IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

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

ITA No.2257/Del/2018
Assessment Year: 2009-10

ACIT, Central Circle-15, New Delhi.	Vs	Versatile Polytech P. Ltd., 25, Bazar Lane, Superior House, Bangali Market, New Delhi. PAN: AACCV1244Q

ITA No.1088/Del/2018
Assessment Year: 2014-15

Versatile Polytech P. Ltd., 25, Bazar Lane, Superior House, Bangali Market, New Delhi. PAN: AACCV1244Q	Vs.	ACIT, Central Circle-15, New Delhi.
(Appellant)		(Respondent)

Assessee by	:	Shri V.K. Aggarwal, AR & Ms Shweta Bansal, CA
Revenue by	:	Smt. Sulekha Verma, CIT, DR
Date of Hearing	:	06.02.2019
Date of Pronouncement	:	.03.2019

ORDER

PER R.K. PANDA, AM:

ITA No.2257/Del/2018 filed by the Revenue is directed against the order dated 5th January, 2018 of the CIT(A)-26, New Delhi, relating to assessment year 2009-10.

ITA No.1088/Del/2018 filed by the assessee is directed against the order dated 3rd January, 2018 of the CIT(A)-26, New Delhi relating to the assessment year 2014-15. For the sake of convenience both the appeals were heard together and are being disposed of by this common order.

ITA No.2257/Del/2018 (A.Y. 2009-10)

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacturing of 'pet plastic preforms.' It filed its return of income on 29th September, 2009 declaring nil income. Original assessment was completed u/s 143(3) on 26th December, 2011 at a loss of Rs.1,06,53,140/-. Tax was levied u/s 115JB on the book profit of Rs.1,19,22,760/-. A search and seizure operation u/s 132 of the IT Act was carried out on 28th March, 2015 in the case of M.M. Aggarwal Group of cases during which the case of the assessee was also covered. In response to notice u/s 153A of the Act issued to the assessee on 10th May, 2016, the assessee filed the return of income on 28th May, 2016 declaring nil income. During the course of assessment proceedings, the Assessing Officer observed that it was gathered during the course of pre-search enquiries that the assessee group had received substantial amount of share capital from various non-descript and shell companies which did not have any factual identity and credit worthiness. The search action established beyond doubt that the assessee company like other group companies had received share capital from various non-descript and shell companies/entities which grossly lacked credit worthiness and were in the nature of accommodation entries. He observed that during

pre-search verification spot enquiries were made at the registered address of M/s MSG Finance India Pvt. Ltd. at 201H, Gautam Nagar, New Delhi from whom Rs.3.50 crores were shown to have been received by M/s Heritage Beverages Pvt. Ltd. It was found that no company is being run from the stated address. He observed that Kandhari group also had received bogus share premium from Indogulf Infrastructure Investment Pvt. Ltd. who had also provided share premium to M.M. Agrawal group of companies.

3. During the course of search action conducted at the office premises of Sh, Varinder Pal Singh Kandhari at Plot no. 237-238, Udyog Vihar, Gurgaon on 28/03/2015, the above facts were confronted to Mr. Pradeep Kumar Shastri, Director in Kandhari group companies, who had admitted that a part of share premium received by M/s Indogulf Infrastructure Investment Pvt. Ltd and M/s MSG Finance India Pvt. Ltd which was further given to M/s Heritage Beverages Pvt. Ltd and M/s Versatile Polytech Pvt. Ltd was nothing but its own unexplained income from undisclosed sources of these two companies introduced in the names of other entities. Therefore, he admitted to offer for taxation a sum of Rs.8,63,36,000/- in the hands of M/s Indogulf Infrastructure Investment Pvt. Ltd for the F.Y. 2008-09 and further sum of Rs.3,50,00,000/- in the hands of M/s MSG Finance Pvt. Ltd for the F.Y. 2010-11, aggregating to Rs. 12,13,36,000/-.

4. The Assessing Officer referred to the relevant portion of statement of Shri Pradeep Kumar Shastri recorded u/s 132(4) of the Act on 29th March, 2015 wherein he had offered an amount of Rs.12,13,36,000/- as additional business income. He

observed that subsequently, the said admission of additional business income aggregating to Rs.12,13,36,000/- made by Shri Pradeep Kumar Shastri were also confirmed by Shri Varinder Pal Singh Kandhari in his statement recorded on oath u/s 132(4) of the Act on 28th March, 2015.

5. Further during the course of revoking of prohibitory order on 22/05/2015 which was placed u/s 132(3) of l.T. Act on 29.03.2015 during the course of search action, Shri Varinder Pal Singh Kandhari was specifically asked to explain the breakup of the admitted amount of Rs.12.13 Crores wherein he had fully agreed with the version of Mr. Pradeep Kumar Shastri regarding admission of addition income of Rs.8,63,36,000/- in the hands of M/s Indo Gulf Fertilizers and Rs.3,50,00,000/- in the hands of M/s MSG Finance India Ltd.

6. The Assessing Officer observed that the assessee has received the share capital/share premium and share application money from different persons during assessment year 2008-09 to 2015-16 which are as under:-

1. M/s Versatile Polytech Private Limited

S.No.	Name of the investor company/ person from whom share capital/ premium received.	No. of shares	Total amount	Rate of share premium	Total Share Premium
A.Y. 2009-10					
1.	Moon Beverages Ltd.	70385	18300100	250	17596250
2.	Enrich Agro Food Products Pvt. Ltd.	70385	18300100	250	17596250
A.Y. 2014-15					

1.	Moon Beverages Ltd.	71731	18650060	250	17932750
2.	Enrich Agro Food Products Pvt. Ltd.	53655	13950300	250	13413750
3.	Focus Buildwell Pvt. Ltd.	9807	2549820	250	2451750
4.	MSG Finance India Pvt. Ltd.	8269	2149940	250	2067250

7. He observed that the company M/s Versatile Polytech Pvt. Ltd. has shown to have received share capital in each of the previous year relevant to assessment year 2009-10 and 2014-15 at substantial premium, the details of which are as under:-

Name	No. of shares subscribed	Face Value per share	Paid up Value (Rs.)	Premium per Share (Rs.)	Premium Received (Rs.)	Total Allotment (Rs.)
Moon Beverages Ltd.	70,385	10	703,850	250	17,596,250	18,300,100
Enrich Agro Food Products Pvt. Ltd.	70,385	10	703,850	250	17,596,250	18,300,100
Total	140,770		1,407,700		35,192,500	36,600,200

8. In order to verify the capacity of the so-called investor companies, the Assessing Officer analysed the financial credentials of these companies to make such huge investments, the summary of which is as under:-

Investor Company	Address	Equity Share Capital		Turnover		Profit Before Tax	
		2012-13	2013-14	2012-13	2013-14	2012-13	2013-14
Moon Beverages Ltd.	25, Superior House, bazaar Lane, Bengali Market, Delhi – 110001.	2,48,48,600	2,74,31,100	2,02,32,91,537	3,03,56,59,494	8,45,99,131	1,20,22,578
Enrich Agro Food Products Pvt. Ltd.	Flat No.1643, Sector-B, Pocket-I, Vasant Kunj, New Delhi – 110057.	6,07,45,000	6,07,45,000	1,45,39,53,397	1,54,52,19,127	5,04,64,759	6,23,93,026
Focus Buildwell Pvt. Ltd.	201-H, Gautam nagar, New Delhi – 49.	63,06,500	63,06,500	2,92,85,167	3,33,22,985	7,559	(2,92,309)
MSG Finance India Pvt. Ltd.	201-H, Gautam nagar, New Delhi – 49.	96,44,000	96,44,000	31,110	1,86,08,250	(3,576)	(1,15,772)

9. From the above, the Assessing Officer noted that the profit declared by the above mentioned so-called investor companies over the years is negligible. Even the turnover declared by the investor companies is not very significant in most of the cases. The financials of these companies are typically of accommodation entry providing companies in whose accounts only huge share capital/premium and investments are reflected without any worthwhile turnover and profits. The Assessing Officer, in order to further verify the issue, examined the bank statements of some of these companies and observed that the statements shows back to back transactions of same amount, i.e., credit and debit of the same amount on the same date(s) or following date(s) with no other deposits and transactions. This observation, clubbed with the fact that the sales and income figures of these investor entities as per their ITD database details depict too meek a balance sheet to justify such huge fund transfer transactions in their bank accounts, along with other observations as mentioned clearly suggests that these accounts belong to various entry providing companies and the same were utilized to provide accommodation entries to the beneficiaries, i.e., Kandhari group. According to the Assessing Officer, no investor has been produced by the assessee group. The assessee failed to furnish any documentary evidence regarding the existence of such investor. Mere filing of confirmations from parties, according to the Assessing Officer, does not discharge the onus of the assessee. According to him, it cannot be believed that investors invests their crores of rupees in a non-listed company without any return and the recipient company even does not have the particulars/contact details of such investors. He, therefore, asked the assessee to

establish the identity, credit worthiness and genuineness of the investors who had subscribed to the share capital of the assessee company. The assessee, in response to the same, filed various details like confirmation, ITR, assessment particulars, MOA, audited financial results, bank statements, MCA site data extract of all such investor companies to establish the identity, creditworthiness and genuineness of such investor companies. It was submitted that all the investor companies are group companies who were allotted shares by the assessee company during the relevant period under consideration. The assessee also filed details of source of source, i.e., the source of funds received by the said investor companies to establish the identity, creditworthiness and genuineness of such investment with the assessee company.

10. However, the Assessing Officer was not satisfied with the explanation given by the assessee. According to him, a perusal of the details filed shows that the assessee received certain funds in the form of accommodation entries in a layered structure. The undisclosed funds were received in the form of share capital in the shell companies of the group which, in turn, remitted the same to operating companies. Since the assessee, according to the Assessing Officer, could not discharge the onus cast on it to prove the three ingredients in terms of the provisions of section 68, i.e., the identity and credit worthiness of the persons from whom monies were taken and the genuineness of the transaction, the Assessing Officer, relying on various decisions added the amount of Rs.3,66,00,200/- to the total income of the assessee as unexplained cash credit u/s 68 of the Act.

11. Before the CIT(A), apart from challenging the addition on merit, it was argued that during the course of search no incriminating material/documents was found regarding the share application money. As on the date of search, no assessment proceeding was pending as assessment u/s 143(3) was already completed. Relying on various decisions, it was argued that no addition could have been made on this issue.

12. So far as the merit of the case is concerned, it was argued that all the necessary documents from the stated investors were filed before the Assessing Officer in order to prove the identity, genuineness and the creditworthiness of the investors. The Assessing Officer did not find any fault with these documents which clearly proved the identity and creditworthiness of the investors and the genuineness of the transactions. Otherwise also, the Assessing Officer has not brought any material on record to indicate that the investment is unexplained. It was argued that the investors are incorporated companies, accounts of which are duly audited. The accounts of the investors clearly show that the investment is duly recorded in their books of account. It was argued that income is not a criteria for making an investment and the criteria is availability of funds which is clearly proved from the accounts of the investors. Therefore, there was no occasion for the Assessing Officer to make such an addition.

13. Based on the arguments advanced by the assessee, the ld.CIT(A), relying on various decisions including the decision of Hon'ble Delhi High Court in the case of *Pr. CIT vs. Best Infrastructure India Pvt. Ltd. (2017) TIOL 2203*, the decision in the case of *PCIT vs. Meeta Gutgutia (2017) TIOL 1000*, the decision in the case of *CIT vs.*

Kabul Chawla, ITA No.707/2014, Order dated 28th August, 2015 and various other decisions held that since no incriminating material was found during the course of search in respect of equity share capital, it cannot lead to the conclusion drawn by the Assessing Officer. No corroborative evidence was brought on record by the Assessing Officer to prove that the equity subscription is an accommodation entry. Further, the Directors of the assessee company have never made any statement regarding the share capital premium/share application money and no disclosure has been made with regard to the share capital/share premium/unsecured loan. Therefore, the addition is legally not sustainable.

14. So far as the merit of the case is concerned, the ld.CIT(A) also decided the issue in favour of the assessee. While doing so, he observed that the assessee, during the course of assessment proceedings, filed necessary information/documents to substantiate the identity and credit worthiness of the investors and the genuineness of the transactions such as Form II filed before ROC, confirmations from the investors, bank accounts of the investors, share application form duly filled by the investors, PAN card of the investors, copy of IT returns of the investors and the Memorandum and Articles of Association of the investor companies depicting their corporate identity number. Further, the assessee has furnished the details of financials of the investing entities. The Assessing Officer, without bringing in fresh material merely accepted the appraisal report of the Investigation Wing. Merely stating that income declared by the investors is lesser than the investment made by them cannot be the

criteria for making the addition. It is only the source and availability of funds which remains the factor to be observed. In view of the above and distinguishing the decisions relied on by the Assessing Officer, the CIT(A) deleted the addition made by the Assessing Officer u/s 68 of the IT Act on merit.

15. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal raising the following grounds:-

> "1. On the facts & circumstances of the case the CIT(A) has erred in deleting the addition of Rs.3,66,00,200/- made by AO on account of unexplained Share Capital and Share Premium u/s 68 of the I. T. Act 1961.
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> 2. On the facts & circumstances of the case the CIT(A) has erred in holding the source of share capital genuine when it was specifically established that investor companies are paper companies.
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> 3. The CIT(A) has erred on facts and in law in observing that requisite details and evidences filed by the assessee were sufficient to prove the genuineness of the transaction related to share capital/ premium where as the assessee failed to discharge the primary onus cast upon it u/s 68 of the IT act 1961 of proving identity, satisfactory explaining the creditworthiness and genuineness of these transactions.
>
> 4. The Id. CIT(A) has erred on facts and in law in not even considering the statements of directors of the investing companies admitting that the investing companies in which they are directors, are actually paper companies meant for providing accommodation entries.
>
> 5. The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal."

16. The ld. DR strongly challenged the order of the CIT(A) deleting the addition both legally and on merit. She submitted that incriminating documents were found during the course of search and pre-search enquiries that most of the companies of the group which had contributed share capital with the assessee company are only paper

companies/shell companies without having any credit worthiness. The admission made by Shri Varinder Pal Singh Kandhari and Shri Pradeep Kumar Shastri constitutes valid evidence under the Indian Evidence Act. Therefore, it is wrong to say that incriminating materials were not found during the course of the search. She submitted that sufficient evidence was found during the pre-search enquiries conducted by the Department which substantiates that the assessee company was indulged in accepting accommodation entries in the shape of share capital and share premium. The substantial share premium charged by the assessee company, which is a non-listed and non-descript company, speaks volumes. Therefore, merely stating that no incriminating material was found during the course of search and, therefore, no addition can be made is not legally correct in the facts and circumstances of this case.

17. So far as the merit of the case is concerned, she submitted that the assessee failed to substantiate with evidence to the satisfaction of the Assessing Officer regarding the identity and creditworthiness of the share applicants and the genuineness of the transaction. Referring to the decision of the Hon'ble Delhi High Court in the case of *PCIT vs. NDR Promoters Pvt. Ltd., ITA No.49/2018, order dated 17th January, 2019*, she submitted that the Hon'ble High Court reversed the decision of the Tribunal and upheld the action of the Assessing Officer on the ground that the transactions in question were clearly sham and make belief with excellent paper work to camouflage their bogus nature. It was further held that the order passed by the Tribunal is superficial and adopts a perfunctory approach and ignores evidence and material

referred to in the assessment order. The reasoning given is contrary to human probabilities , for in the normal course of conduct, no one will make investment of such huge amounts without being concerned about the return and safety of such investment. She submitted that the ratio laid down by the Hon'ble Delhi High Court is clearly applicable to the facts of the present case, therefore, the order of the CIT(A) should be reversed and that of the Assessing Officer be restored. The ld. CIT, DR also relied on the following decisions:-

(i) Bhagirath Aggarwal vs. CIT, 31 Taxmann.com 274 (Del)

(ii) Hiralal and Maganlal & Co. vs. DCIT 96 ITD 113 (Mum)

(iii) Dewan Bahadur Seth Gopal Das Mohta vs. UOI 26 ITR 722 (SC)

(iv) Kishore Kumar vs. CIT, 62 taxmann.com 215, 234 Taxman 771;

(v) Smt. Dayawanti vs. CIT (2016) 75 taxmann.com 308 (Del)

(vi) M/s Pebble Investment & Finance Ltd. vs. ITO, 2017-TIOL-238-SC-IT

(vii) Raj Hans Towers (P) Ltd. vs. CIT, 56 taxmann.com 67

(viii) PCIT vs. Avinash Kumar Setia (2017) 81 taxmann.com 476 (Del)

18. The ld. counsel for the assessee, on the other hand, strongly relied on the order of the CIT(A). He submitted that the original assessment in this case was completed u/s 143(3) on 26th December, 2011 at a loss of Rs.1,06,53,140/- and income u/s 115JB at Rs.1,19,22,760/-. The search took place on 28th March, 2015 and on the date of search no assessment was pending. No incriminating material was found during the course of search relating to share application money which is the subject matter of

appeal. Relying on various decisions including the decision of the Tribunal in the case of the sister concern, namely Moon Beverages Ltd. vs. ACIT 2018-TIOL 1159, order dated 7th June, 2018, he submitted that under identical circumstances, the Tribunal has deleted the addition on the ground that no addition could have been made u/s 153A since the assessment was not abated and no incriminating material was found/seized during the course of search and the addition was made only on the basis of the statement recorded u/s 132(4) of the Act and post-search enquiries. He submitted that the Tribunal, while deciding the case, has relied on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla, Meeta Gutgutia, Best Infrastructure India Pvt. Ltd. and various other decisions. He submitted that the addition, if any, can be made as per law and not on the feeling of the officer.

19. So far as the merit of the case is concerned, he submitted that the assessee has filed all the necessary details substantiating the identity and credit worthiness of the loan creditors and the genuineness of the transaction by filing documents such as confirmation of the investors, copy of their income-tax returns, copy of the assessment particulars, copies of the bank statements, audited financial statements, Memorandum of Association, MCA extract, etc. The Assessing Officer has not done any further enquiries and simply rejected these documents. Referring to page 7 of the assessment order, the ld. counsel for the assessee drew the attention of the Bench to the turnover and profit before tax of Moon Beverages Ltd., wherein the turnover for F.Y. 2012-13 was Rs.202.33 crore and for F.Y. 2013-14 the turnover was Rs.303.57 crores.

Similarly, the profit before tax for F.Y. 2012-13 was Rs.8.46 crore and for F.Y. 2013-14 it was Rs.1.20 crore. In the case of Enrich Agro Food Products Pvt. Ltd., the turnover for F.Y. 2012-13 is Rs.145.40 crores and for F.Y. 2013-14 it was Rs.154.52 crores. Similarly, the profit before tax for F.Y. 2012-13 was Rs.5.05 crores and for F.Y. 2013-14 it was Rs.6.24 crores. Therefore, it is wrong on the part of the Assessing Officer to say that these companies do not have good financials. Further, all these companies are group companies and are assessed to tax and they are not Calcutta based companies. He submitted that the payments are also not back to back transactions as alleged by the Assessing Officer and the Departmental Representative. Referring to various pages of the paper book containing the bank account of the assessee, he submitted that either there were sufficient funds available before the cheques were issued or the amount is out of overdraft and the investor companies have not invested on the basis of obtaining entries in the previous day or on the same day and thereafter making the investment in the assessee company. Relying on various decisions, he submitted that the assessee in the instant case has clearly proved the identity and credit worthiness of the investors and genuineness of the transaction. The facts mentioned in the assessment order are cut and paste orders from some other case and are not applicable to the facts of the present case. The assessee has not only proved the source of funds, but has also demonstrated that these companies are not paper companies. The group companies are only the investors and the companies are yielding income before investment. Therefore, the various decisions relied on by the ld. DR are distinguishable and are not applicable to the facts of the present case. He

accordingly submitted that both legally and factually the addition is not sustainable. Since the order of the CIT(A) is in consonance with law, therefore, the same has to be upheld and the grounds raised by the Revenue should be dismissed.

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

21. We find an identical issue had come up before the Tribunal in the case of the sister concern, namely, Moon Beverages Ltd. (supra). We find the Tribunal, relying on various decisions held that no addition could have been made u/s 153A since the

assessment was not abated and the addition was made on the basis of statements recorded u/s 132(4) and post search enquiry and no incriminating material was found/seized during the course of search. While doing so, the Tribunal has relied on the decisions of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla reported in 380 ITR 573 (Del), CIT vs. Meeta Gutgutia reported in 395 ITR 526, CIT vs. Harjeev Aggarwal reported in 290 CTR 263, CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82* and various other decisions. The relevant observations of the Tribunal from para 35 onwards read as under:-

> "35. Before deciding the issue on merit, we would first like to decide the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search when the assessment was not pending as per ground of appeal no.1 to 1.2. It is an admitted fact that the original return of income was filed on 12.09.2013 which was accepted u/s 143(1) vide intimation dated 18.04.2014. The period for issue of notice u/s 143(2) expires on 30.09.2014 i.e. the notice u/s 143(2) could not have been served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Therefore, in absence of issue of any notice u/s 143(2) and since no other proceedings are pending, therefore, it had attained the finality much prior to the date of search on 28.03.2015. Under these circumstances, the finding of the ld. CIT(A) that the assessment proceedings were pending at the time of search and was abated is factually incorrect.
>
> 36. We find the ld. CIT(A) at para 5 page 11 of his order has observed as under :-
>
> > "The basis of addition as taken by the A.O. was statement recorded of Shri Sanjeev Agarwal during the course of search wherein he has surrendered an amount of Rs.88.52 crore out of which a sum of Rs. 30.78 crores were referred to for the assessment year 2008-09 and rest of amount was non descriptive and vague and was ITA No.7374/Del/2017 ITA No.7567/Del/2017 surrendered subject to cross checking of the facts and to explain after access to the books of accounts. The said statement was retracted by said Shri Sanjeev Agarwal on 18.05.2015 within two months from the date of original statement. Though the appellant has

> stated to have recorded all the transactions under appeal in its books of account and offered all the necessary and relevant proof thereof as such. Since the assessment proceedings were pending at the time of search and was abated, the legal ground objected as such by the appellant was not valid as such the same is bound to be rejected."

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

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

> "38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts ITA No.7374/Del/2017 ITA No.7567/Del/2017 in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non- existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.
> 39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessees herein was not justified in law."

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

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

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

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

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

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

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

43. The Hon'ble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573 has held that the completed assessment can be interfered with by the Assessing Officer while making the assessment u/s 153A only on the basis of some incriminating material found on or during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or not known

in the course of original assessment. Following the above decision, the Hon'ble Jurisdictional High Court in the case of CIT vs. Meeta Gutgutia reported in 395 ITR 526 has taken a similar view and has held that once the assessment has ITA No.7374/Del/2017 ITA No.7567/Del/2017 attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings u/s 153A of the I.T. Act. This of course would not apply if incriminating materials are gathered in the course of search or during the proceedings u/s 153A which are contrary to and/or nor disclosed during the regular assessment proceedings.

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

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

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

deleting the addition on legal ground is upheld, therefore, the grounds raised by the Revenue on merit become infructuous being merely academic in nature. The appeal filed by the Revenue is accordingly dismissed.

ITA No.1088/Del/2018 (A.Y. 2014-15)

23. Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings observed that the assessee, during the year under consideration has received share application money of Rs.3,73,00,120/- the details of which are given at para No. 6 of this order. The Assessing Officer, following identically worded reasoning for assessment year 2009-10, made the addition of Rs.3,73,00,120/- u/s 68 of the Act on the ground that the assessee failed to establish the identity and credit worthiness of the parties from whom the funds were received by the investors of the assessee and the genuineness of the transaction.

24. In appeal, the ld.CIT(A) deleted the share application money to the extent of Rs.14,34,620/- by observing as under:-

> "**Findings**
>
> 5.1 1 have considered the submissions of the Ld. AR, assessment order and case laws cited in this regard. The AO invoked Sec 153A after search on appellant group on 28.03.2015 on receipt of appraisal report from the DI (Investigation) with the allegation that the appellant company has received unexplained credit in its books u/s 68 of the IT Act. All the grounds of appeal are dealt with together being of similar in nature:
>
> 5.2 Regarding the merits, as per ground of appeal no. 5 & 6, 1 have gone through the assessment order passed by and A.O. and verified the material placed on paper book and was part of the assessment records also. All necessary information documents were requisitioned to verify the identity, genuineness of transaction and credit worthiness of the investors were duly submitted by the

appellant for respective investors. The Ld. AR submitted following documents to prove identity, genuineness and creditworthiness of the investor:

(a) Form 2 filed before ROC

(b) Confirmations from the investors

(c) Statements of bank account of the investors showing payments towards share application money.

(d) Share Application form duly filled by the investors.

(e) Copy of PAN card of the investors.

(f) Memorandum & Articles of Association of the investor company clearly depicting their corporate identity number.

(g) A copy of the acknowledgement of the Income tax return filed for AY 2014-15 by the investors along with its audited financial results for the year ended 31st March 2014.

5.3 The assessee has furnished the details of financials of the investing entities. After considering the identities, financials and creditworthiness of the investor companies and genuineness of transaction and source and availability of fund by investors, I am of the considered view that the AO has merely accepted the appraisal report of the Investigation Wing without meeting the touchstone tests of section 68 like — credit worthiness, identities and genuineness of transaction. Further A.O has made such addition stating that the income declared by the investors is lesser than the investment made by them which in my opinion has no criteria it is only source and availability of funds which remain the factor to observe. Accordingly the addition made by die A.O. u/s 68 of the Act is deleted.

5.4 Ld AR also placed reliance on the judgments in CIT vs. Sophia finance Ltd. (1994] 205 ITR 9g ;(FB) (Delhi), CIT vs. Nipuan Auto (P) Ltd. ((2014) 49 taxmann.com 13 (Del.) 361 ITR 155 (Del.), Commissioner of Income-tax vs Winstral Petrochemicals P. Ltd. 2011330 lTR603(Det,),CIT v. Divine Leasing and Finance Ltd. (2008) 299 ITR 268(Delhi), CIT v. Stellar Investments Ltd 192 ITR 287(Del.)& CIT v. Stellar Investment Ltd (2001)251 ITR. 263(SC) and contended that the appellant duly discharged the initial burden to establish the identity, creditworthiness and genuineness by submitting necessary documentary evidences in respect of the share application money. Reliance is also placed on the judgments in CIT v. Lovely Exports Pvt. Ltd. 319 ITR(ST)5(SC), CIT v. Divine Leasing & Finance Ltd 299 ITR 268 (Del.), [SLP rejected by Hon'ble SC vide order dated 21.01.2008), CIT vs Five Vision Promoters Pvt. Ltd 65taxmann.con71(DelhiHC), CIT v. Vrindavan Farms Pvt. Ltd.(ITA 71/2015)(Delhi HC),CIT V. Kamdhenu Steel & Alloys Ltd. [2004]361 ITR0220(Delhi HC).

5.5 It is pertinent to refer to the recent judgment dated 01st August 2017 in the case of Principal Commissioner of Income Tax, Delhi - 2 vs Best Infrastructure India Pvt Ltd ITA No.l3/2017 covers the case of the appellant on the facts. Relevant Para of the judgment is extracted below:-

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

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

33. \ At this stage, it requires to be noticed that the decision of this Court in Commissioner of Income Tax (Central-Ill) v. *Kabul Chawla (supra) took note inter alia of the decision of the Bombay High Court in Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd, [2015] 58 taxmann.com76(Born), wherein it was held that if no incriminating material was found during the course of search, in respect of each issue, then no addition in respect of any such issue can be made to the assessment under Sections 153A and I53C of the Act. The decisions of this Court in CIT* v. *Anil Kumar Bhalia (supra) and CIT* v. *Chetan Das LachmanDas [2012] 254CTO392 (Del) were extensively discussed in Commissioner of Income Tax (Ceniral-Ill)v.KabulChawla(supra). The Court in Commissioner of Income Tax(Central-Ill) v. Kabul Chawla (supra) had also discussed and*

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

34. Before the learned CIT (A), the assessee has produced the copy of bank account of all the share applicant companies. The CIT (A) has admitted the same as, additional evidence and has called for the remand report from the Assessing Officer. There is no cash deposit in the bank account of any of the share applicant before the issue of cheque for share application money to the group companies of the assessed. On the other hand, the credit is by way of transaction. During remand proceedings, the Assessing Officer has made necessary verification from the bank of the share applicant and no adverse finding is recorded by him in the remand report. Therefore, the facts on record are contrary to the allegation of the Revenue that the assessee gave cash to Shri TarunGoyal and he, after depositing the same in the bank account of various companies, issued cheques for share application money. On these facts, the decision of Hon'ble Jurisdictional High Court in the case of Harjeev Aggarval
(supra) would be squarely applicable. Therefore, we hold that the statement of Shri Tarun Goyal cannot be used against the assessee because

(i) His statement was recorded behind the back of the assessee and the assessee was not allowed any opportunity to cross-examine him.
(ii) There is no corroborative evidence in support of the statement of Shri Tarun Goyal. On the other hand, the material found during the course of search and other evidences placed on record by the assessee are contrary to the allegation made by Shri Tarun Goyal in his statement.
— Conclusion —
44. Accordingly the question framed by the Court in ATA Nos. 11, 12 and 21 of 2017 by the order dated 21st March. 2017 is answered in the negative i.e. in favour of the Assessee and against the Revenue by holding that the additions made under Section 68 of the Act on account of the statements made by the Assessee's Directors in the course of search under Section 132 of the Act were rightly deleted by the ITAT.

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

> respect of the equity received by the assessee cannot lead to the conclusions drawn by the AO. No specific corroborative evidence has been brought on record by Assessing Officer to prove that the equity subscription is an accommodation entry. Besides, appellant has also discharged its onus and submitted all the documentary evidence in respect of the investment. The details submitted in this regard by the appellant have also been made part of order by Assessing officer. It is also undisputed fact that the director of the appellant companies have never made any statement regarding the share capital / share premium / share application money and no disclosure have been made with regard to share capital / share premium / share application money / unsecured loan. Therefore, the investment stands explained u/s 68. However, the premium of Rs. 250/- per share has to be considered u/s 56(2)(viib). Since, 1,43,462 shares were issued having face value of Rs. 10/- each, the addition u/s 68 to the extent of Rs. 14,34,620/- is hereby deleted."

25. He, however, observed that the assessee has issued share at a premium of Rs.250/- per share. He asked the assessee to produce the basis of valuation of premium of Rs.250/- per share u/s 56(2)(viib) read with Rule 11UA. The assessee filed the valuation report from M/s Harpal & Associates, a qualified Chartered Accountant, wherein value of shares is calculated at Rs.261 per share by following Discounted Free Cash Flow Method. The valuation was done on the basis of the projected sales of the assessee for next five years and this projected figures were supplied by the management to the valuer. According to him, neither the management nor the valuer has given any basis for the projected figures. Therefore, valuation done by the valuer was not found to be satisfactory for which he rejected the same. He, therefore, held that the assessee has not been able to justify the premium on which shares were issued. He accordingly confirmed the addition on account of premium amounting to Rs.3,58,65,500/- (i.e., 1,43,462 shares @ Rs.250/0) u/s 56(2)(viib) of the IT Act, 1961 read with Rule 11UA.

26. Aggrieved with such order of the CIT(A), the assessee is in appeal raising the following grounds:-

> "1. The Ld. CIT(A) has grossly erred on facts as well as in law in confirming the order passed by the Ld. AO which is ex facie illegal, arbitrary and without jurisdiction being against the provisions of Income Tax Act, 1961 and principles of natural justice.
>
> 2. a) The Ld. CIT(A) has grossly erred on facts as well as in law in ignoring the fact that the impugned additions u/s 143(3) / 153A were made by the Ld. AO in spite of the fact that no incriminating document was found during the search and no assessment proceeding was pending as on the date of search, i.e., 28/03/2015.
>
> b) The Ld. CIT(A) has grossly erred on facts as well as in law in ignoring the fact that impugned additions u/s 153A were made by the Ld. AO inspite of the fact that they do not have any link with the search.
>
> 3. a) The Ld. CIT(A) has grossly erred on facts as well as in law in confirming the addition made by the Ld. AO to the extent of Rs. 3,58,65,500/- u/s 68 on account of share premium.
>
> b) The Ld. CIT(A) has grossly erred on facts as well as in law in exceeding his jurisdiction by confirming the addition of Rs. 3,58,65,500/- u/s 56(2)(viib) inspite of the fact that the Ld. AO made the addition u/s 68 and did not consider the applicability of sec 56(2)(viib).
>
> 4. The appellant craves leave to add, alter, modify and withdraw any grounds before or during the course of appellate proceedings.

27. The ld. counsel for the assessee, at the outset, submitted that the relief granted by the CIT(A) to the extent of share application money has not been challenged by the Revenue. He submitted that in the instant case, no notice u/s 143(2) was issued by the Assessing Officer. Referring to the arguments made for the assessment year 2009-10, he submitted that the same argument is applicable for this year also on account of addition made u/s 68 by the Assessing Officer. He submitted that in the instant year also, the original return was filed on 17th October, 2014 declaring income of

Rs.1,90,86,700/- which was processed u/s 143(1). The search in this case was conducted on 28th March, 2015 and the notice u/s 153A was issued on 10th May, 2016. He submitted that during this year also no incriminating material was found during the course of search and on the alleged date of search no assessment proceeding was pending. Therefore, the provisions of section 153A could not have been invoked for the impugned assessment year. Relying on various decisions which were cited while arguing the appeal for assessment year 2009-10, he submitted that the same arguments are clearly applicable for this year also. So far as the merit of the case is concerned, he submitted that the share applicants are group concerns only whose turnover and net profit has already been reproduced by the Assessing Officer in the body of the assessment order which shows that these companies are having sufficient funds and these are not paper companies. He submitted that the addition on merit which was argued while arguing for assessment year 2009-10 will be applicable for this year also.

28. So far as the addition sustained by the CIT(A) by invoking the provisions of section 56(2)(viib) is concerned, the ld. counsel for the assessee submitted that during assessment proceedings, the Assessing Officer has not considered any issue pertaining to section 56(2)(viib) which is evident from the assessment order. He submitted that it is the settled position of law that the CIT(A) does not have any jurisdiction to make such additions on the issues which were never considered by the Assessing Officer. He submitted that although the powers of the CIT(A) are co-terminus with that of the powers of the Assessing Officer, yet, he has jurisdiction only on those items which

have been considered by the Assessing Officer irrespective of the fact whether the issue is the subject matter of appeal or not. The CIT(A) does not have any jurisdiction over those issues which have not been considered by the Assessing Officer because these will be the subject matter of revision u/s 263 or reassessment u/s 147 of the IT Act. He argued that if the CIT(A) tries to examine those issues which have not been considered by the Assessing Officer, provisions of section 147 as well as section 263 will become redundant and the conditions for their operations will be nullified. For the above proposition, he relied on the decision of the Hon'ble Delhi High Court in the case of *Shri Vikrant Puri vs. ACIT, vide ITA No.142 & 5789/Del/2013, order dated 4th March, 2016, the decision of the Hon'ble Delhi High Court in the case of CIT vs. Union Tyres, 240 ITR 556 (Del) and CIT vs. Sardari Lal & Co. 251 ITR 864 and the decision of the coordinate Bench of the Tribunal in the case of Holcim (India) Pvt. Ltd. vs. DCIT, 2013-TIOL-903-ITAT-DEL.* He also relied on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC).*

29. So far as the merit of the addition is concerned, he submitted that the valuation of shares of the assessee was done by Shri Harpal & Associates, a qualified Chartered Accountant at a value of Rs.261/- per share under Rule 11UA. However, the shares were issued at a value of Rs.260/- per share including premium of Rs.250/-. Referring to page 30 of the order of the CIT(A) where it has been alleged that the projected figures used for valuation of shares are applied by the management to the valuation

and neither the management nor the valuer has given any basis for the projected figures is concerned, he submitted that the same is not correct. The basis of projections made by the management was duly submitted before the CIT(A), vide letter dated 22nd December, 2015 which was not considered by the CIT(A). He submitted that the valuation of equity shares of the assessee was done by M/s Harpal & Associates during F.Y. 2008-09 and 2014-15 by following the Discounted Free Cash Flow Method after considering the following documents which were provided by the assessee to the valuer:-

i) Copy of audited accounts for the relevant Financial Years.

ii) Copy of project report consisting of:-

a) Industry outlook position for PET Preforms.

b) Position of installed capacity.

c) List of company's customers and their projected orders.

d) CMA data depicting profitability projection for next 5 years.

30. He submitted that there is no whisper in the order of the CIT(A) as to which figure was found incorrect and what should be the correct figure. He has completely ignored the various submissions made by the assessee and, therefore, the findings of the CIT(A) are against the materials on record. Further it is only in Explanation (a)(ii) of sec 56(2)(viib) that satisfaction of Ld. AO is required but there is no such condition in explanation (a)(i) which means that if shares are valued as per rule 11U/11UA, the AO is not permitted to reject the valuation. The valuation report filed by the appellant

is also under expl. (a)(i) of sec 56(2)(viib). As per rule 11UA(2)(b), the assessee is required to fulfill only two conditions, firstly, to obtain a certificate from a merchant banker or a Chartered Accountant, secondly, the valuation must be based on Discounted Free Cash Flow method only. There is no other condition prescribed under this rule. In the case of the appellant, it has filed valuation report from a qualified Chartered Accountant whose valuation is based on Discounted Free Cash Flow method. Therefore, the appellant has complied with both the conditions. Since, the valuation filed by the appellant has been done strictly in accordance with the prescribed method, the same cannot be rejected by the Ld. CIT(A) on non existent facts.

31. Relying on various decisions including the decision of the Jaipur Bench of the Tribunal in the case of Rameshwaram Strong Glass Pvt. Ltd. vs. ITO reported in 2018-TIOL-1358-ITAT-JAIPUR, he submitted that since the assessee has issued shares at a premium of Rs.250/- right from F.Y. 2008-09 whereas the value determined as per Discounted Free Cash Flow Method comes to Rs.261/- for F.Y. 2008-09 and Rs.262/- in F.Y. 2013-14, therefore, the premium charged by the assessee was most reasonable and not in excess of the valuation as prescribed under Rule 11UA.

32. He accordingly submitted that both legally and factually the addition made by the CIT(A) is not sustainable.

33. The ld. DR, on the other hand, submitted that so far as the relief granted by the CIT(A) is concerned, although the Revenue has not preferred any appeal against the deletion of Rs.14,34,620/-, the Revenue can always raise the same by invoking Rule 27 of the ITAT Rules. So far as the addition made by the CIT(A) amounting to Rs.3,58,65,500/- is concerned, she submitted that the ld.CIT(A) has given valid reasons while making the addition of Rs.3,58,65,500/- u/s 56(2)(viib) of the IT Act. She accordingly submitted that the addition deleted by the CIT(A) should be reversed and the addition made by him u/s 56(2)(viib) should be sustained.

34. We have considered the rival arguments made by both the sides and perused the material available on record and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case made addition of Rs.3,73,00,120/- u/s 68 of the Act on account of share application money received by the assessee on the ground that the assessee failed to establish the identity, credit worthiness and genuineness of the parties wherever funds received by the investors of the assessee who are also group companies of the assessee group. He, therefore, treated the amount of Rs.3,73,00,120/- as unexplained cash credit u/s 68 treating the assessee as the beneficiary. We find the ld.CIT(A) deleted the addition of Rs.14,34,620/- on the ground that no incriminating material was found during the course of search and, therefore, addition of the same cannot be made u/s 153A. He further held that the assessee has discharged the onus cast on it by proving the identity and

creditworthiness of the share applicants and the genuineness of the transaction. The Revenue is not in appeal before us. However, the ld. DR, at the time of hearing, invoked the Rule 27 of the ITAT Rules and tried to argue the relief granted by the CIT(A) to the extent of Rs.14,34,620/-. First of all, even though the argument advanced by the ld. DR is accepted for a moment, even then the tax effect on the relief granted by the CIT(A) will be within the limit prescribed by CBDT for filing of appeals by the Revenue. Therefore, at the threshold itself, the argument of the ld.CIT, DR falls flat and probably for this very reason, the Revenue has not filed any appeal against the relief granted by the CIT(A). Even otherwise also as mentioned while adjudicating the appeal for 2009-10, all the investor companies are group companies and their turnover and profitability etc. have been reproduced by the Assessing Officer in the body of the assessment order and therefore, these are not at all paper companies. Further, no incriminating material was found during the course of search and the original assessment was completed much before the date of search and the assessment was not pending. Therefore, in view of our finding while deciding the appeal for assessment year 2009-10, the argument of the ld.CIT, DR that the relief granted by the CIT(A) should be reversed does not hold good. Accordingly, the argument of the CIT, DR is rejected to the extent of relief granted by the CIT(A). Since no incriminating material were found during the course of search and the assessment was completed and the order was passed u/s 143(1) and the assessment was not pending on the date of search, therefore, following our reasoning while deciding the appeal for the

assessment year 2009-10, the addition made by the Assessing Officer is liable to be quashed.

35. Now, coming to the addition made by the CIT(A) amounting to Rs.3,58,65,500/- by invoking the provisions of section 56(2)(viib) is concerned, it is an admitted fact that the Assessing Officer in the body of the assessment order has neither discussed this issue nor made any addition on this account. Under these circumstances, it has to be seen as to whether the ld.CIT(A) has jurisdiction to make such addition on an issue which was never considered by the Assessing Officer. Although the powers of the CIT(A) are co-terminus with that of the powers of the Assessing Officer, yet, he has jurisdiction only on those items which have been considered by the Assessing Officer irrespective of the fact whether the issue is subject matter of appeal or not. However, in our opinion, he does not have any jurisdiction over an issue which has not been considered by the Assessing Officer. In case it is accepted that the ld.CIT(A) has power to consider an issue which was not considered by the Assessing Officer, then, the provisions of section 263 or 147 will become otiose.

35. We find an identical issue had come up before the Hon'ble Delhi High Court in the case of *CIT vs. Union Tyres reported in 240 ITR 556 (Del)* wherein it was held as under:-

> "11. Thus, the principle emerging from the aforenoted pronouncements of the Supreme Court is, that the first Appellate Authority is invested with very wide powers under s. 251(l)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those

aspects of the assessment about which the assessee makes a grievance and ranges over the whole assessment to correct the AO not only with regard to a matter raised by the assessee in appeal but also with regard to any other matter which has been considered by the AO and determined in the course of assessment. However, there is a solitary but significant limitation to the power of revision, viz. that it is not open to the AAC to introduce in the assessment a new source of income and the assessment has to be confined to those items of income which were the subject-matter of original assessment."

36. Similarly, the Delhi Bench of the Tribunal in *Vikrant Puri vs. ACIT and vice versa, vide ITA No.142 & 5789/Del/2013 & ITA No.608/Del/2013, order dated 4th March, 2016 for assessment year 2008-09,* after considering various decisions of the Hon'ble Delhi High Court and Hon'ble Supreme Court, has observed as under:-

"9.1 We have gone through the assessment order as well as the impugned order passed by the Ld. CIT(A) on the additions in dispute, we are of the view that after admitting the additional evidence, Ld. CIT(A) has held that the stand taken by the Revenue that amount received by the assessee from the company is unexplained cannot be sustained is a correct one and therefore, we are in agreement with this finding, but later Ld. CIT(A) has diverted his view and wrongly applied the provisions of sections 2(22)(e) read with section 2(24)(ii) and section 56(2)(vi) of the Income Tax Act, 1961, which is not in his jurisdiction and also not sustainable in the eyes of law.

9.2 After going through the additions made by the AO as mentioned in vide para 3 & 3.1 at pages 2&3 of this Order as well as findings given by the Ld. CIT(A) on the issues in dispute raised in the grounds of appeals involved in the present Appeal alongwith the judgment of the Apex Court and Hon'ble High Court decision cited by the Ld. Counsel of the assessee, as aforesaid. We are of the considered view that Ld. CIT(A) have made these addition u/s 2(22)(e) and 56(2)(vi) of the I.T. Act, 1961 under different heads which has not been discussed / adjudicated by the AO in the assessment order which is not sustainable in the eyes of law. The AO has not considered any of these issues pertaining to these sections. In our view Ld. CIT(A) did not have any jurisdiction to make any such additions on the issues which were never considered by the Assessing Officer in the assessment order. Although the powers of the CIT(A) are co-terminus with the powers of the AO, yet the Ld. CIT(A) has jurisdiction only on those issues which have been considered by the AO irrespective of the fact that whether the issue is subject matter of the Appeal or not. The Ld. CIT(A) does not have any jurisdiction over those issues which have not been considered by the AO. This may be subject matter of revision u/s. 263 of the I.T. Act or reassessment u/s. 148 of the I.T. Act. If the Ld. CIT(A) tries to examine those issues which have not been considered by the AO, then the provisions of section

147 as well as section 263 of the I.T. Act will become redundant and the condition for their operation will be nullified. Our view is supported by the following judgments passed by the Apex Court as well as Hon'ble High Court.

a) CIT vs. Union Tyres 250 ITR 556 (Del.)
b) CIT vs. Sardari Lal & Co. 251 ITR 864 (Del.) (FB)
c) CIT vs. Rai Bahadur Hardutroy Motilal Chamaria, (1967) 66 ITR 443 (SC)
d) Holcim (India) Pvt. Ltd. vs. DCIT 2013 TIOL 903 ITAT- Del. 9.3

9.3 Respectfully following the aforesaid decisions rendered by the Hon'ble Supreme Court as well as Hon'ble High Court, we hold that Ld. CIT(A) did not have any jurisdiction to make such additions on the issues which were never considered by the AO as has been done in the present case. Therefore, the impugned order on the issues involved in the grounds of appeal are without jurisdiction and is not sustainable in the eyes of law, hence, we cancel the impugned order dated 26.11.2012 being without jurisdiction by accepting the Appeal filed by the Assessee."

37. The Hon'ble Delhi High Court in Sardari Lal & Co., reported in 251 ITR 864 (Del) (FB), has observed as under:-

" This court was of the view that the question for consideration was whether the directions of the Appellate Assistant Commissioner to the Income Tax Officer to conduct enquiry and furnish information on the aforesaid points is within the scope of his powers under section 251(1)(a) of the Act.

After noticing several judgments, it was held as follows :

" Thus, the principle emerging from the aforenoted pronouncements of the Supreme Court is, that the first appellate authority is invested with very wide powers under section 251(1)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessed makes a grievance and ranges over the whole assessment to correct the assessing officer not only with regard to a matter raised by the assessed in appeal but also with regard to any other matter which has been considered by the assessing officer and determined in the course of assessment. However, there is a solitary but significant limitation to the power of revision, viz., that it is not open to the Appellate Assistant Commissioner to introduce in the assessment a new source of income and the assessment has to be confined to those items of income which were the subject-matter of original assessment.

……
……

> 4. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfillled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, the decision in Union Tyres' case (supra) of this court expresses the correct view and does not need reconsideration. This reference is accordingly disposed of."

38. Considering the fact that the Assessing Officer in the assessment order has neither discussed this issue nor made any addition u/s 56(2)(viib), therefore, respectfully following the decisions cited above, we are of the considered opinion that the ld.CIT(A) has no power to adjudicate the issue by introducing a new source of income and his order has to be confined to those items of income which is subject matter of original assessment. We accordingly set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition. The grounds of appeal raised by the assessee are accordingly allowed.

39. In the result, ITA No.2257/Del/2018 filed by the Revenue is dismissed and the ITA No.1088/Del/2018 filed by the assessee is allowed.

The decision was pronounced in the open court on 15.03.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMFBER

Dated: 15th March, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi