

आयकर अपीलीय अधिकरण “जी” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL

“G” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं

माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND

HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

(Hearing Through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No 5125/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2009-10)

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2. आयकरअपील सं./ I.T.A. No 5126/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2010-11)

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3. आयकरअपील सं./ I.T.A. No 5127/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2011-12)

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4. आयकरअपील सं./ I.T.A. No 5128/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

Sahakar Global Ltd. B-10, 1 st Floor, Kanakia Space, Western Edge II W.E.Highway, Borivali(East) Mumbai-400 066	बनाम/ Vs.	DCIT-CC-4(1) Room No.1916,19 th Floor Air India Building Nariman Point Mumbai-400 021
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAECS-3575-R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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5. आयकरअपील सं./ I.T.A. No 5340/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2010-11)

&

6. आयकरअपील सं./ I.T.A. No 5968/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2011-12)

&

7. आयकरअपील सं./ I.T.A. No 5341/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

DCIT-CC-4(1) Room No.1916,19 th Floor Air India Building Nariman Point Mumbai-400 021	बनाम/ Vs.	Sahakar Global Ltd. B-10, 1 st Floor, Kanakia Space, Western Edge II W.E.Highway, Borivali(East) Mumbai-400 066
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAECS-3575-R		

(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
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Assessee by	:	Shri Prakash Jhujhunwala-Ld.AR
Revenue by	:	Shri Hemant Kumar Leuva-Ld. CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	05/02/2021
घोषणा की तारीख / Date of Pronouncement	:	26/03/2021

आदेश / ORDER

Per Bench

1.1 The assessee is in appeal for Assessment Years (AY) 2009-10 to 2012-13 whereas the revenue is in appeal for AYs 2010-11 to 2012-13. However the facts as well as issues in all the years are more or less similar and it is admitted position that adjudication in any one year shall substantially apply to other years also. Therefore, the appeals were heard together and are now being disposed-off by way of this common order for the sake of convenience & brevity. Taking facts from AY 2011-12 as the lead year, we proceed to adjudicate the same in the succeeding paragraphs. The order under challenge has been passed by learned Commissioner of Income Tax (Appeals)-52, Mumbai [CIT(A)] on 05/06/2017.

1.2 The ground raised by the assessee read as under: -

1. On the facts and in the circumstances of the case, the Ld Commissioner of Income Tax (Appeals) - 52, Mumbai ("herein after referred to as the CIT (A)) has erred in confirming the addition of Rs. 3,50,00,000/- as unexplained cash credit u/s. 68 in respect of amount received during the year as share capital and premium from M/s. Vanguard Jewels Ltd, Ansh Merchandise Pvt Ltd., Alka Diamond Industries Ltd & Talent Infoway Pvt Ltd.
2. The appellant company being aggrieved, prays that the addition of Rs.3,50,00,000/- on account of unexplained cash credit u/s. 68 being unwarranted, illegal, bad in law be deleted.
3. On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.3,50,000/- out of Rs.3,50,00,000/- as unexplained cash credit u/s. 68 on mere estimation basis that some commission must have been paid for securing accommodation entry.

4. The appellant company being aggrieved, prays that the addition of Rs.3,50,000/- on account of unexplained cash credit u/s. 68 being unwarranted, illegal, bad in law be deleted.

1.3 The ground raised by the revenue read as under: -

- i. On the facts and in the circumstances of the case and in law, the CIT(A), while upholding the addition of Rs.3.5 Crore on account of share capital and share premium, has erred in deleting the remaining addition on account of share capital and premium of Rs.13,00,00,000/- received during the year and added as unexplained credit u/s 68 of the I.T.Act, 1961.
- ii. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of share capital premium of Rs.3,46,50,000/- (out of total addition of Rs.3,50,00,000/-) by confirming only 1% of the above amount despite the fact that cash of Rs.3.5 Cr. generated by the assessee was not taken on the receipt side while preparing the P&L A/c.

As evident, the sole subject-matter of cross-appeal is certain addition made u/s 68 since partial relief has been granted by Ld. CIT(A) to the assessee in the impugned order.

2. We have carefully heard the rival submissions as urged before us. We have also gone through material on record including documents placed in the paper-book and written submissions filed during the course of hearing. The judicial precedents as cited during hearing have duly been deliberated upon. The assessee being resident corporate assessee is stated to be engaged in the business of toll collection under government contracts. The key person of the assessee group is stated to be its Chairman & Managing Director (CMD) Shri Kishore P. Agrawal. Our adjudication to the subject matter of appeal would be in subsequent paragraphs.

3. Assessment Proceedings and findings of Ld. AO

3.1 An assessment has been framed against the assessee for the year under consideration u/s 143(3) r.w.s. 153A on 28/03/2016 in view of the fact that the assessee group was subjected to search action u/s 132 on 27/02/2014. The search action stem from pre-search enquiries

conducted by the department wherein it was alleged that the assessee group obtained share capital and share premium from shell companies who had certain common features viz. common directors / common addresses, low turnover, meager income, low opening and closing bank balances, no genuine business etc.

3.2 During search action on one of such group being controlled by Shri Praveen Kumar Jain on 01/10/2013, an admission was made therein that the group was providing accommodation entries against commission in various forms to other companies. In assessee's case, it was alleged that the assessee also introduced share capital and share premium in its books of accounts in various years through accommodation entries as provided by Shri Praveen Kumar Jain and his associated group companies.

3.3 Similar search was carried out in the case of another entry provider namely Shri Mukesh Chokshi on 27/02/2014 wherein similar admission of indulgence in accommodation entries against commission were made.

3.4 It was alleged by Ld.AO that during the year under consideration, the assessee introduced share capital and share premium of Rs.20 Crores in its books of accounts through accommodation entries from the tainted group's 21 entities as detailed below: -

No.	Name of the Companies	Amount
1.	M/s. Alka Diamond Industries Ltd.	100 Lacs
2.	M/s. Dreamland Plaza Ltd.	100 Lacs
3.	M/s. Gravity Barter Pvt Ltd.	100 Lacs
4.	M/s. Handsome Sales Pvt. Ltd. (M/s. Murlidhar Sales Pvt. Ltd.)	40 Lacs

5,	M/s. Stocknet International Ltd.	200 Lacs
6.	M/s, Vangaurd Jewels Ltd.	100 Lacs
7.	M/s. Ansh Mercantile Pvt. Ltd. (M/s. Newpla.net Trading Co. Pvt. Ltd.)	100 Lacs
8.	M/s. Casper Enterprise Pvt. Ltd.	100 Lacs
9.	M/s. Duke Business Pvt. Ltd.	100 Lacs
10.	M/s. Talent Infoway Pvt. Ltd.	50 Lacs
11.	M/s. Sidh Housing Development Pvt. Ltd. (M/s. Bhadrawti Ispat & Energy Ltd.)	65 Lacs
12.	M/s. Buniyad Chemicals Pvt. Ltd.	50 Lacs
13.	M/s. Sarvashretha Traders Pvt. Ltd.	80 Lacs
14.	M/s. Artillengence Bio Innovations Ltd.	200 Lacs
15.	M/s. Gyaneshwar Trading & Fin. Co. Ltd. (M/s. Bhadrawti Steel & Urja Ltd.)	185 Lacs
16.	M/s. Dream Valley Sales Pvt. Ltd.	80 Lacs
17.	M/s. Oshin Investment & Finance Pvt. Ltd.	90 Lacs
18.	M/s. Albatross Shares Registry Pvt. Ltd.	105 Lacs
19.	M/s One2e Solution India Pvt. Ltd.	155 Lacs
	TOTAL	20 Crores

3.5 Accordingly, notice u/s 153A was issued to the assessee on 23/07/2015. In response to the same, the assessee filed return of income on 30/09/2015 declaring income of Rs.620.16 Lacs. The statutory notices u/s 143(2) & 142(1) were issued in due course of time calling for requisite information from the assessee.

3.6 During search action on assessee group on 27/02/2014, it was noted that the assessee was engaged in toll collection business which was cash intensive business. During various financial years, the

assessee introduced share capital at high premium but in the next financial year, the shares were bought back at face value. During assessment proceedings, an opinion was formed by Ld. AO that investing companies were nothing but shell companies providing accommodation entries without having worth of introducing such big amount of funds in other companies.

3.7 During search operation, the statement of assessee's key person namely Shri Kishore P. Agarwal was recorded u/s 132(4), the relevant portion of which has already been extracted in the assessment order. In reply to question nos. 10, 12 & 13, admission was made as to the fact of acceptance of accommodation entries against cash. In response to question no.14, it was admitted that some portion of cash as introduced as share application money was generated from reality business of group concern namely M/s Sahakar Infracon Projects Private Ltd. whereas some cash was generated out of assessee's toll receipts. When loose papers were confronted to assessee vide question no.15, he submitted that the documents contained details of on-money received on sale of flats in project "Sahakar Heights" being developed by group concern i.e. M/s Sahakar Infracon Projects Private Ltd. Lastly, the director agreed to offer these accommodation entries to tax in respective years in which the same were introduced in the books of accounts. The details of shares capital so received by the assessee in various years has already been tabulated in para 6.3 of the assessment order. The detail for this year has already been tabulated by us in preceding para 3.4.

3.8 On the basis of aforesaid facts, following conclusions were drawn by Ld. AO: -

In view of above acceptance by Shri Kishore P. Agarwal, MD of M/s Sahakar Global Limited and statement of Shri Mukesh M. Chokshi recorded during the course of search action and pre-search enquiries, it strengthens the stand that companies from whom M/s Sahakar Global Limited has taken share application money is just accommodation entries and this share application money is actually the cash generated from the business of Sahakar Global Ltd. and on-money received on sale of flats booked in Sahakar Heights project built by assessee's sister concern Sahakar Infracon Pvt. Ltd. which has been brought back into the books of accounts of the assessee company through three accommodation entry providers.

The above facts and admission of Shri Kishore P. Agarwal clearly shows that Sahakar Infracon Pvt. Ltd. had accepted on-money on sale of flats and routing the same into its books of accounts as Share capital and share premium from the accommodation entry provider (bogus companies) as discussed above.

3.9 However, the aforesaid statement stood retracted by the assessee vide retraction letter dated 28/12/2015 which was supported by the sworn affidavit. It was submitted that since the copies of statements recorded at the time of search were not provided to the assessee till 12/12/2015 despite repeated requests / reminders, the retraction affidavit could not be filed earlier. After receipt of copies of statements, the retraction affidavit has been filed. It was also submitted that the contents of the statements made during search operations were involuntary and under pressure and therefore it was not possible to recall the precise contents without perusing the written/recorded copies. In support, a sworn affidavit-cum-declaration was also filed before Ld. AO. The copies of the retraction as well as affidavit-cum-declaration as placed on record have also been considered by us.

3.10 However, the retraction made by the assessee-director was brushed aside by Ld. AO because of the fact that the mishandling or coercive measures allegedly adopted by the search team did not trigger any legal recourse/action by the assessee. Further, the retraction made after 18 months was a mere afterthought and was to be disregarded.

3.11 Proceeding further, Ld. AO maintained that the assessee generated cash from its own business and reintroduced the same through entry-provider entities as detailed in the assessment order. Notices issued u/s 133(6) sent to these entities were allegedly returned / un-served by postal authorities (however, this fact has been disputed by the assessee). The assessee failed to produce any of the share-applicants for confirmation of transactions. Finally, in the light of various judicial pronouncements holding the field, it was alleged by Ld. AO that the assessee indulged in accepting accommodation entries in the form of share application money and premium by utilizing the unaccounted or undisclosed cash generated from the business carried on by it or its group concerns. Since the assessee failed to prove the identity of the investor entities, establish their creditworthiness and also the genuineness of the transactions, the aforesaid sum was added to assessee's income u/s 68 as unexplained cash credit.

4. Assessee's Submissions during Appellate Proceedings

4.1 During appellate proceedings, the assessee, *inter-alia*, submitted that at the time of search operation on 27/02/2014, it had cash-in-hand as per cash book for Rs.12.94 Crores approx. However, the actual cash as found during the search operation was Rs.32.49 Lacs only. The said cash-in-hand for Rs.12.94 Crores, as per books of accounts, was duly entered in to cash book by crediting toll receipts account which ultimately got reflected by way of credit to Profit & Loss Account. Out of the said cash-in-hand of Rs.12.94 Crores, a sum of Rs.9 Crores was used in various years to obtain cheques for share capital / share premium from various parties from time to time. The sum of Rs.3.50 Crores was stated to be so received during this year from 3 entities listed at serial nos. 17

to 19 of table extracted in preceding para 3.4. These entities were:(i) M/s Oshin Investment & Finance Pvt. Ltd. (Rs.90 Lacs); (ii) M/s Albatross Share Registry Pvt. Ltd. (Rs.105 Lacs); (iii) M/s One2e Solution India Pvt.Ltd. (Rs.155 Lacs). The recording of said transactions was stated to be rectified by the assessee in financial year 2013-14 by reducing share premium account with corresponding increase in cash-in-hand by Rs.9 Crores. The list of such shareholders and all the above mentioned facts were stated to be submitted to Ld. AO vide letters dated 13/02/2016 & 15/03/2016.

4.2 The assessee also pointed out that the remaining sum of Rs.16.50 Crores as received from 16 private limited entities was treated as unexplained cash credit merely on the basis of statement of Shri Pravin Kumar Jain. However, the confession made by Shri Pravin Kumar Jain was later on retracted by him and therefore, the same could not be the sole basis for making additions in the hands of the assessee. As against this, the assessee placed on record sufficient documentary evidences in the shape of Application Letter & Form, PAN Card Copy of share applicants, Board resolution, Letter of Confirmation from investor entities, respective bank statements of investor entities, Certificate of Incorporation, Memorandum of Association & Articles of Association as well as Audited financial statements to prove the identity of the investor entities, their respective creditworthiness and the genuineness of the transactions. All these entities had sufficient net worth / resources to make investment in the assessee company as evident from their respective financial statements. The payment was stated to be received through banking channels and there was no cash deposit in the share

applicant's bank account before making investment in the assessee company.

4.3 Regarding allegation of Ld. AO that notices u/s 133(6) remained un-served, it was submitted that 13 shareholders out of 16 shareholders responded to the notices and confirmed the transactions which was evident from documentary evidences on record. The assessee also obtained the copies of reply in response to notices issued u/s 133(6) from 14 entities and filed the same before Ld. AO. The proof in the shape of acknowledgement was produced before Ld. CIT(A) in support of the same.

4.4 Another plea raised by the assessee was the fact that these entities duly complied with the notices and submitted the details as called-for by Ld. AO and therefore, the primary onus casted upon assessee to substantiate the transactions stood discharged. The adverse statement of tainted group as used by Ld. AO against the assessee was never provided to the assessee and no cross-examination was granted despite specific request by the assessee to Ld. AO vide letter dated 15/02/2016. The failure to do so grossly breached the principles of natural justice which would make the additions fatal in the eyes of law as per the decision of Hon'ble Apex Court in **Kishanchand Chellaram V/s CIT 125 ITR 713** and also in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006)** which held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. Similar ratio was stated to

be followed by Hon'ble Bombay High Court in **R.W. Promotions Private Ltd vs. ACIT (ITA No.1489 of 2013)**.

4.5 Refuting Ld. AO's allegation of buy back, the attention was drawn to the fact that there was no buy back of shares and the shareholders continue to be the shareholders of the assessee company. Similarly, the other allegation that share certificates of investor entities were found from assessee's premises was refuted by submitting that the share-certificates found were merely waste paper stationery in view of the fact that they were affixed with wrong stamps and unusable.

4.6 Regarding delayed retraction, it was submitted that copies of statements, as repeatedly demanded by the assessee, were not provided to the assessee till 12/12/2015. The admission was not conclusive and the retraction was valid one. Reliance was placed on various following circulars of CBDT which discouraged / prohibit the officers to obtain forcible confessional statements: -

- a. CBDT Instruction (letter) F. No.286/2/2003 - IT (Inv.II) dated March 10, 2003
- b. CBDT Instruction (letter) F. No.286/98/2013 - IT (Inv.II) dated January 09, 2014
- c. CBDT Instruction (letter) F. No.286/98/2013 - IT (Inv.II) dated Dec 18, 2014
- d. CBDT Instruction (letter) F. No. 286/57/2002 - IT (Inv.II) dated July 07, 2002

4.7 The share premium as received on issue of shares was justified on the basis of valuation report which was placed on record. It was submitted that the valuation was duly supported by the financials of the assessee for various years since financials reflected excellent growth of the assessee over the years. Further, it was the prerogative of the Board of Directors of the Company to decide the quantum of premium amount and the wisdom and freedom of the shareholder to subscribe at particular share premium.

4.8 Reliance was placed on the various decisions to assail impugned additions u/s 68. The Hon'ble Bombay High Court in **CIT V/s Creative World Telefilms Limited (2011 333 ITR 100)** held that once assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank, it was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which was ultimately returned back. The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer. The failure to do so would justify the deletion of addition. Similar was the view of Hon'ble Delhi High court in **CIT V/s Vrindavan Farms (P) Ltd. (ITA No. 71/2015 dated 12/8/2015)**. Further, in terms of decision of Hon'ble Apex Court in **CIT V/s Lovely Exports (P) Ltd. (2008 216 CTR 195)**, the department could not proceed against the assessee but it could proceed against the alleged doubted subscribers.

4.9 In the above background, it was submitted that since the assessee produced sufficient documentation to discharge initial onus of showing the genuineness and creditworthiness of the share applicants, it was obligatory for Ld. AO to have undertaken some inquiry and investigation before coming to a conclusion that the transactions were not genuine. Where the complete particulars of the share applicants was furnished to the AO and the AO fails, no addition could be made in the hands of assessee u/s 68.

4.10 Keeping in view the submissions made by the assessee refuting allegations leveled by Ld. AO, various opportunities were provided to Ld. AO to attend the appellate proceedings and furnish a report whether these letters / replies received from the investor entities were indeed filed by them. However, despite various opportunities, no compliance could be made by Ld. AO and no report was furnished. Left with no option, the matter was proceeded with by Ld. CIT(A) on the basis of material on record.

5. Findings & Adjudication of Ld. CIT(A)

5.1 The Ld. CIT(A) noted assessee's submission as to delayed retraction that copy of statements were provided by the department to the assessee only on 12/12/2015 and therefore, the retraction was made immediately thereafter on 13/12/2015. The assessee had also argued that subsequent to the retraction, Ld. AO had again summoned Shri Kishore P. Agarwal and one more statement of Shri Kishore P. Agarwal was recorded on oath u/s 131 on 27/01/2016, in which he had explained that the earlier statement during search was given under force and in a state of confusion and may be treated as withdrawn.

5.2 It was noted by Ld. CIT(A) that 4 entities (listed at serial nos. 1,6,7 & 10 in the table as extracted in para 3.4.) belonging to Shri Pravin Kumar Jain group and Shri Mukesh Choksi group invested share money of Rs.350 Lacs during the year. The addition against these entities were to be confirmed by following appellate order for AY 2009-10 which held the investments to be unexplained in the light of statement of Shri Pravin Kumar Jain & Shri Mukesh Choksi. Further, the shares of these entities were bought back by the assessee during subsequent years. Therefore, this addition was to be confirmed.

5.3 It was argued by assessee that 12 entities (listed at serial nos.2 to 5, 8, 9, 11 to 16 in the table as extracted in para 3.4. and also tabulated in para 18 of impugned order) from whom aggregate investment of Rs.13 Crores was received, did not belong to Shri Pravin Kumar Jain Group or to Shri Mukesh Choksi Group since there was no mention of these entities in the statement made by Shri Pravin Jain or Shri Mukesh Choksi during search action on them. Therefore, Ld. AO was not justified to club these entities along with other entities belonging to the tainted group. Further, no incriminating material or evidence was stated to have been found against these 12 entities during the course of search on assessee. The notices sent to all these entities u/s 133(6) were stated to be duly responded to by these entities. All these entities were stated to have remained invested in the assessee company till date.

Though the submissions made by the assessee were duly confronted to Ld. AO, however, as noted earlier, Ld. AO failed to attend the hearing and did not file any reply despite various reminders by Ld. CIT(A). The same led the Ld. CIT(A) to adjudicate the issue on the basis of material on record. Upon perusal of documentary evidences, it was noted by Ld. CIT(A) that these entities had, in fact, responded to notices issued by Ld.AO u/s 133(6) as well as summons issued u/s 131. These entities had duly furnished their respective return of income, financial statements, copy of PAN card, Memorandum & Article of Association, source of investments, allotment letter and copy of bank statement etc. to Ld. AO to confirm the transactions. It was stated by all of them that there was no buyback of shares and the investments were sourced out of company's funds. They also submitted purchase details of shares. The ROC website reflected the status of these companies as 'active'.

Their Balance Sheet, Profit Loss account and Auditors' report was available on ROC website.

The Ld. CIT(A), upon perusal of all these documentary evidences, concurred with assessee's submissions that these entities did not belong to the tainted groups. They had duly confirmed the transactions and furnished sufficient documentary evidences in support of investments made by them. All these entities had sufficient capital and reserves to make the investment in assessee. There was no immediate cash deposit in the banks of these entities before making investment in Assessee-Company and transactions had taken place through banking channels. There was no buy back of shares from these entities and therefore, the action of Ld. AO in making addition against these entities could not be held to be justified. The Ld. AO was not able to dispute the details furnished by the assessee. None of these entities were mentioned anywhere, either in the statement of Shri Pravin Kumar Jain or in the statement of Shri Mukesh Choksi and these entities apparently did not belong to the tainted group. No incriminating material was found against these entities. The share premium was supported by valuation report and various projections made in the valuation report were found to be true. The turnover as well as profitability of the assessee had been quite significant over last 4 to 5 years which could be gathered from the fact that the turnover of the assessee rose from 203.93 Crores in AY 2008-09 to Rs.654.85 Crores in AY 2016-17. The assessee reflected significant growth in the profitability also. Therefore, the fact of huge share premium could not be held against the assessee in the absence of any incriminating material. More so, the statement made by Shri Kishore P. Agarwal stood retracted immediately after receipt of statement from

the department. In fact, Ld. AO had summoned Shri Kishore Agarwal and his statement was again recorded on oath u/s 131 on 27/01/2016 wherein he affirmed the fact of retraction and contested the surrender earlier made by him. In terms of decision of Hon'ble Gujarat High Court in **Kailash Ben Manohar Lal Choksi Vs. CIT (328 ITR 411)**, when original statement was retracted by the assessee and the assessee had satisfactorily explained the delay in retraction, its evidentiary value gets reduced. In the given circumstances, it would be duty of Ld.AO to make water tight case by making necessary enquires and by bringing cogent evidences on record to prove otherwise. In a situation like above, the AO has to rely more on the evidences found during the course of search and need to collect further evidence against the assessee during the course of assessment proceedings to nail it. Since, apparently no incriminating evidence has been found in respect of the above mentioned 12 entities during the course of search nor any evidence was gathered by Ld. AO later during the course of assessment proceedings, he could not make additions simply on the basis of statements. Hence, the impugned addition against these entities was to be deleted.

5.4 Regarding balance addition of Rs.3.50 Crores stated to be received from 3 entities (listed at serial nos. 17 to 19 of table in para 3.4) belonging to Shri Mukesh Chokshi Group, it was the submissions of the assessee that investments were sourced out of cash-in-hand held by the assessee in its books of accounts. Since, the cash was duly accounted for in the books of account, addition so made would amount to double taxation and would be against the principles of taxation. Even Ld. AO, in para 6.5 of the assessment order accepted that share application money

was in the nature of accommodation entries sourced out of cash generated by the assessee.

Upon perusal, Ld. CIT(A) concurred with the submissions that cash-in-hand, on the date of search, as per assessee's books of accounts was Rs.12.94 Crores as against actual availability of cash of Rs.32.49 Lacs on the date of search. This fact would support the observation of Ld. AO that cash was given to entry providers to obtain accommodation entries which is further fortified by the fact that the recording of the said transactions was rectified in financial year 2013-14 by reducing share premium account with corresponding increase on cash-in-hand by Rs.9 Crores. Therefore, the investment, in principle, was to be treated as unexplained. But these entries were sourced only out of cash generated by the assessee in its toll business and the same was held by the assessee in its books of accounts. Therefore, the additions could not be sustained since assessee's own accounted cash was diverted / used to obtain these entries. But the assessee would have certainly paid commission to procure these entries and therefore, the addition to the extent of 1% was to be made in the hands of the assessee. The relevant observations of Ld. CIT(A), were as follows: -

34. In view of these facts, it is clear that the amount of Rs.3.50 cr as share application money from above company had been received by the assessee only through diversion of cash in hand of the appellant company and therefore, even though, these companies were entry providers, still no addition could have been made in the hands of the assessee as its own cash in hand is gone to procure these entries in the form of cash. Therefore, the sum could not be treated as unexplained cash credits in the hands of the assessee. However it is relevant to mention over here that the assessee must have paid some commission in securing such accommodation entries through Mukesh Choksi group against payment of cash. Such commission varies from 0.5% to 1% in such kind of business, which the assessee must have paid outside the books and therefore remains unexplained. Considering the facts of the case I am inclined to estimate such expenditure in securing accommodation entry @ 1% of such amount, which works out to Rs.3,50,000/- .

35. Therefore out of addition of Rs.3.5 cr, an amount of Rs.3,50,000/- is upheld and remaining amount of Rs.3,46,50,000/- is directed to be deleted. Consequently, Ground No. 3 taken by the assessee is partly allowed.

The aforesaid adjudication has given rise to present cross-appeals before us.

6. Our findings and Adjudication

6.1 Upon careful consideration of factual matrix as enumerated in preceding paragraphs as well as after perusal of material on record including orders of lower authorities, we find that the assessee group was subjected to search action on 27/02/2014 which was triggered on the basis of pre-search enquiries conducted by the department that the assessee received accommodation entries from various concerns being run /operated by Shri Pravin Kumar Jain Group and Shri Mukesh Choksi Group. It was the allegations that the shares were bought back in subsequent years. During search operations, the director of the assessee-company, made admission of the fact that the assessee obtained accommodation entries partly by exchanging cash generated from toll business as well as partly out of 'on-money' generated by assessee's sister concern i.e. M/s Sahakar Infracon Projects Private Limited from realty business. The key person of the assessee agreed to offer the said amount in various years to tax. However, the said statement was retracted immediately upon receipt of copies of statement from the department on 12/12/2015. The retraction as filed vide letter dated 28/12/2015 (as placed on record) is duly supported by affidavit-cum-declaration. In the affidavit, Shri Kishore P. Agarwal, while retracting the confession, has maintained that there was no undisclosed income earned by the assessee after considering the Books of Accounts,

Financial statements and records. It has also been submitted that the confession was made under pressure and threat and therefore, the same was to be disregarded since it was not supported by any corroborative evidences. Upon filing of retraction, another statement on oath u/s 131 has been recorded by Ld. AO from Shri Kishore P. Agarwal on 27/01/2016 wherein it has been reiterated that earlier confessional statement was given under force and in a state of confusion. However, Ld. AO has termed the retraction made after approx. 18 months as mere afterthought and therefore, chose to disregard the same overlooking the fact that despite repeated reminders, copies of statement was provided to the assessee only on 12/12/2015 and the retraction was made immediately after receipt of statement by the assessee. In such a case, the confession made by the assessee, in our opinion, would lose considerable credibility unless the confession was supported by some incriminating material as unearthed by the department during the course of search action on assessee.

6.2 Another pertinent accepted fact is that cash allegedly used by the assessee to procure accommodation entries to have been sourced partly out of on-money received in real estate business of assessee's sister concern namely M/s Sahakar Infracon Projects Private Limited. However, this cash has also been treated as assessee's unexplained money despite concurrence of Ld. AO of the fact that accommodation entries were sourced partly out of cash generated by M/s Sahakar Infracon Projects Private Limited. No addition is shown to have been made in the hands of M/s Sahakar Infracon Projects Private Limited. These two entities, in our opinion, are separate legal entities and the one

entities' unaccounted money could not be added to the income of the other entity's income.

6.3 Another fact to be noted is that the assessee was engaged in toll business which is a cash intensive business. A fact noted by Ld. CIT(A) is that on the date of search, the assessee had cash balance of approx. Rs.12.94 Crores as against actual availability of cash to the extent of Rs.32.49 Lacs. This fact is nowhere in dispute. There is nothing contrary on record to dispute this fact. This being so, considering the allegation of the Ld. AO that accommodation entries were sourced out of cash generated by the assessee in its toll business coupled with surrounding facts and circumstances, it could safely be presumed that the cash shortage arose due to the fact that cash was given to entry providers against cheques received from them. However, once the same has been sourced out of cash held by the assessee in its books of accounts, the same could not be treated as unexplained money of the assessee since the cash would be generated only out of toll receipts credited by the assessee in its books of accounts. In other words, it could not be said that the entries were sourced from cash generated out of the books and therefore, the entries to that extent could not be said to be unexplained money of the assessee. This is further fortified by the undisputed fact that the entries of Rs.9 Crores have subsequently been reversed by the assessee, in its books of accounts, in financial year 2013-14. We concur with the findings of Ld. CIT(A) finding, in this regard, as rendered in the impugned order.

6.4 Proceeding further, it could be seen that the additions have been made by Ld. AO on the allegations that none of the parties have responded to notices issued u/s 133(6) and therefore, the onus casted

upon assessee to establish the genuineness of the transactions remained un-discharged. However, this is not the correct fact since most of the investor entities furnished replies to Ld. AO which is evident from copies of replies as placed on page nos. 34 to 64 of the paper-book. The investor entities confirmed having made investment in assessee-company and furnished their respective Income Tax Returns, bank statements, financial statements, source of investments, copies of Memorandum & Articles of Association, details of directors, basis of investment, details of purchase of shares, allotment letter etc. They also confirmed that there was no buy back of shares. The said facts could also not be controverted by department before us. Pertinently, these facts could also not be controverted by Ld. AO during appellate proceedings despite being provided with various opportunities of hearing by Ld. CIT(A). Therefore, the allegation of Ld. AO that none of the investor entities responded to the notices u/s 133(6), would not hold much water and therefore, this allegation was to be disregarded.

6.5 Proceeding further, we find that additions have been made by Ld. AO relying heavily on the statements given by tainted group during search operations. However, despite being assessee's specific request of cross-examination of each of the investor entities, vide letter dated 15/02/2016, no opportunity of cross-examination has been provided to the assessee. The copies of incriminating statements as used against the assessee have also not been furnished. The failure to do so grossly breached the principles of natural justice which would make the additions fatal in the eyes of law as per the decision of Hon'ble Apex Court in **Kishanchand Chellaram V/s CIT 125 ITR 713** and also in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006)** which

held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. Similar ratio was stated to be followed by Hon'ble Bombay High Court in **R.W. Promotions Private Ltd vs. ACIT (ITA No.1489 of 2013)**. Further, no addition could be made merely on the basis of suspicious, conjectures or surmises as held by Hon'ble Supreme Court in **Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151)** wherein it was held that the suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in **Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271)**.

In the above background, it could be seen that Ld. CIT(A) has trifurcated the investor entities into three categories- (i) entities not belonging to tainted group with respect of whom no incriminating material was found during search; (ii) entities belonging to tainted group where cash was exchanged in lieu of accommodation entries; (iii) entities belonging to tainted group which was confirmed on the basis of appellate order for AY 2009-10; We proceed to deal with each category of investor entities as follows:-

6.6 Entities not belonging to tainted group with no incriminating material

The addition with respect to first category of investor entities has been deleted by Ld. CIT(A) in view of the finding (as noted by us in para 5.3) that these entities did not belong to the tainted group. These entities had duly confirmed the transactions and furnished sufficient documentary

evidences in support of investments made by them. All these entities had sufficient capital and reserves to make the investment in assessee. There was no immediate cash deposit in the banks of these entities before making investment in Assessee-Company and transactions had taken place through banking channels. There was no buy back of shares from these entities and therefore, the action of Ld. AO in making addition against these entities could not be held to be justified. The Ld. AO was not able to dispute the details furnished by the assessee. None of these entities were mentioned anywhere, either in the statement of Shri Pravin Kumar Jain or in the statement of Shri Mukesh Choksi and these entities apparently did not belong to the tainted group. No incriminating material was found against these entities during search on assessee. The share premium was supported by valuation report and various projections made in the valuation report were found to be true. The turnover as well as profitability of the assessee had been quite significant over last 4 to 5 years which could be gathered from the fact that the turnover of the assessee rose from 203.93 Crores in AY 2008-09 to Rs.654.85 Crores in AY 2016-17. The assessee reflected significant growth in the profitability also. Therefore, the fact of huge share premium could not be held against the assessee in the absence of any incriminating material. In the light of retraction, Ld. AO was duty bound to make water-tight case against the assessee by making necessary enquires and by bringing cogent evidences on record to prove otherwise. It was obligatory on the part of Ld. AO to collect more evidences against the assessee during the course of assessment proceedings to disprove the documentary evidences filed by the assessee. The failure to do so would make the addition unsustainable in the eyes of law since it could be said that the

assessee had discharged the primary onus of proving these transactions in terms of requirement of Section 68. Similar is the position before us. No new material could be placed before us. Therefore, in our considered opinion, no infirmity could be found in the impugned order with respect to these entities. We order so. Resultantly, the grounds raised by the revenue, in this regard, stand dismissed.

6.7 Entities belonging to tainted group where cash was exchanged

The second set of entities comprises-off of 3 entities belonging to Shri Mukesh Chokshi Group. From the factual matrix, it is quite evident that cash was given to these entities out of cash-in-hand held by the assessee in its books of accounts. The cash was generated out of cash intensive toll business carried out by the assessee. In such a case, the same could not be treated as unexplained money of the assessee since the cash would be generated only out of toll receipts credited by the assessee in its books of accounts. In other words, it could not be said that the entries were sourced from cash generated out of the books and therefore, the entries to that extent could not be said to be unexplained money of the assessee. This is further fortified by the undisputed fact that the entries of Rs.9 Crores have subsequently been reversed by the assessee, in its books of accounts, in financial year 2013-14. Therefore, on the facts and circumstances, the Ld. CIT(A), in our considered opinion, has rightly estimated commission income against these entries. Therefore, no interference is called for in the impugned order, in this regard also. The grounds thus raised in the cross-appeals stand dismissed.

6.8 Remaining entities belonging to tainted group

The addition with respect to balance entities (listed at serial nos. 1,6,7, & 10) allegedly belonging to Shri Mukesh Choksi has been confirmed on the basis of appellate order for AY 2009-10. Facts in AY 2009-10 are that consequent to search operation on assessee and on the basis of statements, similar assessment was framed against the assessee u/s 143(3) r.w.s. 153A on 28/03/2016. The assessee received share application money of Rs.200 Lacs from 4 entities belonging to Shri Pravin Kumar Jain Group. These entities were (i) M/s Real Gold Trading Private Limited; (ii) M/s Yash Jewels; (iii) M/s Vanguard Jewels Ltd.; (iv) M/s Lexus Infotech Ltd. The amount so received was added to assessee's income u/s 68 by Ld. AO on similar findings. The Ld. CIT(A) confirmed the addition by observing that these entities were mentioned in the statement of Shri Pravin Kumar Jain wherein he admitted that these entities were engaged in providing accommodation entries. Further, the shares of these entities were bought back by the assessee in subsequent years. Another fact observed by Ld. CIT(A) was that no evidence was furnished by the assessee that these entities replied to the notices issued u/s 133(6). Therefore, the addition was to be confirmed.

Upon perusal of facts, it is noted that the additions have primarily been made on the basis of statement of Shri Pravin Kumar Jain and in view of the allegations that there was buy back of shares in subsequent years. Further, the notices u/s 133(6) remained un-responded. However, we find that the opportunity to cross-examine Shri Pravin Kumar Jain was never provided to the assessee. Nor the copies of statements were furnished / confronted to the assessee. The failure to do so would make the additions unsustainable in the eyes of law in view of settled legal

position as enumerated by us in para 6.5. Further, we find that all these entities have duly furnished replies to Ld. AO which are placed on Page nos. 34 to 64 of the paper book wherein the transactions have been confirmed by these entities along with sufficient documentary evidences in the shape of Income Tax Returns, bank statements, financial statements, source of investments, copies of Memorandum & Articles of Association, details of directors, basis of investment, details of purchase of shares, allotment letter etc. They have confirmed that there was no buy back of shares. These entities are not listed as entities to whom the cash is stated to have been paid by the assessee in exchange of accommodation entries. Therefore, the allegations of lower authorities would have no legs to stand. Consequently, the addition in AY 2009-10 stand deleted. The assessee's appeal for AY 2009-10 stands allowed.

Similar is the position in this year. The Ld. CIT(A) has relied upon appellate order for AY 2009-10 while confirming the additions in this year. Therefore, since additions have been deleted by us in AY 2009-10, the addition in this year also stand deleted except for entity listed at serial no.1 i.e. M/s Alka Diamonds Industries Ltd. since this entity is tabulated as an entity from whom accommodation entries have been obtained in lieu of cash. The addition against this entity is sustained to the extent of 1% of Rs.100 Lacs which comes to Rs.1 Lacs. The balance addition of Rs.349 Lacs stands deleted.

7. The assessee's appeal for AY 2009-10 stands allowed. The assessee's appeal as well as revenue's appeal for AY 2011-12 stands partly allowed.

8. Cross-Appeals for AY 2012-13

8.1 The registry has noted a delay of one day in revenue's appeal which we are inclined to condone keeping in view the period of delay.

8.2 In this year, similar assessment has been framed u/s 143(3) r.w.s. 153A of the Act on 28/03/2016 wherein similar additions have been made against 24 investor entities. The same have been detailed in the assessment order.

8.3 Upon further appeal, Ld. CIT(A) has divided the investor entities into four categories- (i) entities not belonging to tainted group with respect of whom no incriminating material was found during search; (ii) entities not belonging to tainted group where complete details could not be furnished; (iii) entities belonging to tainted group where cash was exchanged in lieu of accommodation entries; (iv) Group entities of the assessee;

8.4 The addition with respect to first category has been deleted by Ld. CIT(A). The addition with respect to second and fourth category has been confirmed. The addition with respect to third category has been estimated @1%. Consequently, the assessee as well as revenue is in further appeal before us.

8.5 Since the material facts with respect to entities in the first category i.e. entities not belonging to tainted group with respect of whom no incriminating material was found are quite similar to AY 2011-12, taking the same view, we confirm the impugned order.

8.6 Similarly, the material facts with respect to third category i.e. entities belonging to tainted group where cash was exchanged in lieu of accommodation entries is also quite similar to AY 2011-12, taking the same view, we confirm the impugned order.

8.7 The second category is one investor entity (M/s Lalli Sales & Marketing Private Limited) for Rs.100 Lacs not belonging to tainted group wherein addition have been confirmed since the assessee could not furnish complete details. The perusal of document on record would show that this assessee is an Income Tax Assessee under PAN AABCL-8428-P. It is duly registered entity under CIN: U52100MH2010PTC205884. Pertinently, this entity does not belong to the tainted group and no incriminating material has been found against this entity during the search operation. This being so, this addition could not be subject matter of assessment u/s 153A since it was not a case of abated assessment. Therefore, in the absence of any incriminating material with respect to this entity, this addition is not sustainable in the eyes of law. By deleting the same, we allow the assessee's ground, to that extent.

8.8 The fourth category of investors for Rs.100 Lacs comprise-off two associated entities of the assessee group (M/s Atharva Business Private Limited & M/s Viraj Mercantile P. Ltd.). The addition has been confirmed by Ld. CIT(A) by observing that there is no concrete proof that the on-money of M/s Sahakar Infracon Projects Private Limited has gone towards receipt of share application money. However, we find that there are no evidence of cash exchange between the assessee and these two entities. Rather this cash has been sourced out of 'on-money' received by M/s Sahakar Infracon Projects Private Limited which is altogether separate entity. Therefore, this money could not be treated as assessee's unexplained money. Hence, we are inclined to delete the same.

9. Consequently, the assessee's appeal for AY 2012-13 stands partly allowed whereas the revenue's appeal stand dismissed.

10. Cross-Appeals for AY 2010-11

10.1 In this year, an assessment has been framed on similar lines u/s 143(3) r.w.s. 153A of the Act on 28/03/2016 wherein similar additions have been made against 10 investor entities. The same have been detailed in the assessment order.

10.2 Upon further appeal, Ld. CIT(A) has divided the investor entities into three categories- (i) entities not belonging to tainted group with respect of whom no incriminating material was found during search; (ii) entities belonging to tainted group where cash was exchanged in lieu of accommodation entries; (iii) entities belonging to Shri Pravin Kumar Jain group which was confirmed on the basis of appellate order for AY 2009-10;

10.3 The addition with respect to first category has been deleted by Ld. CIT(A). The addition under second category has been estimated @1%. The addition with respect to third category has been confirmed on the basis of appellate order for AY 2009-10.

10.4 We find that factual matrix with respect to first and second categories of investor entities are quite similar to AY 2011-12. Resultantly, the impugned order with respect to first and second categories of investor entities stand confirmed.

10.5 The third category includes 5 entities viz. (i) M/s Olive Overseas; (ii) M/s Yash V.Jewels; (iii) M/s Vanguard Jewels Ltd.; (iv) M/s Triangular Infocom Ltd.; (v) M/s Ansh Merchandise P. Ltd.

10.6 The addition has been confirmed by Ld. CIT(A) on the basis of appellate order for AY 2009-10. Similar issue has also been dealt by us

at preceding para 6.8 in AY 2011-12 wherein it has been noted that the additions have primarily been made on the basis of statement of Shri Pravin Kumar Jain and in view of the allegations that there was buy back of shares in subsequent years. However, we have deleted the additions by observing that the opportunity to cross-examine Shri Pravin Kumar Jain was never provided to the assessee. Nor the copies of statements were furnished / confronted to the assessee. Resultantly, the additions would be unsustainable in the eyes of law as per settled legal position. Further, all the stated entities have duly furnished replies along with sufficient documentary evidences. They have confirmed that there is no buy back of shares. These entities are not listed as entities to whom the cash is stated to have been paid by the assessee in exchange of accommodation entries. Therefore, the allegations of lower authorities would have no legs to stand. Similar ratio is applicable to this category of investors, facts being pari-materia the same. Therefore, the addition as sustained by Ld. CIT(A) stand deleted.

11. The assessee's appeal stand partly allowed. The revenue's appeal stands dismissed.

Conclusion

12. The assessee's appeal for AY 2009-10 stands allowed. The assessee's appeal for AYs 2010-11, 2011-12 & 2012-13 stands partly allowed. The revenue's appeal for AY 2011-12 stands partly allowed whereas the appeal for AY 2010-11 & 2012-13 stands dismissed.

Order pronounced on 26th March, 2021.

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 26/03/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**