevance or nexus with the seized material. The law is well settled in this regard. Reference can be made to the judicial precedents *viz. CIT vs. Kabul Chawla (2016) 380 ITR 573 (Del); Pr.CIT vs. Saumya Constructions Pvt. Ltd. (2016) 387 ITR 529 (Guj); Principal Commissioner of Income Tax-1 vs. Devangi alias Rupa 2017-TIOL-319-HC-AHM-IT; CIT vs. IBC Knowledge Park Pvt. Ltd. (2016) 385 ITR 346 (Kar); Pr. CIT-2 vs. Salasar Stock Broking Ltd. 2016-*

TIOL-2099-HC-KOL-IT and CIT vs. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom).

10. We find complete merit in the various pleas raised on behalf of the assessee as listed above. The additions made by the AO is completely arbitrary, baseless and *dehors* any underlying material unearthed in the course of search or discovered subsequently on the basis of post search material relatable to evidence found in search. The additions made by invoking Section 40A(3) of the Act by the AO is thus unsustainable in law in the impugned search assessments.

11. In the grounds of appeal, we find no grievance of Revenue with reference to Section 40(a)(ia) of the Act. Be that as it may, for the similar reasons, the disallowance under s.40(a)(ia) of the Act is also not permissible in law in these facts and in the absence of any incriminating material. Consequently, the additions made by the AO has been rightly quashed by the CIT(A) and reversed. We thus see no error in the order of the CIT(A) and thus decline to interfere.

12. In the result, appeal of the Revenue is dismissed.

13. For the similar reasonings in the identical factual matrix, the appeal of the Revenue in ITA Nos. 38 to 40/RPR/2020 concerning AYs. 2010-11 to 2012-13 are also dismissed.

14. We now advert to appeal in ITA No. 41/RPR/2020 concerning A.Y. 2013-14.

ITA No. 41/RPR/2020 – A.Y. 2013-14

15. The grounds of appeal raised by Revenue concerning A.Y. 2013-14 read as under:

> *"1. On the facts and in the circumstances of the case, the ld.CIT(A) erred in deleting the addition of Rs.1,64,75,000/- made by the Assessing Officer u/s 68 of the Income Tax Act, 1961 on account of unexplained loan received from M/s Zigma DealCom Pvt. Ltd.*
>
> *2. Without prejudice to the above, on the facts and in the circumstances of the case the ld.CIT(A) erred in not appreciating the alternative basis of the addition of Rs.1,64,75,000/- which also attracts the provisions of section 2(22)(e) of the Income Tax Act, 1961 and accordingly rightly added to the income of the assessee by the Assessing Officer."*

16. Briefly stated, in the course of search, certain loose papers relating to M/s. Zigma DealCom Pvt. Ltd. (ZDCPL), a company based in Kolkata were found in the office of the assessee firm. Shri Shankarlal Agarwal, the working partner of the assessee firm. In the course of statement recorded on oath under s.132(4) of the Act, he stated that the above company intended to join his partnership firm. The AO noticed that the company (ZDCPL) had advanced unsecured interest free loan of Rs.1,64,75,000/- and Rs.5,63,00,000/- in A.Ys. 2013-14 & 2014-15 respectively to the assessee. The AO was not satisfied with the genuineness of loans received from the lender company (ZDCPL). The commission was issued by the AO to Investigation Wing, Kolkata for collection of information on the lender. The ADIT-Inv. wing, Kolkata stated that summons issued to 14 investors of ZDCPL has returned unserved. The Inspector reported that whereabouts of 14 investors of ZDCPL cannot be found. It was further observed by the AO that analysis done by ADIT (Inv.), Kolkata revealed that source of capital introduced in ZDCPL is doubtful and its investors did not exist.

16.1 The AO on this broad parameters held the nature and source of loan from the lender to be unsatisfactory. The AO accordingly invoked Section 68 of the Act and added the amount received from the lender as unexplained credits in respective assessment years.

16.2 The AO also invoked the provisions of Section 2(22)(e) of the Act in the alternative and observed that such unsecured loan should be treated as deemed dividend in the hands of the recipient assessee. To support such action, it was claimed that the partner of the firm Shri Shankar Lal Agarwal holds 50% shares in Hilltop Distributers P. Ltd. & Gromex Vanijya P. Ltd. who were, in turn, substantially holding shares of ZDCPL. The additions under s.2(22)(e) of the Act was thus carried out as an alternative measure.

17. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) after taking note of the submissions and the evidences placed before him exonerated the assessee from the additions made under s.68 of the Act as well as 2(22)(e) of the Act. The relevant operative para of the order of the CIT(A) is reproduced hereunder:

> *"3.3 I have gone through the assessment order and the submissions of the appellant. The AO has added the Joan as unexplained credit u/s 68. The appellant received money from M/s Zigma for which documents such as PAN, ROC certificate, audited balance sheets etc were provided to establish genuineness of the credit. M/s Zigma Dealcom Pvt Ltd had received money from 14 companies on sale of investments to these companies. AO has mentioned that commission was issued to ADIT Kolkata issued commission to the ADIT to inquire into the source of these companies, Under section 68, where a company receives share application money from a person then the source from whom such person has received money will also be investigated. In case of a company receiving loan, there is no such prerequisite u/s 68. In the present case the ADIT issued summons on 29/12/2014 to the 14 companies but the summons were returned unserved. The ADIT and the AO drew conclusion that these companies are non-existent and these were dummy companies.*
>
> *During the appeal the assessee submitted that all these inquiries were conducted much earlier to passing of assessment order dated 29.12.2016. No opportunity was provided to the assessee firm before*

taking adverse decision in the assessment. The loan was received at M/s Zigma Dealcom intended to enter into partnership with the assessee firm. However the partnership could not materialize. The amount was therefore returned back. In the same year the assessment of M/s Zigma Dealcom was completed u/s 143(3)/147 and in the said order the credits were accepted as genuine. Copy of assessment order dated 18.03.2016 was furnished as per which the assessment of M/s Zigma was reopened under direction u/s 263 and inquiries were made. The relevant parts of the order are as under-

> *5. After examination of the facts and the order passed u/s 147/143(3) and also the relevant filed by the assesses company to substantiate the identity and creditworthiness of the subscriber companies and genuineness of the share capital and share premium already disclosed in the Return of Income, the Hon'bte Pr. CIT- 2, Kolkata was pleased to pass an order u/s 263 of the Act on 18/03/2015 in this case by setting aside the order of assessment u/s 147/143(3) of the Act dated 30/04/2012 for doing it afresh by issuing the following directions to the Assessing Officer: -*
>
> *i) Examine the genuineness and source of share capital, not on a test check basis' but in respect of each and every shareholder by conducting independent enquiry not through the assessee.*
>
> *ii) The bank account for the entire period be examined in the course of verification to find out the money trail of the share capital.*
>
> *iii) Further the A.O. should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them on oath to verify their credentials as director and reach a logical conclusion regarding the controlling interest.*
>
> *6. In pursuance of set aside order u/s 263 passed by the Hon'ble Pr CIT - 2, Kolkata and the directions issued by her and mentioned in her order, the case of the assesses company for the A.Y. 2010-11 was re-fixed for hearing on 28/09/2015 by issue of letter of hearing dated and simultaneous issue of a notice of requisitions u/s 142(1) of the- Act dated 17/09/2015 asking the assessee. company to furnish the relevant particulars and document including complete list of Directors, the details of share capital received with share premium from different companies and individuals and the copy of Bank statements for the entire FY 2009-10 (A Y.2010-11) to prove/establish the identity and credit worthiness of the subscribers of shares and the genuineness of the transactions'*
>
> *7. On the other hand, the companies who had subscribed to the shares of the assessee company, have been separately served with notice u/s 133(6) of the Act' all dated 16/02/2016 asking each of them to furnish within 7 days of receipt of the notice u/s 133(6) the relevant particulars and documents as herein*

mentioned to prove their identity and creditworthiness of making the investment in share capital of the assessee company along with share premium and genuineness and authenticity of their transaction made with assessee company

8.. The assessee company as well as the subscribers of the share capital fully complied with the requisitions made and furnished the derailed particulars and documents as were called for including copy of the relevant bank statement for the entire F Y 2009-10.

9. Apart from the papers and documents called for separately from the assessee company as well &s the subscribers of the shares, Shri Pradeep KuJnar Agrawal Director of the assessee company personally appeared before the under signed on 17/03/2016 in compliance to the summons u/s 131 of the Act issued to the assessee company. A statement of the said director was recorded u/s 131 on that day i.e. on 17/03/2016. He confirmed the genuineness / authenticity of the particulars of documents filed by the assessee company against the notice u/s 142(1) of the Act.

10. The particulars and documents filed by the assessee company and separately by the subscribers of shares were reconciled and thoroughly examined according to the needs of the case. Through production and submission of the required documents, it appears that the subscriber companies contributing to the share capital and share premium of the assessee company were able, to prove their identity and creditworthiness by properly declaring their address and PAN and explaining the source of payment of share capita! (including premium) and the genuineness of share transactions made through banking channel as per-the whole year's bank statement filed for the FY 2009-10 (AY 201011) The source of investment made by art the subscribers of shares in the share capital (including share premium) of the assessee company appears fully explained and the onus of proof was fully discharged by each of them. Under the circumstances, the source of Share capital of the assessee company including share premium invested by the subscribers of shares have been accepted.'

When the capital in the hands of M/s Zigma Dealcom have been found genuine and the same funds were used to advance loan to the assessee, it cannot be doubted. It may be noted that while ADIT made inquiries in 2014 and the results of which were not intimated to the assessee, the assessment in the case of M/s Zigma Dcalcom was made just prior to the assessment in 2016 in the case of the company. The AO of M/s Zigma Dcalcom found its funds genuine. Lastly when the loan has been repaid back as per through banking channel it is not correct to interpret that the amount was any kind of introduction of own money.

If no adverse facts are found in inquiry , the entry of credit in assessee's book cannot be assessed as income. In the case of Rajshree Synthetics v CIT 256 ITR 331 Raj 2002 it was held that sec 68 of the Act empowers the AO to make inquiries if he is not satisfied with

entries of cash credits. The AO's satisfaction to invoke sec 68 must be derived from relevant factors on the basis of proper inquiry and collection of facts. If no proper inquiry is made, the cash credit entry cannot be assessed u/s 68 of the Act. Further the AO cannot follow the finding of the ADIT without applying his own mind. In such case the decision of AO cannot be confirmed. In the case of [2011] 338 ITR 5] (Delhi) [2012] 20 taxmann.com 797 (Delhi) Signature Hotels (P.) Ltd. v. Income-tax Officer information given by Director of income-tax (Investigation), that amount received by assessee from other company was nothing but accommodation entry and assessee was beneficiary, was not sufficient to reopen assessment when Assessing Officer did not apply his, own mind to that information. As per the assessment order of M/s Zigma Dealcom the creditors were duly assessed to tax and their capital was accepted. Further M/s Zigma Dealcom is duly assessed to tax. In the case of PK Seth v. CIT 286 ITR 318 Gau. 2006 honourable HC appreciated the fact that out of the three requirements, the first two, viz. The identity of the creditors and their creditworthiness had been established since the creditors were being assessed to tax and their assessment particulars were before the AO which were not proved as false. In respect of the genuineness of the transactions as far as the assessee was concerned, it has been proved that the entire amount involved was received by way of account payee cheques. The AO completing the assessments of the creditors had accepted them as genuine in the respective assessments of the creditors. However, in the case of the assessee, he held them as not genuine. Admittedly there was no other evidence or material in support of the finding of the Tribunal that the cash credits were not genuine, except substituting personal inferences. Hence the HC held that the order of the Tribunal was not justified. CIT Vs. Five vision Promoters (P) Ltd (2016) 131 DTK 0337 (Del HC) it was held that "Provisions of s 68 can be invoked only where assessee offers no explanation at all or explanation offered is unsatisfactory, and addition thereunder can be made only on that condition". Delhi HC in case of CIT Vs. Vrindawan Farms (P) Ltd. ITA 71/2015 pronounced on 12.08.2015 it was held that if the identity and other details of the share applicants are available, the share

application money cannot be treated as undisclosed income in the hands of the Co. The additions if at all, should be in the hands of the applicants if their creditworthiness cannot be proved." CIT Vs. Pranav Foundation Ltd (2015) 117 DTR 0227 (Chennai HC) it was held that "Where the share applicants were registered companies and they had ditty furnished the confirm a lions along with their IT Asst. details, the assessing officer ought to have accepted these contributions towards share capital as genuine and no addition was warranted u/s 68 in hands of assessee on account of share application money received". I have cited these decisions pronounced in case of share application money since the AO has treated the loan amount as not genuine not due to anything adverse in respect of source of the loan but on the basis of source of the source. Strictly reading the section 68, when the source i.e. funds of M/s Zigma Dealcom were explained, he should not have gone into source of source since the amount in question was not share capital.

Alternately, the AO has treated the amount of loan of Rs 7,27,75,000/'- as deemed dividend in the hands of the assessee. Facts are that and amount of Rs. 7,27,75,000/- was received by M/s. Shri Jagdamba Construction Company from a company M/s. Zigma Dealcom Pvt. Ltd. Zigma Dealcom P.Ltd is owned by M/s. Hilltop Distributor Pvt. Ltd and M/s, Growmex Vanijya Pvt. Ltd. Both these companies held the shares of M/s. Zigma Dealcom. 50% share of M/s. Hilltop Distributor and M/s. Growmex Vanijya are held by Mr. Shankar Agarwal who is the proprietor of the assessee company M/s. Jagdamba Construction Company. The AO has drawn the conclusion that on the above facts the amount received by M/s. Jagdamba Construction is the deemed income of these company as per section 2(22)(e) of the Act. The AO has relied on the decision of Delhi High Court in the case of CIT vs. National Travel Services. On going through the said decision I find that issue in the case of National Travel Services is different. As per the existing laws the partnership firm cannot hold shares of companies, however they can hold shares through partners. The issue in the present case is that the assessee has received loan from M/s. Jagdamba Dealcom in which Shri Shankar Agarwal partner of the assessee has no shares. However he was holding substantial interest in two other companies; Hill top Distributors and Growmex Vanijya which were owned by M/s. Zigma Dealcom. It is not that the two companies are partners in M/s. Zigma Dealcom which is not a 'Firm' but a limited company. Therefore the judgment in the hands of the National Travel Services will not be applicable.

As per section 2(22)(e) any payment by a company, of any sum by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest or any payment by any such company on behalf, or for the individual benefit; of any such shareholder, to the extent to which the company in either case possesses accumulated profits will be deemed to be dividend in the hands of such share bolder. In the present case, the assessee M/s Shree Jagdamba Construction is not a shareholder in M/s Zigma Dealcom Pvt Ltd. The indirect relation with this company by virtue of Shri Shankar Agrawal holding shares in M/s Hilltop Distributor and M/s Growmex Vanijya which were inturn holding substantial shares in M/s Zigma Dealcom cannot be used to invoke section 2(22)(e) as has been held in several court decisions. It has been explained by the assessee is that he is not a shareholder neither a beneficial shareholder nor a shareholder holding substantial shares in the company M/s Zigma Dealcom. Therefore any loan taken by him from this company would not attract provisions of section 2(22)(e). On going through the provisions of sections 2(22)(e), it says that " any payment by a company ... of any sum ... to a shareholder ... or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest" will be regarded as deemed dividend. In the present case the assessee is not shareholder in the Zigma Dealcom. Neither the payment has been made to a concern in which the assessee may be a shareholder holding 10% shares. Therefore the impugned payment will not be regarded as dividend. This view has been taken by Rajasthan High Court in the case of [2012] 18 taxmann.com 308 (Rajasthan) Commissioner of Income-tax, Udaipur v Hotel Hilltop MARCH 17,

2008. The facts in that case were that assessee-firm had received certain amount as an advance from a company under an agreement to handover management of firm's hotel to said company. Partners of assessee-firm were also shareholders in said company. Assessing Officer treated said amount received by asses see-firm as deemed dividend under section 2(22)(e) in hands of assessee and assessed same to tax. When the matter reached to the high court, the h'ble court replied in affirmative that it was not assessee-firm which was shown to be shareholder of company but in fact it was its partners who were holding more than requisite amount of shareholding in company and were having requisite interest in firm. Therefore, aforesaid amount received by assessee would not be deemed dividend in hands of assessee-firm.

In another case of [2011] 16 taxmann.com 411 (Delhi) Commissioner of Income-tax v MCC Marketing (P.) Ltd with similar facts, that assessee, a private limited company, received a certain amount as unsecured loan from its sister concern by name MIPL. 71ie Assessing Officer having noticed that one A was holding more than 20 per cent shares in both MIPL and assessee-company invoked provisions of section 2(22)(e) of the Act and made addition of aforesaid amount to income of assessee. The honourable High Court held that since the assessee company was not a shareholder of M/s MIPL therefore in view of judgment of Delhi High Court rendered in ease of C1T v. Ankitech (P.) Ltd. J2011] 199 Taxman 341 / 31 taxmann.com 100, provisions of section 2(22)(e) were not attracted in instant case.

Further as per this section, the amount to be considered as deemed dividend will be treated an amount to the extent of accumulated profits of company. The AO has mentioned that M/s Zigma Dealcom has accumulated profit of above Rs 9 cr which is not as per records. A perusal of audited accounts for the YE31.3.2013 shows following details-

Note2: Reserve and Surplus

	As on 31.3.2014	*As on 31.3.2013*
1. Securities Premium Reserve	*9,14,34,000/-*	*9,14,34,000/-*
2 . Surplus (Profit & Loss ace)	*(107,459/-)*	*(84,289/-)*

Thus there was accumulated surplus of loss Rs 84,289/- during FY 2012-33 and loss Rs 1,07,459/- for FY 2013-14. Rs 9.14 is the reserve and surplus and not the accumulated profit.

In a case dealt with by Kolkata HC (Commissioner of Income-tax, Kol.-III v Shree Balaji Glass Manufacturing (P.) Ltd. 72 taxmann.com 118 (Calcutta) 2016) this issue was dealt. The facts in the case were that in the assessment year 2004-05 assessee-company borrowed funds from two companies A and P in which it had substantial interest. Company A lent money out of reserve and surplus; it had insufficient accumulated profit. However, Company P had some accumulated profit, which was lent and balance sum was paid out of share premium account. Assessing Officer treated loan amounts as deemed dividend in hands of assessee company. After the case reached to the high court, the honourable High Court answered in affirmative that share premium does not constitute accumulated profits or even

profits of a company; and where money was lent out of reserve and surplus representing share premium and not from accumulated profits, there would be no deemed dividend in hands of recipient. Similar issue has been dealt with by Chandigarh bench of the ITAT in the case of 28 taxmann.com 255 (2012) Deputy Commissioner of income-tax, Circle VII, Ludhiana v Radhe Sham Jain. Deciding on the same issue for the AY 2008-09 the ITAT held that share premium account would not partake nature of commercial profits and, therefore, cannot be treated as accumulated profits.

In view of the above facts the genuineness of loan can not be doubted and also the transaction will not come under the purview of Section 2(22)(e) of the Act. The addition is therefore deleted."

18. Aggrieved by the relief granted by the CIT(A) to the assessee, the Revenue has preferred appeal before the Tribunal as per grounds noted above.

19. We have considered the rival submissions as advanced on behalf of the Revenue as well as the assessee in the course of hearing. We also perused the assessment order and the first appellate order. The evidences referred to and relied upon has been taken note of in terms of Rule 18(6) Income Tax (Appellate Tribunal) Rules, 1963.

19.1 The grievances of the Revenue are two folds; (i) applicability of Section 68 of the Act on the loans received in the facts of the case & in the alternative (ii) applicability of Section 2(22)(e) of the Act in the factual matrix. While the Revenue has relied upon the observations made in the assessment order to support the action of the AO, the action of the CIT(A) was strongly defended on behalf of the assessee and it was contended that the action of the AO was wholly unsupportable in law and rightly set aside and reversed by the CIT(A).

19.2 On perusal, we notice that the AO has proceeded against the assessee under s.68 of the Act mainly on the premises that the

investors in the lender company were not found traceable at the time of enquiry. In defense, it is the case of the assessee that all relevant evidences relating to the loan were filed before the AO in the course of the assessment. No enquiry was made by the AO or the Investment Wing from the lender company *per se*. The enquiry was made on the investors of the lender company. It is thus the contention of the assessee that where cogent evidences in relation to loan transactions between the lender company and the assessee remains undisputed or not disproved, the primary onus on the assessee stood discharged and the burden was shifted to the AO, which was never shifted back to the assessee. Significantly, we further note that the source of money in the hands of lender company arose in A.Y. 2010-11 whereas the loans were given by the lender company to the assessee in A.Ys. 2013-14 & 2014-15. More importantly, the source in the hands of ZDCPL was duly accepted by the Revenue in the scrutiny assessment as per assessment order dated 18.03.2016 passed under s.143(3) r.w.s. 147 r.w.s. 263 of the Act. The original assessment passed under s.143(3) r.w.s. 147 dated 30.04.2012 was taken up for revision under s.263 of the Act on the ground that no proper and full enquiry was made by the AO in respect of share capital of the assessee company introduced by several subscriber companies, which is the source of money in the instant case lent to the assessee herein. Consequent upon the directions in the revisional order, one of the Directors of lender company appeared before its AO in the set aside proceedings. The identity, genuineness and creditworthiness of 14 investors of ZDCPL found satisfactory by the AO of ZDCPL. In this backdrop, where the income tax authorities themselves have accepted the source of capital in the hands of the lender company, the dispute on bonafides of loans taken out of such source by the assessee is incomprehensible. The CIT(A), in our view, has rightly approached

the issue in hand and deleted the additions made under s.68 of the Act. We see no error in the action of the CIT(A). We, thus, decline to interfere.

19.3 Adverting to the alternative ground of maintainability under s.2(22)(e) of the Act, we straightway take note of the assertions made on behalf of the assessee that neither assessee nor any of its partner was shareholder at any point of time in ZDCPL. The applicability of deeming fiction contained in Section 2(22)(e) of the Act is a complete non-starter at the threshold in the absence of presence of common interest. We also appreciate the alternate plea of the assessee in affirmative that ZDCPL is mainly engaged in money lending activities. It is noticed from the balance sheet of the lender company that substantial part of business of lender company is financing and therefore, the applicability of Section 2(22)(e) of the Act is ousted in view of exceptions contained in Clause (2) thereof. We also observe that the accumulated profit in the hands of the lender company is on account of share premium which cannot be reckoned for the purposes of Section 2(22)(e) of the Act. Thus, no addition can be made under s.2(22)(e) of the Act in the absence of accumulated profit in the hands of the lender company as defined under s.2(22)(e) of the Act.

19.4 Thus, looking from any angle, the alternative addition under s.2(22)(e) of the Act is totally devoid of any legal basis and thus cannot be sustained. The conclusion drawn by the CIT(A) in favour of the assessee, thus, cannot be faulted in any of the assessment years i.e. 2013-14 & 2014-15 in question. Consequently, we decline to interfere.

20. In the result, appeal of the Revenue is dismissed.

21. For the similar reasonings placed in the identical factual matrix, the appeal of the Revenue in ITA No. 42/RPR/2020 concerning AY 2014-15 is also dismissed.

22. In the combined result, all six captioned appeals of Revenue are dismissed.

This Order pronounced in Open Court on 02/09/2021

Sd/-	Sd/-
(PAWAN SINGH)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Raipur: Dated 02/09/2021

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर / DR, ITAT, RAIPUR
6. गार्ड फाइल / Guard file.

By order,

Sr. Private Secretary
ITAT, Raipur (on Tour)