IN THE INCOME TAX APPELLATE TRIBUNAL GAUHATI BENCH, "VIRTUAL HEARING" AT KOLKATA

(समक्ष)श्री पी. एम.जगताप,उपाध्यक्ष **एवं** श्री ए.टी. वर्की,न्यायिक सदस्य)

[Before Shri P.M. Jagtap, Vice President (KZ) & Shri A. T. Varkey, JM]

I.T.A. Nos.126 to 131/GAU/2020
Assessment Year: 2011-12 to 2015-16 & 2017-18

ACIT, Circle-1, Guwahati	Vs.	Goldstone Cements Ltd., Meghalaya (PAN: AADCG2870Q)
Appellant		Respondent

&

C.O. Nos.03 to 08/Gau/2020
In I.T.A. Nos.126 to 131/GAU/2020
Assessment Years: 2011-12 to 2015-16 & 2017-18

Goldstone Cements Ltd., Meghalaya	Vs.	ACIT, circle-1, Guwahati
Cross Objector		Respondent

Date of Hearing	22.10.2021
Date of Pronouncement	10.12.2021
For the Revenue	Shri Amit Kumar Pandey, JCIT, Sr. DR
For the Assessee/Cross Objector	Shri Akkal Dudhwewala, AR

ORDER

Per Bench:

All these appeals preferred by the Revenue and cross objections filed by the assessee are against the common order of Ld. CIT(A)-2, Guwahati dated 18-03-2020 for AYs 2011-12 to 2015-16 & 2017-18. Since the issues involved were common, all the appeals were heard together. Both the parties also argued them together raising similar contentions on these issues. Accordingly, for the sake of brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the facts of the case in brief. The assessee is a company incorporated in the year 2007. The assessee was jointly promoted by M/s Gangwal Group, M/s More Group and M/s UFM Group for setting up cement factory at State of Meghalaya having a capacity of 2040 TPD. In connection therewith, these three (3) promoter groups had infused capital into the assessee company across all the years through the *aegis* of their group bodies corporate and individuals. The said cement plant was finally commissioned in July 2016 and the commercial production commenced in FY 2016-17. Search u/s 132 of the Income Tax Act 1961 (herein after referred to as the Act) was conducted against the M/s Goldstone Group, on 12-12-2017 (AY 2018-19). Ordinarily, having regard to the date of search, the AO was within his jurisdiction to issue notices u/s 153Aof the Act in respect of six assessment years preceding the assessment year of search i.e. in the present case search took place in AY 2018-19, so, ordinarily the AO was empowered u/s. 153A of the Act to reopen six preceding assessment years preceding the searched assessment year and those AY's were AYs 2012-13 to 2017-18.However, in this case, the AO further in exercise of powers conferred under fourth proviso to Section 153A of the Act, which was inserted by Finance Act 2017 w.e.f. 01.04.2017, also reopened the seventh year, i.e. AY 2011-12, which was beyond six assessment years but within ten assessment years. All the notices were issued u/s 153A of the Act on 11-09-2019. It was pointed out that, prior to the date of search, the income-tax assessment u/s 143(3) of the Act for AY 2011-12 had been completed on 28-03-2013. Accordingly, the assessment for AY 2011-12 being not-pending on the date of search, did not abate consequent to the search as per second proviso to section 153A of the Act. And also, since the returns of income for these assessment years (hereinafter in short 'AYs') AYs 2012-13, 2013-14, 2014-15 & 2015-16 were filed on 30-03-2013, 24-10-2013, 22-11-2014 & 29-03-2016 respectively, and undisputedly the time limit for issuance of notices u/s 143(2) of the Act for all these years had expired as on the date of search on 12.12.2017. Accordingly, these AY's i.e. AY 2012-13 to AY 2015-16 were also **unabated,** since they were not pending before the Income Tax Authority on the date of search. With regard to AY 2017-18, it was pointed out that, the return of income was filed on 31-10-2017 and therefore, the time limit for issuance of notice u/s 143(2) of the Act had not expired on the

date of search i.e. 12-12-2017.Hence, AY 2017-18 was pending before the AO on the date of search and consequently, AY 2017-18 was an **abated** assessment year. Therefore, except AY 2017-18, all the other AYs 2011-12, 2012-13, 2013-14, 2014-15 & 2015-16 were unabated assessments.

3. The AO issued identical questionnaire u/s 142(1) of the Act on 29-09-2019 for all these AY's, inter alia, requiring the assessee to furnish page-wise explanations of the documents and material seized during the course of search, which was complied with by the assessee vide replies dated 18-11-2019 and 04-12-2019. In the meanwhile, the assessee vide letter dated 04-11-2019 raised specific objections before the AO regarding reopening of AY 2011-12,which fell beyond six assessment years as discussed (supra) (hereinafter referred to as the '*seventh assessment year*'). The assessee requested the AO to provide the relevant seized material regarding income escaping assessment for AY 2011-12 (seventh assessment year) and especially the details of the undisclosed/unaccounted '*assets*' discovered during search for which the assessment of AY 2011-12was being reopened in terms of fourth proviso to Section 153A of the Act. The AO overruled the objection through the order sheet noting dated 04.11.2019, and evasively refused to provide the same. In the same order sheet noting dated 04-11-2019, a detailed common notice was issued by the AO to the assessee, which has been extensively reproduced at Pages 4 to 9 of the assessment orders for all the years that has been reopened u/s. 153A of the Act. The questionnaire *inter alia* included details/information sought for, regarding the share capital raised by the assessee across all these years. Pursuant thereto, the assessee filed details of the share subscribers to show their respective identity, creditworthiness as well as the genuineness of the share subscriptions received from them. The AO thereafter made independent enquiries from the share subscriber's u/s 133(6) of the Act. It is noted by the AO in the assessment order that, all the notices were complied with and that statements of key persons/directors were also recorded by him. The AO thereafter issued a show cause notice (SCN) dated 27-12-2019 requiring the assessee to explain as to why the following amounts of share capital and premium raised by the company in AYs 2011-12 to 2017-18 should not be added as unexplained cash credit u/s 68 of the Act.

Asst Year	Amount (in Rs)
2011-12	5,38,35,000
2012-13	3,01,00,000
2013-14	11,85,00,000
2014-15	22,22,99,970
2015-16	1,79,99,995
2016-17	1,01,99,989
2017-18	34,69,54,848

4. In response, the assessee furnished detailed explanation along with supporting documents which are available at Pages 207 to 335 of the paper-book. The AO however was not agreeable to the submissions made by the assessee. According to the AO, the electronic seized material marked as GCL-HD-1 revealed that the share capital of the assessee company were subscribed to by three major promoter groups viz., UFM Group, Mayur Ply (More) Group and M.P. Jain (Gangwal) Group. The AO stated that the very mention of group-wise capital in this material was itself incriminating, which showed that the monies were routed by these groups through shell entities to invest in the assessee company. The AO in the assessment orders also relied on certain selective portions of the statements given by alleged entry operator, Mr. S.K. Agarwal dated 13-12-2017 & 06-05-2018 to conclude that few of the companies, which had subscribed to the share capital of the assessee, were shell entities. The AO also set out three flow charts in the assessment orders and named them cash trails, which according to him, corroborated his conclusion that the assessee had routed its unaccounted monies in the guise of share application monies. The AO thereafter discussed the source of funds of each of these share subscribers and held that the transactions regarding the raising of share capital with them, was not acceptable as genuine. The AO accordingly added all the amounts mentioned in his show cause notice as unexplained cash credit u/s 68 of the Act in all AYs 2011-12 to 2017-18. Aggrieved by the order of the AO, the assessee preferred an appeal before the Ld. CIT(A).

5. Since the assessment orders for all the AYs were verbatim same and even the assessee had furnished common submissions, and even the Ld. CIT(A) disposed off all the appeals by the impugned consolidated order dated 18-03-2020. The Ld.CIT(A) observed that except AY 2017-18, the assessments for all other AYs 2011-12 to 2016-17 were unabated being not pending on the date of search as per second proviso to section 153A of the Act (*which fact is undisputed*). According to him, in these unabated assessments, additions made by the AO u/s. 153A of the Act could have been made only if they were supported or backed-up by incriminating material found in the course of search, or otherwise these concluded assessments could not be disturbed. In support of this proposition, the Ld. CIT(A) relied on several decisions of the Hon'ble High Courts, viz., PCIT vs Kurule Paper Mills Pvt. Ltd. (380 ITR 571), PCIT vs Saumya Construction Pvt. Ltd. (387 ITR 529), Jai Steel (India) vs ACIT (259 ITR 281), CIT vs Kabul Chawla (380 ITR 573) and others. The Ld. CIT(A) thereafter examined the contents of GCL-HD-1, the image of which has been reproduced by him at Pages 144 to 145 of the First Appellate Order, and which according to the AO, constituted the purported '*incriminating material*' found in the course of search. The Ld. CIT(A),after analyzing and examining the same, held that this document (GCL-HD-1) was a secretarial compliance report which was filed by the assessee with the Registrar of Companies along with Form MGT-7 (*Annual Return*) giving the shareholding pattern of the company. According to Ld. CIT(A), this report was a regular business document and the contents therein were not of incriminating nature at all. The Ld. CIT(A) thus concluded that the additions made in the AYs 2011-12 to 2016-17 were not based on any material which can be stated to be '*incriminating material*' and therefore deleted the additions made in these unabated assessments on the strength of the case laws referred (supra). As regards AY 2017-18, [*unabated assessment year being pending on the date of search*] the Ld. CIT(A) examined in detail, the information and documents furnished by the two shareholders, M/s Orchid FinleasePvt. Ltd. & M/s Shantidham Marketing Pvt. Ltd. and also the Assessee company and thereafter concluded that both these shareholders were genuine and they had substantiated their respective *source of source* of funds. According to Ld. CIT(A), all the three ingredients *viz*., *identity, creditworthiness* and

genuineness of these two shareholders were established and therefore he deleted the addition made in AY 2017-18 on its merits.

6. Aggrieved by the order of Ld. CIT(A), the Revenue is in now in appeal before us in all the AY's except AY 2016-17.The assessee has also filed Cross Objections in all these AY's. The grounds taken by the assessee and Revenue are summarized below:

Revenue's Grounds of Appeal

Sl. No.	Grounds	2011-12	2012-13	2013-14	2014-15	2015-16	2017-18
(i)	On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.	1	1	1	1	1	1
(ii)	That the Ld. CIT(A) erred in facts and in law in deleting the addition made u/s 68 of the IT Act 1961 by the Assessing Officer u/s 143(3)/153A and hence the impugned order of the Ld. CIT(A) is liable to be quashed and the order of the Assessing Officer be restored.	2	2	2	2	2	2
(iii)	That the Ld. CIT(A) erred in facts and in law in holding that the additions were not based on any incriminating seized material as it is clearly evident from the Order of the Assessing Officer that the additions were based on seized electronic material marked as GCL-	3	3	3	3	3	-

	HD-1 seized during the course of search.						
(iv)	Whether the Ld. CIT(A) is justified in holding that the assessee M/s Shantidham Marketing Pvt. Ltd. was found to be examined u/s 143(3) of the Act for AY 2017-18 by its own AO and findings of AO are not based on any evidence or material on record and are merely in the nature of surmises, suspicion and conjecture without appreciating the facts contained in the first proviso to Section 68 which is effective from AY 2013-14, clearly cast onus on the assessee, prove the source in the hand of investor	-	-	-	-	-	3

Assessee's Grounds of Cross Objections

Sl. No.	**Grounds**	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**	**2017-18**
(i)	Ld. CIT(A) should have held that conditions specified in fourth proviso to Section 153A(1) were not complied and notice dated 11.09.2019 issued u/s 153A along with order dated 30.12.2019 u/s 153A/143(3) were without jurisdiction and void ab initio.	1	-	-	-	-	-

(ii)	LdCIT(A) should have held that the provisions of Section 153D of the Act were not complied with and the order passed u/s 153A/143(3) is bad in law.	2	1	1	1	1	1
(iii)	LdCIT(A) should have held that no interest can be charged u/s 234A of the Act.	3	2	2	2	2	5
(iv)	Ld CIT(A) erred in rejecting the assessee's contention that the order u/s 153A read with 143(3) was not issued in the prescribed ITBA Module as notified by the Board was void ab initio.	-	-	-	-	-	2
(v)	LdCIT(A) erred in not granting set off of business loss against the addition made in the assessment.	-	-	-	-	-	3
(vi)	LdCIT(A) erred in rejecting the assessee's contention that tax on the addition made in the assessment was to be computed at the normal rate and not at the rate prescribed in Section 115BBE of the Act.	-	-	-	-	-	4
(vii)	LdCIT(A) should have directed grant of credit of the seized cash of Rs.61.73 lacs by way of self-assessment tax for AY 2017-18.	-	-	-	-	-	6

7. We have heard both the parties and perused the material on record. After giving thoughtful consideration to the facts of the present case and the grounds raised by both parties and taking their consent, we have re-framed the issues/questions for our adjudication in the following sequence.

(A) Whether the AO had validly assumed jurisdiction to issue notice u/s 153A of the Act upon the assessee for AY 2011-12 in terms of the fourth proviso to Section 153A of the Act, read with Explanation 2 of the Act?

(B) Whether in absence of any incriminating material found in the course of search at the premises of the assessee, the additions/disallowances made in the assessments of the assessee which were unabated/non-pending on the date of search, could be held to be sustainable on facts and in law?

(C) Whether the Joint Commissioner of Income-tax, Guwahati had validly granted approval u/s 153D of the Act and therefore whether the consequent order passed u/s 153A/143(3) was sustainable in law or not ?

(D) Whether the assessee had discharged its onus of establishing the identity and creditworthiness of the share subscribers and substantiating genuineness of the transactions and therefore whether the additions made u/s 68 of the Act on account of share application monies received by the assessee was tenable on facts and in law i.e., on merits addition was sustainable or not?

(E) Whether the AO had rightly computed interest u/s 234A of the Act?

(F) Whether having regard to the fact that, the assessment order for AY 2017-18 was not issued by the AO under the prescribed ITBA Module but under the erstwhile ITD Module, the impugned order could be held to be ab-inito-void?

(G) Whether the addition/s made u/s 68 of the Act in AY 2017-18, if upheld, was eligible to be set off against current year's business loss of AY 2017-18 ?

(H) Whether the addition/s made u/s 68 of the Act in AY 2017-18, if upheld, was taxable at normal tax rates or at the higher tax rate prescribed u/s 115BBE of the Act?

(I) Whether the lower authorities had erred in not granting the benefit for set-off of seized cash by way of self-assessment tax in AY 2017-18?

8. We first proceed to answer the Question (A).

(A) Whether the AO had validly assumed jurisdiction to issue notice u/s 153A of the Act upon the assessee for AY 2011-12 in terms of fourth proviso to Section 153A of the Act read with Explanation 2 of the Act ?

[Ground No. 1 of Cross Objection of Assessee for AY 2011-12]

8.1 This ground is pertaining to AY 2011-12 i.e., the seventh assessment year preceding the searched assessment year. In this ground, the assessee has challenged the usurpation of jurisdiction by the AO u/s 153A of the Act without first satisfying the essential condition precedent prescribed in the fourth proviso to Section 153A read with Explanation 2 of the Act. Referring to the fourth proviso to Section 153A of the Act, the Ld. AR Shri Dudhwewala pointed out that the notice for re-assessment of AY 2011-12 which was beyond the period of six assessment years could have been issued only when the AO had in his possession any incriminating evidence which revealed that *income valued Rs. 50 lakhs or more represented in the form of asset* had escaped assessment. He pointed out that the term '*asset*' has been defined in Explanation 2 to the fourth proviso to Section 153A of the Act which states to include, (a) *immovable property being land or building or both*, (b) *shares & securities*, (c) *loans & advances* and (d) *deposits in bank account*. According to Shri Dudhwewala, therefore, the AO could not have usurped jurisdiction u/s 153A of the Act without having in his possession evidence/material which would reveal income valued Rs 50 lakhs or more, represented in the form of *asset* having escaped assessment in terms of the fourth proviso to Section 153A of the Act. Shri Dudhwewala pointed out that despite the specific request, the AO never provided to the assessee the details of the undisclosed/unaccounted '*asset*' which, if any, had been unearthed during search and had

resultantly escaped assessment. Shri Dudhwewala explained further on the scope of fourth proviso to Section 153A of the Act. According to him, the additional power given to the AO to reopen beyond six assessment years upto ten assessment years (7^{th} to 10^{th} AY's) were conferred by the Finance Act, 2017 w.e.f. 01.04.2017. However, according to him, this power can be exercised only on satisfaction of the *essential condition precedent* as specified in the fourth proviso to section 153A of the Act. Therefore, according to him, the invocation of jurisdiction under section 153A of the Act in respect of seventh to tenth assessment years were not automatic as is in the case of six assessment years preceding the year of search. If the AO wants to re-open the seventh to tenth assessment years, then he should be empowered to do so by legal/valid assumption of jurisdiction as per the fourth proviso to section 153A of the Act. So according to Shri Dudhwewala, the *jurisdictional fact* to be met under the fourth proviso to section 153A of the Act is that, the AO should have in his possession incriminating evidence/material which could reveal that income valued Rs. 50 lakhs or more represented in form of '*asset*' had escaped assessment. Only if, the AO had in his possession this *jurisdictional fact* i.e. undisclosed/unaccounted '*asset*' valued Rs. 50 lakhs or more, which was discovered during search, relating to seventh to tenth assessment years, that he can rightly invoke the jurisdiction to re-open the said assessment years, or otherwise the AO cannot reopen the assessment. [*Please note:- The contention of Ld. A.R. Shri Dudhwewala in respect of jurisdictional fact will be dealt in length (infra)*].Shri Dudhwewela further argued that, it is implied from a reading of fourth proviso to section 153A of the Act is that, when the Parliament in its wisdom has prescribed the existence/discovery of undisclosed *Asset* valued Rs.50 lakhs or more, as condition precedent for invoking jurisdiction, the Parliament has excluded discovery of other income escaping assessment not represented in the form of 'Asset' to assume jurisdiction under fourth proviso to Section 153A of the Act as well as even the *Asset* valued less than Rs 50 lakhs. He gave an illustration to make us understand as to what he wants to say. According to Shri Dudhwewala, if any unexplained or undisclosed *asset* is found in the course of search, which can be added or assessed u/s 69 or 69A or 69B of the Act, then only can the AO validly initiate proceedings u/s 153A for such relevant assessment years (7-10 AY's). However, in an event, if no undisclosed asset valued Rs. 50 Lakh or more is found, but there

happened to be other material/evidence of unexplained expenditure which can be assessed u/s. 69C or unexplained cash credits u/s. 68,which came to possession of the AO, but which are not in the nature of 'Asset', as defined in Explanation 2 to the fourth proviso to Section 153A of the Act, then in such an event, according to Shri Dudhwewala, the AO cannot invoke the jurisdiction under the fourth proviso to Section 153A of the Act and cannot issue notice for assessment of 7th to 10th AY's preceding the search. Further, according to him, even if un-disclosed Asset is found during search qua assessee for the extended AYs, still if its value is one rupee less than Rs 50 lakhs, then AO cannot invoke section 153A jurisdiction. So, according to him,the notice u/s 153A of the Act can be issued by the AO for seventh to tenth AY's only after valid assumption of jurisdiction as per the fourth proviso, and that can be done only after the AO has the essential *jurisdictional fact* in his possession. He argued that, in this present case, this essential jurisdictional fact (*undisclosed asset valued Rs. 50 lakhs or more*), was not in the possession of the AO when he invoked section 153A of the Act for the sevenths AY i.e. AY 2011-12, and therefore according to him, the AO could not have validly assumed jurisdiction and issued notice u/s 153A of the Act for AY 2011-12. It was therefore the contention of Shri Dudhwewala that, without satisfying the essential jurisdiction fact prior to the issuance of the notice u/s 153A of the Act, the AO's very action of issuance of notice u/s 153A was bad in law in as much as the AO did not have in his *possession* the jurisdictional fact to validly assume jurisdiction to re-open AY 2011-12and hence, he urged that the consequent order framed u/s 153A/143(3) for AY 2011-12 be held to be ab-initio void. Shri Dudhwewala, further pointed out to us that, even when the AO had ultimately framed the assessment for AY 2011-12, no addition was made by him in respect of undisclosed/unaccounted '*asset*', which according to him, further fortifies that the AO did not had in his possession the jurisdictional fact when he issued notice u/s 153A on 11.09.2019 (*refer page 106 of PB*) for AY 2011-12, either at the time of initiation or upon completion of the proceedings. So he wants us to quash the assessment order framed by the AO for AY 2011-12, being without any jurisdiction.

8.2 Per contra, the Ld. DR Shri Amit Kumar Pandey vehemently opposed the submission made by the Ld. A.R. of the assessee and contended that there was no

requirement in law for the AO to have pointed out the 'asset' to the assessee for which the *relevant assessment year 2011-12*being re-assessed u/s 153A read with fourth proviso to Section 153A of the Act. According to him, the phrase "*income represented in the form of asset"* was vast enough to encompass addition on account of unexplained cash credits which was added by the AO. According to him therefore, the AO rightly assumed jurisdiction u/s 153A of the Act for AY 2011-12 when he had the seized material in his possession and so, we should not disturb the validity of the order.

8.3. In his rejoinder, the Ld. AR Shri Dudhwewala urged that since there was no undisclosed asset in the instant case for AY 2011-12 (7th year) the 4th proviso to Section 153A of the Act would not apply and hence, the AO did not get jurisdiction to reopen the AY 2011-12. Shri Dudhwewala contended that when the jurisdiction to reopen the assessment for the AY 2011-12 i.e. the seventh 7th year is bad for non-satisfaction of essential jurisdictional fact, all the consequent action of AO (*in this case making addition of credit entries*) is null in the eyes of law. Alternatively, Shri Dudhwewala submitted that, when the condition precedent to reopen the 7th assessment year was *viz., the possession of material regarding undisclosed assets valued Rs. 50 lakhs or more*; and in the event the AO re-opens the 7th AY on the assumption that he is in possession of undisclosed asset, then when he frames the re-assessment the AO cannot make any other addition like in this case addition of credits u/s. 68 of the Act, without first making any additions on account of the *undisclosed asset*, on the strength of which he invoked/initiated jurisdiction u/s 153A of the Act. For this, he relied on the ratio laid down in the judgments of Bombay High Court in the case of Jet Airways (331 ITR 236) & Delhi High Court in the case of Ranbaxy Laboratories Ltd. vs. CIT (336 ITR 136), and by Calcutta High Court in M/s Infinity Info Tech in ITAT No 60 of 2014 G A no 1736 of 2914 dated 10 sept 2014, though rendered in the context of reopening u/s. 147 of the Act. So, according to him, looking from any angle, the addition made by the AO in AY 2011-12 is bad for want of jurisdiction. So, he pleads that the action of AO needs to be quashed.

8.4 Heard both the parties. In order to adjudicate the legal issue, let us have a look at the law relevant to this issue. It is noted that until the insertion of Section 153A of the Act by the Finance Act, 2003, if any person was searched u/s. 132 of the Act upto 31.05.2003, that person had to undergo the block assessment as per Chapter XIVB (*special procedure for assessment of search cases*) u/s 158BB of the Act; and thereafter if an assessee undergoes search u/s 132 of the Act, w.e.f 01.06.2003, the AO has been empowered to issue notice u/s 153A of the Act to searched persons u/s 132 of the Act, for six assessment years preceding the searched assessment year. Thus, ordinarily, having regard to the date of search in this present case i.e. 12-12-2017, the AO was well within his jurisdiction to issue notices u/s 153Aof the Act in respect of six (6) assessment years preceding the assessment year of search, which in the present case took place in AY 2018-19. Therefore, in terms thereof, the AO was competent to issue notices u/s 153A of the Act for the AYs 2012-13 to 2017-18. Now before us by raising Ground No.1/CO No. 1 (*Reframed Ground "A" refer supra para 7*), the assessee has challenged the validity of assumption of jurisdiction by the AO u/s 153A of the Act and the issuance of notice u/s 153A of the Act for AY 2011-12,which is the seventh (7) assessment year preceding the assessment year of search. To adjudicate this legal issue, we have to go through the fourth proviso of Section 153A of the Act which was inserted by the Finance Act, 2017 with effect from 01.04.2017, enabling an Assessing Officer (AO) of a searched person to issue notices u/s 153A of the Act for '*relevant assessment year or years*' in terms of Explanation 1 of the fourth proviso to Section 153A of the Act i.e. assessment years beyond the six (6) assessment years till tenth (10) assessment year preceding the searched assessment year (i.e. 7^{th} to 10^{th} AY's preceding the searched AY), provided the AO satisfies the essential conditions specified therein. The relevant parts of Section 153A of the Act i.e. fourth proviso to Section 153A of the Act, which has a bearing on the controversy in hand is being reproduced below:

> "Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—
>
> (a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017."

Explanation 1.- For the purpose of this sub-section, the expression 'relevant assessment years' shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2. – For that purposes of the fourth proviso, 'asset' shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

8.5. From a reading of the aforesaid fourth proviso to Section 153A, it can be seen that the expression used by the Parliament, while enlarging the power of the AO to extend the jurisdiction u/s. 153A of the Act from seventh to tenth AY is, first of all prohibiting the AO to issue the notice u/s. 153A of the Act, unless the condition precedent therein is satisfied. The expression used is "*no notice for assessment or reassessment shall be issued by the AO for the relevant AY/AY's*"; and the relevant AY/AY's has been explained by the aid of Explanation-1 appended to it (7^{th}-10^{th} AY's preceding the searched year). Therefore, it is noteworthy that the fourth proviso to section 153A bars the AO to issue notice u/s. 153A of the Act for the assessment or reassessment of the 7^{th} – 10^{th} AY's unless he has in his possession evidence/material which revealed that income represented in the form of asset valued Rs. 50 lakhs or more has escaped assessment. So, the AO, in order to assume jurisdiction for the extended period (i.e. 7^{th} to 10^{th} AY preceding the searched year) should have in his possession income represented in the form of 'asset' valued Rs. 50 Lakhs or more which has escaped assessment, which 'fact' according to Ld. A.R. Shri Dudhwewala is the '*jurisdictional fact*', which if present/or in possession of AO will only enable the AO to assume jurisdiction u/s. 153A of the Act to issue notice for these extended AYs'. According to Shri Dudhwewala, the *jurisdictional fact* in this case for AY 2011-12 (7^{th} AY preceding to searched year) is the existence of fact relating to the

undisclosed 'asset' valued Rs.50 lakh or more that has been discovered in the search qua the assessee qua the AY in question i.e. AY 2011-12. According to him, in the present case, not only when the AO issued notice u/s 153A for AY 2011-12, did he not have in his possession this essential jurisdictional fact, but even when he completed the assessment, there was no addition in respect of any undisclosed asset, rather the addition was in respect of purported un-explained credit u/s 68 of the Act, which according to him, lend credence to his argument that the *jurisdictional fact* was indeed absent and hence, the action of AO was bad in law for want of jurisdiction.

8.6. So, first let us examine whether this legal contention of Shri Dudhwewala that existence of the undisclosed asset valued Rs. 50 lakh or more discovered during search qua the assessee qua AY 2011-12 is the jurisdictional fact or not; and if it is the jurisdictional fact, then the next question is whether the AO was in possession of this jurisdictional fact prior to issuance of notice u/s. 153A for AY 2011-12. Since determination of this legal issue in favour of assessee will go to the root of the very jurisdiction of AO to even issue notice in this case for AY 2011-12 u/s 153A of the Act, let us first examine the same. For this, first of all we have to understand, what is *jurisdictional fact*? For that, let us look at the ruling of the Hon'ble Supreme Court in the case of Arun Kumar &Ors. Vs Union of India & Ors. 2006 (12) SC 121wherein it was held/explained as to what is jurisdictional fact. The Hon'ble Supreme Court explained that, a *'jurisdictional fact'* is a fact which must exist, before a Court, Tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one, on whose existence or non-existence, depends the jurisdiction of a court, a Tribunal, or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of *certiorari*. The underlying principle is that, by erroneously assuming the existence of such jurisdictional fact, no authority can confer upon itself jurisdiction, which it otherwise does not possess. The Hon'ble Supreme Court further clarified that if the statute prescribes a jurisdictional fact necessary for

invoking jurisdiction, then the existence of the '*jurisdictional fact*' is sine qua non for the exercise of power. If the 'jurisdictional fact' exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once an authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

8.7. In the case of Raja Anand Brahma Shah v. State of U.P. &Ors., AIR 1967 SC 1081 : (1967) 1 SCR 362, the Hon'ble Supreme Court had an occasion to look into the jurisdiction of the District Collector to acquire land under sub-section (1) of Section 17 of the Land Acquisition Act, 1894 which enabled the State Government to empower the District Collector to take possession of 'any waste or arable land' needed for public purpose even in absence of award. The possession of the land belonged to the appellant had been taken away in the purported exercise of power under Section 17(1) of the Act. The appellant objected against the action inter alia contending that the land was mainly used for ploughing and for raising crops and was not 'waste land', unfit for cultivation or habitation. It was urged that since the jurisdiction of the authority depended upon a preliminary finding of fact that the land was 'waste land', the High Court was entitled in a proceeding for a certiorari to determine whether or not the finding of fact by the District Collector, that land was waste land, was correct or not. It is noted that the Hon'ble Supreme Court while upholding the contention and declaring the direction of the State Government to District Collector as without jurisdictions held that the District Collector had jurisdiction to acquire only if the jurisdictional fact existed i.e. if the land was waste land and if that fact is incorrect, then the District Collector does not have the jurisdiction to acquire the land. The Hon'ble Supreme Court ruled as under;

"In our opinion, the condition imposed by s. 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to

take possession of the land under s. 17(1) of the Act. It is well-established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of certiorari to determine, upon its independent judgment, whether or not that finding of fact is correct".

8.8. In State of M.P. &Ors. v. D.K. Jadav, AIR 1968 SC 1186 : (1968) 2 SCR 823, the relevant statute abolished all jagirs including lands, forests, trees, tanks, wells etc., and vested them in the State. It, however, stated that all tanks, wells and buildings on 'occupied land' were excluded from the provisions of the statute. The Hon'ble Supreme Court held that the question whether the tanks, wells etc., were on 'occupied land' or on 'unoccupied land' was a jurisdictional fact and on ascertainment of that fact, the jurisdiction of the authority would depend. For doing so, the Hon'ble Apex Court relied upon a decision in White & Collins v. Minister of Health (1939) 2 KB 838 : 108 LJ KB 768, wherein a question debated was whether the court had jurisdiction to review the finding of administrative authority on a question of fact. The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure-ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was part of park. The Minister directed public enquiry and on the basis of the report submitted, confirmed the order. Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated; *"The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory."*[See also Rex v. Shoredich Assessment Committee; (1910) 2 KB 859 : 80 LJ KB 185].

8.9. A question under the Income Tax Act, 1922 arose in Raza Textiles Ltd. v. Income Tax Officer, Rampur, (1973) 1 SCC 633 : AIR 1973 SC 1362. In that case, the ITO directed X to pay certain amount of tax rejecting the contention of X that it was not a non-resident firm. The Tribunal confirmed the order. A single Judge of the High Court of Allahabad held X as non-resident firm and not liable to deduct tax at source. The Division Bench, however, set aside the order observing that "*ITO had jurisdiction to decide the question either way. It cannot be said that the Officer assumed jurisdiction by a wrong decision on this question of residence*". X approached the Hon'ble Supreme Court. Allowing the appeal and setting aside the order of the Division Bench of the Hon'ble High Court, the Hon'ble Apex Court held as under:

"The Appellate Bench appears to have been under the impression that the Income-tax Officer was the sole judge of the fact whether the firm in question was resident or non- resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assesses was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi- judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen."

8.10. In the light of the aforesaid case laws, in our opinion, the submission of Shri Dudhwewala is well founded and deserves to be accepted. From the ratio of the aforesaid decisions of the Apex Court, it is clear that if the statute prescribes the existence of *'jurisdictional fact*' for an authority/quasi judicial body to invoke jurisdiction, then the existence of the jurisdictional fact is *sine qua non* for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter upon the existence of *'jurisdictional fact*', then it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable, provided essential or fundamental fact as to existence of jurisdiction is present. Thus, we understand that *jurisdiction fact* is the fact which is required to exist, as insisted by the Parliament/Legislature, for a quasi judicial/

authority to exercise jurisdiction over a particular matter. So in this present case, we have to examine whether the Parliament has specified in the *fourth* proviso to Section 153A of the Act any such facts which can be termed as jurisdictional fact. On a reading of the fourth proviso to Section 153A of the Act along with Explanation 2 to it which defines 'Asset', we find considerable merit in the contention of Shri Dudhwewala that in order to invoke jurisdiction u/s 153A of the Act for the seventh to tenth AY preceding the searched year, the AO should have in his possession the jurisdictional fact i.e. *existence/possession of undisclosed/unaccounted assets valued at Rs. 50 lakhs or more as defined in Explanation 2 to fourth proviso of Section 153A qua the assessee qua the 7th to 10th AY un-earthed from search*, without which the AO cannot issue notice u/s 153A of the Act for these extended AY's. It is only when there exists this jurisdictional fact the AO can validly reopen those extended AYs; and then only AO can validly assume jurisdiction and then only he is empowered to issue notice. In other words, unaccounted asset valued at Rs. 50 lakhs or more which were discovered during search qua the assessee qua the assessment year (7th 10th years) preceding the searched assessment year is the *jurisdictional fact*; and if the *jurisdictional fact* is in the possession of the AO, [and possession means physical possession; or personal knowledge of the existence of the undisclosed asset which need to be spelled out in clear terms (*not vaguely*) qua assessee qua AY 2011-12 discovered during search.] then he can assume jurisdiction u/s. 153A of the Act and issue notice to assess the assessment of the escaped income for these assessment year's (7th to 10th year) which is the 'fact in issue' or 'adjudicatory fact'. On the other hand if the AO did not have in his possession the *jurisdictional fact*, then he is debarred from invoking/issuance of notice u/s 153A of the Act for the 7th-10th AY preceding the search.

8.11. Having held so, let us examine the next argument of Shri Dudhwewala that, the Parliament by specifying the jurisdictional fact as undisclosed asset valued Rs. 50 Lakhs or more, has impliedly excluded other items of income viz., *liabilities/credit, unexplained expenditure etc*. A reading of the fourth proviso to section 153A of the Act and Explanation (2) to fourth proviso to section 153A of the Act which defines 'Asset' for the purpose of fourth proviso to section 153A of the Act, clarify the intention of the Parliament to permit

the AO to enlarge the assessment u/s. 153A after search u/s. 132 of the Act beyond six assessment years to ten assessment years preceding the searched assessment year, provided the AO has in his possession the essential jurisdictional fact i.e. "undisclosed/unaccounted asset" valued Rs 50 lakhs or more of the assessee discovered during search pertaining to 7th to 10th Assessment Year preceding the searched assessment year. Since the Parliament has used the expression '*income in the form of asset*' and the definition of asset has been spelled out in the fourth proviso, this itself necessarily implies that the liability/items falling in the left side of the Balance Sheet stands excluded. For this view of ours, we rely on the legal Maxim for interpretation *"Expressio Unius Est Exlcusio Alterius"* which principle states that, express mention of one is the exclusion of other and this maxim has been accepted by the Hon'ble Supreme Court in GVK Industries Ltd. Vs. ITO [197 Taxman 337] (Constitution bench of 5 Supreme Court Judges). By express mention of 'Assets' and definition given to it specifically, it is implied that the Parliament silently excluded the items of 'revenue', 'expenditure' & 'liabilities' from its jurisdictional fact for invoking/assumption/usurpation of jurisdiction u/s. 153A of the Act for the seventh to tenth assessment year preceding the searched assessment year.

8.12 It is a rudimentary accounting concept, that "debit" denotes "asset" and "credit" denotes "liability". An asset represents an economic resource, either immovable or movable, having value, such as immovable property viz., land or building, investment held in shares and securities, loans & advances given and deposits in bank account. On the other hand, 'Liability' includes items such as share capital, reserves, loans obtained (secured as well as unsecured) etc. which cannot be characterized or classified as 'Asset'. Similarly, items of 'expenses' or revenues in form of 'sales' / 'turnover' does not constitute 'asset'. This can be illustrated in the following manner *(**'Asset'** below falls within the ambit of the fourth proviso to Section 153A of the Act)*:

Profit & Loss Account	
Particulars (Debit)	Particulars (Credit)
Expenses	Revenues

Balance Sheet	
Liabilities (Credit)	**Assets (Debit)**
Share Capital/ Reserves/ Loan/ Current Liabilities	**Immoveable Property/ Loans & Advances/ Shares/ Bank Balance**

8.13 The above view of ours get bolstered from reading of Explanation 2 appended to the fourth proviso, which defines 'asset', for the purpose of fourth proviso to Section 153A,to include i) immovable property, ii) shares and securities , iii) loans and advances & iv) Deposit in bank. Hence, where search action u/s 132 of the Act reveals that, (i) the assessee owns an undisclosed immovable property, or (ii) information has been gathered which shows that the assessee had given loans or advances outside the regular books or (iii) search has revealed unaccounted investments held by assessee in shares & securities, which do not form part of regular books of accounts or (iv) if undisclosed bank accounts having deposits, have been found in the course of search, pertaining to the 7^{th}-10^{th} AY preceding the search; then having in his possession this *jurisdictional fact*, the AO may assume jurisdiction under the fourth proviso to Section 153A of the Act for the relevant seventh to tenth assessment year preceding the searched assessment year. Hence, the most important aspect is that, these 'assets' must have been found to be undisclosed or unaccounted, in the regular books of account maintained by the assessee, and discovered during the course of search, which otherwise would not have seen the light of the day but for the search, resulting in escapement of income.

8.14 As per our discussion, is to be kept in mind that, the term 'deposits in bank account' has to be considered with the term 'asset'. The term 'deposits in bank account' and 'asset' are to be understood in their cognate sense, as it takes their colour from each other, i.e., the more general is restricted to a sense analogous to the less general. Hence, the term 'deposits in bank account' denotes discovery of an 'asset' in the form undisclosed bank deposits, say fixed deposit bank a/c, savings deposit bank a/c, foreign deposit bank a/c etc. which is found

to have escaped assessment in the 7th-10th AY preceding the search. It does not suggest or include any or all credits in bank accounts, which is disclosed and forms part of the regular books of accounts. To say, if any credits in a regular bank account, like sale proceeds/ loan / share capital etc. is found to be unexplained, then it may be a case of discovery of undisclosed 'income' / 'cash credit' but it does not suggest discovery of an undisclosed 'asset' by the Revenue so as to bring it within the teeth of the fourth proviso to Section 153A of the Act for invoking jurisdiction u/s 153A for the extended period.

8.15 Hence, from the above discussion, it is thus clear that Section 153A of the Act can be invoked only if the AO comes to a positive conclusion that he has in his possession documents or information revealing an *undisclosed asset* of the assessee qua the assessment year (7th to 10th) which is valued Rs. 50 lakhs or more. This, in our judgment is a foundational, fundamental or jurisdictional fact.

8.16. Having clarified the position of law regarding the jurisdictional fact (supra), now let us examine whether the jurisdictional fact existed before the AO when he issued notice u/s 153A of the Act dated 11.09.2019 (refer page 106 PB) for AY 2011-12. In this context, we note that, the assessee had specifically objected to the AO's action of reopening the unabated assessment for AY 2011-12 u/s 153A of the Act and had requested the AO to give details of the purported 'assets' (*undisclosed/unaccounted assets unearthed during search qua the assessee qua the AY 2011-12*). The AO however did not provide the details of the undisclosed/unaccounted assets of assessee, which were in his possession before issuance of notice u/s 153A of the Act for AY 2011-12. This fact is clear from the order sheet noting dated 04.11.2019 wherein he over-ruled the objection raised by the assessee against reopening u/s 153A of the Act the AY 2011-12 by stating as under:

> The A/R of the assessee, Shri Vivek S Sharma, FCA appeared with a letter stating that with respect to AY 2011-12 in the case of the assessee company, the assessment u/s 153A/143(3) was completed on 28/03/2013. The A/R further requested for details of income escaping assessment for the AY 2011-12 and the assets due to which the case of the assessee company for AY 2011-12 has been covered u/s 153A. It is explained to the A/R that the final order of assessment in this case will contain the details and the A/R can appeal before the appropriate appellate authority in case the A/R is not satisfied with the reasons for opening the case of the

> assessee u/s 153A and seek available remedy. However, at this point of time, the undersigned has recorded reasons there is seized material available, on the basis of which the case of the assessee for AY 2011-12 has been covered u/s 153A. The relevant documents and issues will be discussed in due course of assessment proceeding and the assessee will be given opportunity to explain the concerned issue. It has been conveyed to the assessee that primarily the issue pertains to the assessee company allotting shares to jamakharchi companies by taking share capital and premium for issue of shares to them. The sums so received are further invested by the assessee company either in fixed assets or extended as loans and advances or invested in shares further. It is explained to the A/R that this is a matter of investigation and assessment, that is why the case of the assessee for AY 2011-12 has been covered u/s 15A so that this issue can be assessed in the light of the search and seizure action conducted on the assessee company on 12/12/2017 and the documents and materials seized therein. The A/R is requested to furnish return of income for AY 2011-12 electronically as called for u/s 153A without further delay.(emphasis supplied)

8.17. Conjoint reading of the above order sheet noting with the objection raised by the assessee before the AO, shows that the assessee had specifically challenged the usurpation of jurisdiction by the AO under the fourth proviso to Section 153A of the Act and also requested him to spell out the details of the undisclosed/unaccounted "asset" found from the books of accounts/documents seized in the course of search, for which the assessment for AY 2011-12 was being re-opened. The AO however not only turned down the request to provide the details of the 'assets' (*jurisdictional fact*) but instead told the assessee that the final assessment order would contain the details of such "asset". It is noted that the AO did not stop at this, but went on to give a ludicrous advice to the assessee that in case the assessee is not satisfied with the assessment order, then he may seek recourse to appellate remedy. We do not countenance such an action of AO. According to us, when the assessee contended before the AO that there is no jurisdictional fact (as stated supra), the AO was duty bound to decide the said question as to his jurisdiction and record a finding as to whether he had in his possession details of any 'undisclosed/unaccounted 'asset' valued Rs 50 lakhs or more, qua the assessee qua the assessment year (7^{th} to 10^{th} year) preceding the searched assessment year, and thereby state clearly as to how the case of assessee was being covered by him under the 4^{th} proviso to section 153A read with explanation (2) appended thereto. Only upon valid assumption of jurisdiction, the AO ought to have proceeded against the assessee to assess the escaped asset of the assessee and thereafter other undisclosed income if any as per law. And when he does that, he first has to make addition

in respect of the escaped *asset* [based on which AO initiated section 153A proceedings] and then only based upon the incriminating documents unearthed in the course of search, that he can make additions/disallowances in respect of other items of escaped income/credit/expense etc., if any (for unabated assessment years); in the event if no addition could be made by AO in respect of undisclosed asset [based on which AO initiated section 153A proceedings] then the AO has to drop the section 153A proceedings because, he has assumed jurisdiction on a wrong/non-existing undisclosed asset and can resume only u/s 153A only on satisfaction of new/fresh undisclosed asset/jurisdictional fact, which principle will discuss separately (infra).

8.18 Be that as it may, we further note another interesting aspect that, the AO while denying the details of assets for AY 2011-12 observed that, "*at this point of time i.e. [04-11-2019] the undersigned has recorded reasons there is seized material available on the basis of which the case of assessee for AY 2011-12 has been covered u/s 153A",* This factual assertion made by the AO while making the order-sheet entry dated 04.11.2019 shows that, he had not recorded his satisfaction prior to issuance of notice dated 11.09.2019 in terms of the fourth proviso to Section 153A of the Act, but did so only subsequent to reopening of the assessment on 04.11.2019. His own admission in the noting sheet reveals that he has recorded satisfaction only on 04.11.2019 to cover the case of assessee in respect of AY 2011-12 on the strength of the seized material. From this assertion/averment/admission, it is clear that AO did not have in his possession the *jurisdictional fact* [on or prior to 11.09.2019] to invoke and issue notice u/s. 153A of the Act. Here, one should bear in mind that the fourth proviso was inserted by the Parliament w.e.f. 1.04.2017 by Finance Act, 2017, thereby extending the jurisdiction of the AO to assess/re-assess beyond six AY's to ten AY preceding the searched year. And as discussed at para 8.5, the fourth proviso clearly bars the AO to issue notice for the extended period (7^{th} – 10^{th} AY) unless the AO is in possession of the jurisdictional fact of undisclosed asset valued Rs. 50 lakh or more qua the assessee qua the extended assessment year. So the Legislative intent is very clear that AO would be empowered to issue notice u/s 153A only if he is in possession of the jurisdictional fact otherwise he cannot issue notice u/s 153A of the Act. No such bar can be

seen in the case of six AY's preceding the searched AY. So the Parliament while extending the jurisdiction of AO by Finance Act, 2017, for 7th – 10th AY has prescribed this particular safe guard against arbitrary exercise of power by the AO u/s 153A of the Act. It is thus prescribed in the fourth proviso that, *no notice shall be issued by AO,* unless the AO is in possession of the undisclosed assets valued Rs. 50 lakh or more qua the assessee qua the AY. Hence, the admission made by the AO in the order sheet on 04.11.2019, that *"at this point of time"* he was recording his satisfaction for covering AY 2011-12 u/s 153A of the Act as he had seized material with him, clearly shows that the AO had not applied his mind to the seized material prior to issuance of notice u/s 153A on 11.09.2019. The AO had not gone through the seized material to gather details/information which would suggest discovery of undisclosed assets qua the assessee qua the AY 2011-12 and even if something was found, then whether the undisclosed asset was valued Rs 50 lakhs or more? This exercise was not carried out by the AO. Instead, he simply made a sweeping statement that since seized material is there with him, so he is covering the case of AY 2011-12. This action of the AO cannot be accepted. According to us, the AO's bald assertion/dependence on the seized material before him, does not fulfil the requirement of law to confer on himself jurisdiction u/s. 153A of the Act. The extended jurisdiction to invoke/assess 7th – 10th AY is conferred on the AO by authority of law and the AO cannot confer to himself the jurisdiction in a casual manner by stating/substituting the specific *jurisdictional fact* to encompass all seized material. It is common knowledge that, seized material may contain both disclosed &undisclosed assets, liabilities, expenses & income. So, it is imperative that before issuance of notice u/s 153A [for the extended period], the AO sets out his objective satisfaction from the seized material, the details of the specified/undisclosed assets in his possession qua the assessee for AY 2011-12 valued Rs. 50 lakhs or more. If this essential requirement of law is not satisfied, the AO does not get the authority of law to invoke the jurisdiction u/s 153A for 7th to 10th AY. For this, we rely upon the dictum of the Privy Council in Nazir Ahmed Vs. King Emperor AIR 1936 PC 253*(which has since been accepted and later followed by Hon'ble Supreme Court*), that when a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all. As discussed at Para 8.5 (supra), the language of the fourth proviso to section 153A of the Act show that

issuance of notice can be resorted to by the AO only after he is in possession of the jurisdictional fact, which is found to be absent in the present case. Therefore according to us, the AO only after having in his possession the jurisdictional fact could have assumed jurisdiction and issued notice u/s. 153A of the Act or else he could not have issued notice, as done in this case. For the reasons elaborately discussed by us in the foregoing, we thus hold that the notice u/s. 153A dated 11.09.2019 was issued by the AO without authority of law and without satisfying the essential jurisdictional fact, and hence the issuance of notice u/s. 153A is held to be bad in law.

8.19. Even though we are fortified with our above view, that prior to issuance of notice u/s 153A for the 7th – 10th AY, the AO should be in possession of the *jurisdictional fact*, we deem it fit to further examine the facts as to whether ultimately the AO, while addressing the request of the assessee to provide the details of the undisclosed assets qua the assessee for AY 2011-12,did at all make any endeavour to discover any undisclosed asset qua assessee for AY 2011-12. It is noted that the AO even in the impugned order did not bother to bring on record the *jurisdictional fact* nor did he even whisper anything about any undisclosed asset in the order nor did he make any addition in respect of undisclosed assets u/s 69 or 69A or 69B of the Act, which clearly shows not only did the AO not havein his possession the *jurisdictional fact* before invoking or while assumption of jurisdiction u/s 153A for AY 2011-12 but it remained absent even when he framed the impugned assessment order. The Hon'ble Supreme Court has categorically held that, if the jurisdictional fact does not exist, the AO/quasi-judicial authority or authority cannot act on the erroneous supposition that it exists. Further the Hon'ble Supreme Court held that, if a quasi judicial authority or authorities wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. [*Here in this case, it may be noted that AO refused to divulge the details of the undisclosed Assets discovered during search qua assessee for AY 2011-12 and asked the assessee to await the outcome of the reassessment order, which action of AO tantamounts to deny the assessee an opportunity to approach the Hon'ble High court for issue of writ of certiorari, which action of AO cannot be countenanced*.] The Hon'ble Supreme Court further laid down the principle that, by erroneously assuming

existence of jurisdictional fact, no authority/AO in this case can confer upon itself jurisdiction which it otherwise does not possess. From the facts narrated in the foregoing, it is evident that at no point of time did the AO have in his possession the evidence regarding the undisclosed/unaccounted assets as defined in Explanation (2) to the 4th proviso qua the assessee qua the assessment year 2011-12 and therefore he could not have conferred upon himself the jurisdiction under section 153A of the Act. Thus, on these admitted facts as discussed (supra), and for other defects and contention noted (infra), we find merit in the submission of Shri Dudhwewala that, the notice u/s 153A for AY 2011-12 had been issued by the AO in an arbitrary and casual manner, without first satisfying himself that he was in possession of incriminating material which revealed that income represented in form of asset had escaped assessment for AY 2011-12 which was the essential jurisdictional fact found to be absent in this case. In our considered view therefore, the AO's failure to do so, rendered the very act of usurpation of jurisdiction and issuance of notice dated 11.09.2019 under the fourth proviso to Section 153A of the Act for AY 2011-12 to be null in the eyes of law.

8.20. Thus according to us, the pre-requisite condition for conferment of jurisdiction under section 153A for the assessment of AY's falling from seventh (7th) to tenth (10th) assessment years preceding the searched assessment year being the jurisdictional fact in this case is absent and the AO without fulfilling this essential jurisdictional fact erroneously invoked jurisdiction u/s 153A of the Act for AY 2011-12, which is a serious flaw and a jurisdictional defect, that cannot be cured.

8.21. The Ld. A.R Shri Dudhwewala in the alternate also pointed out that, even in the assessment order, the AO had singularly failed to identify and spell out such "asset", as defined in Explanation 2 to the fourth proviso to Section 153A of the Act, which had escaped assessment for AY 2011-12 and did not make any addition to the income of the assessee u/s. 69, 69A or 69B of the Act. So, therefore, according to Shri Dudhwewala, since the AO did not make any addition on account of escaped income represented in form of undisclosed/unaccounted asset, the AO could not have made any *other addition* like, in respect of credit entry u/s. 68 of the Act. For this, he relied on the decisions rendered by the

case of Hon'ble High court of Bombay in Jet Airways (supra) and Hon'ble Delhi High Court in Ranbaxy Laboratories (supra) though in the context of reopening u/s. 147 of the Act. So, according to Shri Dudhwewala, the AO's action of making addition u/s. 68 of the Act, was even otherwise, legally impermissible.

8.22. From our discussion (supra) it is clear that, only if any of specified 'asset/s' as defined in Explanation (2)is unearthed during the course of search and the acquisition of such an 'asset' being unexplained or undisclosed, which is valued Rs. 50 Lakhs or more, that the AO can be said to be in possession of the jurisdictional fact to initiate proceedings u/s 153A for 7^{th}-10^{th} AY (AY 2011-12, in the instant case). Now, to understand the alternate ground of argument of Shri Dudhwewala, let us for the sake of argument, assume that the AO had validly invoked the jurisdiction u/s 153A for AY 2011-12.Then in such an event, it has to be borne in mind that, first the AO had to make addition in respect of the purported undisclosed asset valued at Rs. 50 lakhs or more; and only thereafter the AO can venture to make any other additions/disallowance which are not in the nature & character of 'Asset' but represents undisclosed/unexplained income/expenditure/credit etc. Perusal of the assessment order impugned before us, shows that that AO did not make any addition/s in respect of escaped/undisclosed asset in the relevant AY 2011-12. We therefore find ourselves in agreement with Shri Dudhwewala that, unless the AO made addition/s of Rs. 50 Lakhs or more in relation to escaped/undisclosed asset, he could not assume jurisdiction to make addition/s on other items (viz. liabilities like credit entry etc.) The reason is simple, because in such a scenario, it bellies the claim of the AO in issuing notice u/s 153A of the Act, that he is in possession of the *jurisdictional fact* i.e. undisclosed asset valued Rs. 50 lakhs or more has escaped assessment, which constitutes the key to open the lock and then re-assess the income of the assessee for the 7^{th} to 10^{th} AY. It is therefore incumbent upon the AO to show that the key used for opening the lock for the concluded 7^{th} to 10^{th} AY is the most appropriate key to unlock and thereby reopen the proceedings for bringing to charge any other items of escaped/unexplained income unearthed in the course of search. However in a case where, either the assessee demonstrates that the key used by the AO for reopening the assessment is either incorrect or where the AO himself abandons the *jurisdictional fact*

in the course of assessment proceedings, then as a corollary, it has to be held that the key used by the AO for opening the lock was incorrect and thereby the lock placed earlier on the concluded assessment remained unopened and therefore the AO could not enter upon the arena of reassessing the income of the assessee. So, when the AO fails to make any addition for the 'undisclosed asset', then it tantamount to admission that there was no jurisdictional fact present before the AO in the first place, and the necessary corollary is that he has wrongly assumed jurisdiction u/s. 153A for AY 2011-12 and therefore AO cannot proceed further to make other items of additions/disallowances. In such a scenario, the AO has no other option but to drop the assessment proceedings. He may however proceed again, if there is any new/fresh jurisdictional fact before him, of course, subject to limitation. For this conclusion of ours, we rely on the ratio laid down in the judgments of CIT Vs Jet Airways (supra) & Ranbaxy Laboratories Ltd. vs. CIT (supra).Though these judgments were rendered in the context of reopening u/s. 147 of the Act, however the ratio decidendi will apply in the present case, because, like Section 147/148 of the Act, the AO gets the authority to assess/reassess the income of a searched person or other person u/s 153A/153C for the extended assessment years (7^{th} to 10^{th} AYs) only if he has in his possession the jurisdictional fact, as discussed. If the AO is found to have assumed jurisdiction erroneously on mistaken belief about the existence of jurisdictional fact or ultimately drops it (after making enquiries in the course of assessment) while framing the reassessment order; then the AO cannot legally proceed further with the assessment/reassessment and/or make any other items of additions/disallowances, because the jurisdictional fact on the strength of which he assumed section 153A jurisdiction is absent or not in existence. In the light of the aforesaid discussion, and in our considered opinion, this alternate plea of Shri Dudhwewala is well founded and deserves to be accepted.

8.23. In view of the above and on perusal of the impugned re-assessment order, we note that the only addition made by the AO in AY 2011-12 was on account of unexplained cash credit represented by share application monies of Rs.5,38,35,000/- u/s 68 of the Act. According to the AO, the source of source of the monies received from shareholder, M/s Hari Trafin Pvt Ltd was not properly explained, and therefore the same was added as

unexplained cash credit u/s 68 of the Act. As noted above, the additions on account of unexplained cash credit and that too share capital, which is in the nature of 'liability' could not have been made by AO, unless he first made an addition of undisclosed 'asset' valued at Rs. 50 Lakhs or more. So in this case, as there was no addition made by AO on account of undisclosed asset, we can safely infer that there was no jurisdictional fact in the AO's hand or in his possession when he assumed jurisdiction u/s 153A for AY 2011-12 in the first place itself. As, the very usurpation of jurisdiction u/s. 153A of the Act is found to be bad in law for want of jurisdiction, the AO was precluded from making any other addition in the assessment for AY 2011-12. Hence, the AO's action of making addition u/s 68 of the Act in the relevant AY 2011-12 is held to be unsustainable for want of jurisdiction and is therefore is quashed. The assessee thus succeeds on this ground raised in the cross objections and the same is allowed.

9. Now we proceed to answer Question (B).

(B) Whether in absence of any incriminating material found in the course of search at the premises of the assessee, the additions/disallowances made in the assessments of the assessee, which were unabated/ non-pending on the date of search, could be held to be sustainable on facts and in law?

Ground No. 3 of Revenue's appeal for AY 2011-12
Ground No. 3 of Revenue's appeal for AY 2012-13
Ground No. 3 of Revenue's appeal for AY 2013-14
Ground No. 3 of Revenue's appeal for AY 2014-15
Ground No. 3 of Revenue's appeal for AY 2015-16

9.1 In light of the facts narrated in Para 2 above, it is noted that, on the date of search i.e. 12-12-2017, income tax assessments for AYs 2011-12 to 2015-16 were unabated. The provisions of Section 153A of the Act, forming part Chapter XIV of the Act contain special provisions for completing assessments in case of search conducted u/s 132 of the Act or

requisition made u/s 132A of the Act. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary powers of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. We find that Section 153A itself creates the differentiation amongst specified six assessment years depending whether prior to search, the proceedings are abated or not. We note that the relevant section itself clarifies that where an assessment was already completed against an assessee and any appeals or further proceedings are pending, then such appeals or other proceedings do not abate. We should therefore keep in mind that merely because an assessee is subjected to search u/s 132 of the Act, such action by itself does not give carte blanche to the Department to subject such an assessee to the rigors of the assessment afresh for all the completed assessments. It is for this reason that the Parliament in its wisdom has categorically created two classes among the six years, (a) un-abated assessment and (b) abated assessments. Consequent to a search conducted u/s 132 of the Act, the AO is required to issue notices u/s 153A of the Act to assess the income of the assessee for six assessment years preceding the date of search. These six assessment years comprise of assessments which are not abated; and assessments which are pending on the date of search, and is treated to be abated. In case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income, having regard to the provisions of the Act. However, in relation to unabated assessments, which were not pending on the date of search, there is an embargo on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search. Considering these aspects the Hon'ble Delhi High Court in the case CIT vs Kabul Chawla reported in 380 ITR 573 held as under:-

> "37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
>
> Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Ld AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

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

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

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

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

9.2 We find that the Hon'ble Delhi High Court while adjudicating the appeal in the case of CIT vs Kabul Chawla (2016) 380 ITR 573 had taken judicial note of host of the earlier decisions in the cases of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; MadugulaVenu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT

reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (NhavaSheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB). We also find that Revenue's SLP against the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (Supra) was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC).

9.3 The Hon'ble Delhi High Court in the case of Pr.CIT. Vs. Kurele Paper Mills (P) Ltd. (280 ITR 571) at Page 572held as follows:-

> "1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs.89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.
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> 2.The Court finds that the order of the CIT (Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.
>
> 3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination.
>
> 4.The appeal is, accordingly, dismissed."

It is noted that Hon'ble Supreme Court has dismissed the special leave petition filed by the Department against this judgment as reported at (2016) 380 I.T.R. (St.) 64.

9.4 The Hon'ble Gujarat High Court in the case of Pr.CIT Vs Saumya Construction Pvt Ltd (387 ITR 529) observed as follows:

> "15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to

issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153.the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In

case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. 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. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. JayabenRatilalSorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

9.5 Gainful reference may also be made to the decision rendered by the coordinate bench of this Tribunal in the case of DCIT Vs Satyam IspatPvt Ltd in ITA No. 83 & 84/Gau/17 dated 02.08.2019 for AYs 2006-07 & 2007-08. In the decided case also there was a search operation u/s 132 on the assessee company. Thereafter notices u/s 153A were issued inter alia including for AYs 2006-07 & 2007-08, whose assessments had not abated on the date of search. In the assessments framed u/s 143(3)/153A for AYs 2006-07 & 2007-08, the AO made additions u/s 68 with regard to share capital raised by the assessee in those respective years. The AO observed that the assessee had unaccounted monies, which was routed back into the company in form of share application monies. On appeal the assessee challenged the validity of the assessment framed u/s 153A on the premise that in absence of any incriminating material found in the course of search, no addition was permissible. Upholding the contention raised by the assessee, the CIT(A) held that, as no incriminating material was found in the course of search to justify the addition made on account of share application monies in an unabated assessment year, the additions impugned before him were

liable to be deleted. The CIT(A) accordingly allowed the appeals of the assessee. On appeal, this Tribunal observed that the original returns for AYs 2006-07 & 2007-08were processed u/s 143(1) and that the time limit for issuance of notice u/s 143(2) had also expired prior to the date of search, and therefore the assessments for these years did not abate. It was accordingly held that the AO could have made addition only if any incriminating material was found in the course of search. Having regard to the facts of the case, the Tribunal upheld the order of the CIT(A) deleting the additions made towards share application monies in unabated assessments of AYs 2006-07 & 2007-08, for want of any corroborative incriminating material found in the course of search.

9.6 We find that similar view was also expressed by the Guwahati Bench of this Tribunal in another case of DCIT Vs SMS Smelters Pvt Ltd (ITA No.91, 69, 76 & 77/Gau/17) dated 06.09.2019 wherein it held as under:

> "7. Next comes Revenue's appeal ITA No.69/Gau/2017 for assessment year 2007-08. The CIT(A)'s order under challenge has deleted share capitals share premium and share application money addition of Rs.6,69,71,870/-, 11,95,78,050/- and Rs.7,24,50,080/-; respectively vide following detailed discussion:-
>
> "5.2 I have considered the submissions made by the appellant before me. I have also perused the assessment order as well as the remand report sent by the Assessing Officer on this issue. In his remand report the Assessing Officer has simply stated that the addition was made on the basis of findings recorded in the assessment order. He has further stated that he has no objection to the admission of any fresh or additional evidence if it is considered to be relevant for disposal of the issue. Apart from this, the Assessing Officer has not given any comment on certain legal issues raised by the appellant in its written submissions.
>
> 5.3 In its written submissions the appellant has raised a legal issue regarding the nature of additions that could be made in an assessment that is to be made u/s.153A/153C read with section 143(3) of the Income Tax Act, 1961 in the case of a "non abated assessment". According to the appellant it is now a well settled proposition that in respect of nonabated assessment, i.e. where the proceedings have reached finality, the assessments u/s.153A read with Section 143(3) of the Act, has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those documents/incriminating material and clubbed only to the assessment framed originally. It is submitted that the appellant's assessment for the year under appeal had already attained finality and hence it was a "non abated assessment". Hence, the addition should have been confined to any incriminating material found during the search. In support of its contention, the appellant has relied upon the following case laws:-
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> i) All Cargo Global Logistics Ltd. V/s. DCIT (2012) 137 I.T.D. 287 (Mumbai)(S.B.)

(ii) C.I.T. Vs. Continental Warehousing Corpn. (NgavaSheva) Ltd. (2015) 374 ITR 645 (Bom.)

(iii) Marigold Merchandise Pvt. Ltd. V/s. D.C.I.T. (2014)164 TTJ 448 (Delhi "F" Bench)

(iv) Jai Steel (India) V/s. A.C.I.T. (2013) 259 CTR 281 (Rajasthan)

(i) A.C.I.T. Vs. Pratibha Industries Ltd. (2013) 141 I.T.D. 151 (Mumbai)

(ii) A.C.I.T. Vs. Kamal Kumar S. Agarwal (2010) 133 TTJ 818 (Nagpur)

(iii) C.I.T. Vs. Kabul Chawla (2016) 380 I.T.R. 573 (Del.)

(iv) Jaipuria Infrastructure Developers (P) Ltd. V/s. A.C.I.T. I.T.A. Nos. 5522 & 5523/Del/2015 decided by Hon'ble ITAT, Delhi Bench "B", Delhi on 27-06- 2016

(v) Principal C.I.T. Vs. Kurele Paper Mills (P) Ltd. (2016) 380 I.T.R. 571 (Delhi) (SLP filed by the Department against this judgment dismissed (2016) 380 I.T.R. St.64)

It is further submitted by the appellant that no incriminating document/material relating to the share capital/share premium was found and/or seized in the case of the appellant. The Assessing Officer has neither referred to nor relied upon any such document while making the assessment.

5.4 As far as merits of the case is concerned, the appellant has submitted the following documents with a prayer under Rule 46A of the Income Tax Rules 1962 for admission of these documents as additional evidences: (i) Chart showing name and address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies. (ii) Copies of the appellants statements with the following banks showing the receipt of share capital/application money: (a) HDFC Bank, H.B. Road, Guwahati (b) HDFC Bank, Guwahati (c) Standard Chartered Bank, Guwahati (iii) Copies of Memorandum & Articles of Association and audited balance sheet in respect of corporate shareholders/applicants. (iv) Copies of returns of allotment filed by the appellant in respect of shares allotted during the previous year relevant to the assessment year under appeal. The appellant has also pointed out that out of the total share capital Rs.6,69,71,870/-, which was added in the total income of the appellant, an amount of Rs.5,40,00,000/- was received by the appellant in the earlier year, as will be evident from the details submitted. Hence, the Assessing Officer erred in law as well as on facts in making the addition of this amount of Rs.5,40,00,000/- in the assessment year under appeal.

5.5 A perusal of the case laws relied upon by the appellant show that in the case of a non-abated assessment i.e. where the assessment proceedings have reached finality, the assessments u/s.153A/153C read with Section 143(3) of the Income Tax Act, 1961 has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those document/incriminating material and clubbed to the assessment made originally. Thus, the scope of additions to be made in the case of a non-abated assessment is well defined.

5.6 In the case of C.I.T. V/s. Kabul Chawla (supra), Hon'ble Delhi High Court held as follows: At page 589, 590 "Summary of the legal position

….

While so holding, Hon'ble Delhi High Court has taken note of the judicial pronouncements made in All Cargo Global Logistics Ltd. V/s. DCIT (supra), C.I.T. V/s. Continental Warehousing Corpn. (NgavaSheva) Ltd. (supra), Jai Steel (India) V/s. ACIT (supra) and Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra) and a number of other case laws.

5.7. In the case of Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra), Hon'ble Delhi High Court held as follows:- At page 572

…..

5.8 In the case of Jaipuria Infrastructure Developers (P) Ltd. V/s. ACIT (I.T.A. Nos. 5522 & 5523/Del/2015) which was decided by Hon'ble ITAT, Bench "B" Delhi on 27-06-2016, Hon'ble Tribunal has held as follows:-

…….

5.9 An analysis of the above case laws relied upon by the appellant clearly show that the completed assessments i.e. the non-abated assessments can be tinkered with only on the basis of any incriminating material found during the course of search and not otherwise. In view of what has been discussed above, I am of the considered view that the additions of Rs.6,69,71,870/-, Rs.11,95,78,050/- and Rs.7,24,50,080/- made on account of share capital, share premium and share application respectively are not sustainable in the eyes of law. Hence, these are deleted.

5.10 Even on the merits also, I find that the addition made by the Assessing Officer is not sustainable.

5.11 I find that the appellant had submitted the details of share capital and share premium in course of the assessment proceedings vide its letter dated 18.02.2015. This fact has been noted by the Assessing Officer in para 11(a) of his order. The appellant could not submit the documents in support of share capital/premium as these were not readily traceable at the time of assessment proceedings. The appellant has further contended that it was not given proper and meaningful opportunity of being heard to produce the documents in support of share capital/premium. The appellant has submitted before me the following details/documents in support of the share capital /premium: - (i) Chart showing name & address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies. (ii) Copies of the appellant's statements with the following banks showing the receipt of share capita [/application money: - (a) HDFC Bank, Guwahati (b) HDFC Bank, Guwahati (c) Standard Chartered Bank, Guwahati (iii) Copies of Memorandum & Articles of Association and audited balance sheets in respect of corporate shareholders/applicants, bank statements etc. (iv) Copies of returns of allotment filed by the appellant in respect of shares allotted during the previous year relevant to the assessment year under appeal. A prayer under Rule 46A of the Income Tax Rules, 1961 was made by the appellant for admission of these documents as additional evidence. These documents were sent to the assessing officer while calling for his remand report. As stated above, the Assessing Officer has not objected to the admission of these additional evidences. Considering the facts

and circumstances of the case, I admit the additional evidences now produced by the appellant as these are required to be admitted for doing substantial justice in the matter.

5.12 The appellant has filed complete details of shareholder companies viz. - their names & addresses, No. of shares applied for/allotted, face value of shares, premium paid, mode of payment, their PAN No., CIN No., copies of Memorandum & Articles of Association, audited balance sheets and copy of return of allotment. A perusal of the bank statements filed by the appellant show that all the transaction have taken place through banking channels. On examination of these details/documents, I do not find any reason to doubt the identity of the shareholders, their credit worthiness and the genuineness of the transactions. It is settled law that once an assessee provides details regarding identity of the share applicants/holders, their permanent account numbers, bank details, balance sheets, A/D receipt in support of filing of income tax returns, copies of Memorandum & Articles of Association etc., the share application money/capital cannot be treated as unexplained in the hands of the assessee. This view has been taken in the following cases:

(i) Principal CIT. V/s. Soft-line Creations Pvt. Ltd. (2016) 387 ITR 636 (Delhi)

(ii) C.I.T. V/s. KamdhenuStel& Alloys Ltd. (2014) 361 ITR 220 (Delhi)

(iii) C.I.T. V/s. Lovely Exports Pvt. Ltd. (2009) 319 ITR (St.) 5 (S.C.)

(iv) C.I.T. V/s. Sameer Bio-Tech Pvt. Ltd. (2010) 325 ITR 294 (Delhi)

(v) C.I.T. V/s. Five Vision Promoters Pvt. Ltd. (2016) 380 ITR 289 (Delhi)

(vi) C.I.T. V/s. Dwarkadhish Investment Pvt. Ltd. (2011) 330 ITR 298 (Delhi)

(vii) C.I.T. V/s. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Delhi)

In view of the above also, the addition made in respect of share capital and share premium cannot be sustained. This ground of appeal is, therefore, allowed."

8. It is therefore clear that the CIT(A) has quashed the impugned assessment(s) on the ground that the department had not found or seized any incriminating material against the assessee during the course of search in issue. Various high court(s) in CIT vs Kabul Chawla (2016) 380 ITR 573 (del), PCIT vs. M/s Salasar Stock Broking Ltd in GA No. 1929/2016 ITAT No.264 of 2016 dated 24.08.2016 (Cal), PCIT vs Dipak J Panchal (2017) 397 ITR 153 (Guj) support the assessee's case qua the instant legal aspect. Mr. Singh has quoted E.N. Gopakumar vs. CIT (2017) 390 ITR 131 (Ker) and CIT vs. KesarwaniZardaBhander Income-tax Appeals No.270/2014 dated 06.09.2016 (Allahabad) that the purpose of the impugned sec. 153A proceedings is to assess total income of the searched taxpayer rather than that based on incriminating material only. Hon'ble jurisdictional high court has admittedly not adjudicated upon the instant legal issue as informed by the learned senior counsel as well as the department. We therefore quote hon'ble apex court's decision in CIT vs. M/s Vegetable Products Ltd. (1973) 88 ITR 192 (SC) that the view favouring the assessee / taxpayer has to be adopted in such a backdrop involving conflicting judicial opinions of various hon'ble high courts and accordingly hold that the CIT(A) has rightly quashed the impugned assessment since not based

on any incriminating material found or seized during the curse of search. That being the case, the Revenue's pleading on merits are renderedinfructuous. Its appeal ITA No. 69/Gau/2017 is rejected."

9.7 Considering the judicial precedents (supra) on the subject, and the decisions rendered by the coordinate Bench of this Tribunal at Guwahati, the settled law is clear that, in the case of unabated assessments of an assessee, no addition is permissible in the order u/s 153A unless it is based on any tangible & cogent incriminating material found during the course of search.

9.8 To this extent, even the Ld. DR, in the course of hearing, did not dispute this legal position. According to him however, the addition/s made by the AO in the AYs 2011-12 to 2015-16 was based on seized incriminating document, GCL-HD-1,which was the group-wise share holding pattern of the assessee found from the computerized books of account and hence, he submitted that the above discussed judicial principle was not applicable in the given facts of the present case. According to him, this piece of evidence extracted from the books of accounts was 'incriminating' enough to justify the additions made u/s 68 of the Act. He contended that the Ld. CIT(A) had erred in holding that GCL-HD-1 was not 'incriminating' in nature and therefore urged that the additions made by the AO be restored. Per contra, the Ld. AR supported the order of the Ld. CIT(A).

9.9 Heard both the parties. In light of the above settled position of law, which has not been disputed by either of the parties, the limited question for our consideration is, whether the contents of the seized document GCL-HD-1, referred to by the AO, was 'incriminating' in nature or not. Before we proceed to examine the contents of the seized document GCL-HD-1, it is first relevant to understand as to the meaning of the expression "incriminating material" or evidence. There can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature, which incriminates or militates against the person from whom it is found. Some common forms of incriminating material, *inter alia*, are for instance, where the search action u/s. 132 of the Act reveals information (oral or documentary) that the assets found

from the possession of the assessee in form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income (which includes earlier AY's return also) and/or there is a material difference in the actual valuation of such assets and the value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible, which suggests or leads to an inference that the assessee is conducting transactions outside the regular books of account which are not disclosed to the Department. Incriminating material may also comprise of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, let us assume that an assessee has recorded transactions in his books or other documents maintained in the ordinary course of business, then it is discovered in the search from certain material or evidence which states the contrary.In such an event then, the discovered material or evidence can be held to be incriminating in nature, only when it is found to affect the veracity of the entries made in the books of the assessee and thus lead to the conclusion that the entries made regularly/maintained by the assessee do not represent true and correct state of affairs. Rather the evidence unearthed or found in the course of search would go on to show that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs *i.e.* the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regularly maintained or the returns filed with the authorities from time to time is not true etc. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would *prima facie* show that the real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in ordinary course of business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to transaction reflected in regular books or documents maintained in the ordinary course of business, then also in such an event the AO is not permitted to straightaway treat such

material as 'incriminating' in nature unless the AO thereafter brings on record further corroborative material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs and rather that can be the starting point of inquiry to un-earth further material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or document found in the course of search as incriminating in nature *qua* the assessee justifying the additions in unabated assessments. In other words, any and every seized material, which comes in AO's possession cannot be construed as 'incriminating material' straightaway. For instance, scribbling or rough notings found on loose papers cannot be straightaway classified as 'incriminating material' unless the AO establishes nexus or connect of such notings with unearthing of undisclosed income of the assessee. This nexus or connect has to be brought out in explicit terms with corroborative material or evidence which any prudent man properly instructed in law must be able to understand or correlate so as to justify the AO's inference of undisclosed income from such seized incriminating material. This exercise is therefore found to be essentially a question of fact.

9.10 Useful reference in this regard may be made to the decision of the Hon'ble Delhi High Court in the case of PCIT Vs Index Securities Ltd (86 taxmann.com 84). In the decided case, search was conducted u/s 132 of the Act upon Jagat Group wherein documents comprising of trial balance and balance sheet of the assessee company was found & seized by the Revenue. According to AO, since these documents pertained to the assessee, he proceeded to reopen the assessments of the assessee u/s 153C of the Act and added the share application monies received by the assessee u/s 68 of the Act. On appeal, the assessee challenged the validity of jurisdiction exercised by the AO u/s 153C of the Act on several grounds inter alia including that these seized documents cannot be said to be 'incriminating' to justify additions made u/s 68 of the Act in the unabated assessments of the assessee. The Hon'ble High Court found merit in this plea of the assessee and accordingly upheld the orders of the lower authorities deleting the impugned additions by observing as under:

> 32. In the present case, the two seized documents referred to in the Satisfaction Note in the case of each Assessee are the trial balance and balance sheet for a period of five months in 2010. In the first place, they do not relate to the AYs for which the assessments were reopened in the case of both assessees. Secondly, they cannot be said to be incriminating. Even for the AY to which they related, i.e. AY 2011-12, the AO finalised the assessment at the returned income qua each Assessee without making any additions on the basis of those documents. Consequently even the second essential requirement for assumption of jurisdiction under Section 153 C of the Act was not met in the case of the two Assessees.
>
> 33. This Court does not consider it necessary to examine the merits of the case as far as the deletions by the CIT (A) of the additions made by the AO under Section 153C of the Act are concerned. In any event, a detailed analysis has been undertaken by the CIT (A) of the materials produced by the Assessee which justified the deletion of such additions. Even on this score, no interference is warranted with the impugned order of the CIT (A).

9.11 We may, in this regard, gainfully refer to the decision of the Kolkata Bench of this Tribunal in the case of Daffodil VincomPvt Ltd Vs DCIT in ITA (SS) Nos. 95 & 96/Kol/2018 dated 28.06.2019. In the decided case the AO had added the share capital raised by the assessee in AYs 2011-12 & 2012-13 by way of unexplained cash credit u/s 68 of the Act in the assessments framed u/s 153A of the Act. Before the Tribunal the assessee contended that the addition u/s 68 was not based on any incriminating material found in the course of search and therefore the additions made in unabated assessments of AYs 2011-12 & 2012-13 were unsustainable. Per contra, the Revenue contended that the additions were made with reference to documents ID Marked SFA/01 and SFA/02 which were seized in the course of search and hence urged that the AO had rightly made the impugned addition. Upon examining the contents of the seized material referred to by the Revenue, this Tribunal noted that it comprised of bank account statements which formed part of the regular books of the assessee and these accounts were disclosed to the Department prior to the search. The Tribunal observed that indeed these documents were found during the course of search and seizure operation but for such reason alone these could not be held as incriminating in nature justifying the impugned addition. It was noted that all the entries of deposits and withdrawals of the said bank account statement formed part of the regular books of account and therefore these documents did not constitute incriminating evidence which could be linked to the impugned additions. The Tribunal therefore, in absence of any incriminating material found in the course of search, deleted the additions made in the orders u/s 153A in the unabated assessments for AY 2011-12 & AY 2012-13. For arriving

at this conclusion, this Tribunal relied on the following observations of the co-ordinate Bench in the case of M/s A ONE Infra Projects Pvt. Ltd Vs DCIT in IT(SS) A No. 91/Kol/2018.

> "8. In the present case, the addition of Rs.15,00,000/- by treating the share application money as unexplained cash credit under section 68 was made by the Assessing Officer in the assessment completed under section 153A of the Act on the basis of Bank account found during the course of search and since the said Bank account as well as the transactions reflected therein were duly disclosed by the assessee in its return of income originally filed for the year under consideration, we find ourselves in agreement with the contention of the ld. Counsel for the assessee that the same cannot be treated as incriminating material found during the course of search."

9.12 Similar issue also came up for consideration before the Delhi Bench of this Tribunal in the case of HBN Insurance Agencies Vs ACIT in ITA No. 3783/Del/2014 dated 23.12.2019. In this case the AO had added cash deposits made in bank account in the assessments framed u/s 153A of the Act. On appeal, the assessee contended that the additions made u/s 68 were not based on any incriminating material found in the course of search whereas the Revenue claimed that the balance sheet, bank statements etc. found and seized in the course of search constituted 'incriminating material' which justified the impugned addition. The Tribunal rejected the Revenue's argument and deleted the addition by observing as under:

> "In our considered opinion, the profit and loss account and balance sheet of the assessee company, by any stretch of imagination, cannot be considered as incriminating material. It is also not the case of the Revenue that the bank accounts were unearthed during the search operation. On these facts, the ratio laid down by the Hon'ble High Court of Delhi in the case of Kabul Chawla [supra], squarely apply wherein the Hon'ble High Court of Delhi held as under:
>
> ……..
>
> Respectfully following the ratio laid down by the Hon'ble High Court of Delhi and Hon'ble Supreme Court [supra], we are of the considered view that the assessment framed u/s 153A of the Act for both the Assessment Years under appeal deserves to be set aside. We, accordingly direct the Assessing Officer to delete the impugned additions from both the Assessment Years."

9.13 In view of the above, let us now examine the only material referred to by the AO in the order impugned to justify the addition i.e. GCL-HD-1.The image of this material is extracted below:

Name of the Company: Goldstone Cements Limited
Shareholding Pattern for the F.Y ended as on 31st March, 2017

Sl No	Name of Companies	No of Shares	Amounts of Share (In Rs)	Percentage of Holding (%)
UFM Group (MP Jain Group)				
1	Nirvana Enterprises Ltd	68250	6,82,500	0.11
2	Leonine Vanijiya Pvt Ltd	953645	95,36,450	1.53
3	Godavari Vincom Pvt Ltd	1818758	181,87,580	2.92
4	Hari Trafin Pvt Ltd	10819795	1081,97,950	17.39
5	Lalit Projects Private Ltd	40000	4,00,000	0.06
5	Bonus Dealers Pvt Ltd	1884126	188,41,260	3.03
6	Harakchand Investment Ltd	7935	79,350	0.01
7	Namokar Marketing Ltd.	80555	8,05,550	0.13
8	Sethi Oilfield & Services Pvt Ltd	31746	3,17,460	0.05
9	Arihant Sugar Limited	579062	57,90,620	0.93
10	Ufm Industries Ltd	1616661	161,66,610	2.60
11	Yogesh Jain (Huf)	71746	7,17,460	0.12
12	Yogesh Jain	51920	5,19,200	0.08
13	Vishal Jain	443399	44,33,990	0.71
14	Vishal Jain HUF	95692	9,56,920	0.15
15	Tara Rani Jain	228301	22,83,010	0.37
16	Sonam Jain	113973	11,39,730	0.18
17	Avishek Jain Huf	31746	3,17,460	0.05
18	Jyoti Jain	15873	1,58,730	0.03
19	Mahabir Prasad Jain (Huf)	294280	29,42,800	0.47
20	Mahabir Prasad Jain	166865	16,68,650	0.27
21	Avishek Jain	450847	45,08,470	0.725
22	Bakra Pratishthan	74603	7,46,030	0.1199
23	Msv Fiscal Services (P) Ltd	15873	1,58,730	0.0255
24	Gallore Suppliers Pvt Ltd.	36507	3,65,070	0.0587
25	Oleander Manufacturers	31746	3,17,460	0.0510
26	Orchid Finlease Pvt Ltd	1284236	128,42,360	2.0646
27	Shantidham Marketing Pvt. Ltd.	23376756	2337,67,560	37.5815
28	Lalit Poly Weave LLP	732199	73,21,990	1.1771
29	United Commercial Co.	291897	29,18,970	0.4693
30	Shree Lalit Cold Storage	272100	27,21,000	0.4374
31	Shetty Flour Mills	340100	34,01,000	0.5468
32	Shweta Jain	1040100	104,01,000	1.6721
	Total	473,61,292	4736,12,920	76.14
More Group				
1	Akash Buiscuits Pvt Ltd	135000	13,50,000	0.2170
2	Arjun Ply & Veneers Pvt Ltd	46030	4,60,300	0.0740
3	Consistent Construction Pvt Ltd	1281745	128,17,450	2.0606
4	Deepak Kumar More	5000	50,000	0.0080
5	Holyfield Vyapar Pvt Ltd.	173809	17,38,090	0.2794
6	Mayur Ply Industries Pvt. Ltd.	8825872	882,58,720	14.1889
7	Mayur Roller Flour Mills Pvt Ltd	890000	89,00,000	1.4308
8	Naurang Lal More	5000	50,000	0.0080
9	Orthodox Distributors Pvt. Ltd.	150000	15,00,000	0.2411
10	Padma Devi More	5000	50,000	0.0080
11	Prakash Kumar More	23805	2,38,050	0.0383
12	Prefer Infrastructure Pvt. Ltd.	100896	10,08,960	0.1622
13	Southern Resources & Holding Pvt. Ltd.	450000	45,00,000	0.7234
[illegible]	Sunny Fincom Pvt. Ltd.	182000	18,20,000	0.2926
[illegible]	[illegible]oti More	10000	1,00,000	0.0161
	Total	12284157	1228,41,570	19.75
Others				
1	Abhinandan Complex Pvt Ltd	315870	31,58,700	0.51
2	Dhawan Vinimay Pvt Ltd	158730	15,87,300	0.26
3	Improve Tradecom Pvt Ltd	809520	80,95,200	1.30
4	Remole Marketing Pvt Ltd	79365	7,93,650	0.13
5	Sanket Sales Pvt Ltd	476190	47,61,900	0.77
6	Transparent Tie Up Pvt Ltd	717460	71,74,600	1.15
7	Balentine Shylla	100	1,000	0.00
8	Bokstar Kurkalang	100	1,000	0.00
	Total	2557335	255,73,350	4.11
	Grand Total	62202784	6220,27,840	100.00

9.14 We note that the Ld. CIT(A) had examined in detail the contents of the above document and concluded that this document was not an incriminating document and that the it was a shareholding pattern of the assessee which was duly verifiable from the books of accounts and other secretarial records filed by the assessee with ROC, prior to the date of search. For the sake of convenience, the relevant findings recorded by the Ld. CIT(A) in this regard, at Pages 145 to 147 of his order, is extracted below:

“The Appellant has further submitted that the purported incriminating material/documents referred to and relied upon by the AO was in-fact a Secretarial Compliance Report which was filed by the Appellant, on 28/11/2017 with the Registrar of Companies along with Form MGT-7(i.e. the Annual Return of the Appellant filed in the ROC). It has been further submitted by the Appellant that the office of the Registrar of Companies is a Public Office and any document or return filed in such à public office is a "public document" and, thereby, upon filing of the document with the ROC, the same becomes unclassified and lies catapulted in public domain. As such any document or information which is available in the public office (read Registrar of Companies here) and public domain cannot be regarded or considered to be a secret/classified/concealed information or incriminating information hidden from public or any Authority. The Appellant thus submitted that not only was the said document a regular business record but the information regarding the shareholders of the company was already available in the public domain much prior to the date of search. The said statement formed a part of the secretarial records of the Appellant having no incriminating contents, whatsoever. It is further submitted by the Appellant that even the AO was unable to correlate or link as to how the contents of the aforesaid document led to unearthing of unexplained cash credit received in form of equity capital by the Appellant, more-so, when the purported document contained only the names of the shareholders and the details of the respective shareholdings.

The Appellant had, thus, contended that the aforesaid document, by any stretch of imagination, cannot be construed to be "incriminating" in nature. The Appellant has also submitted that the AO has also not specified as to how the aforesaid document was incriminating" in nature or as to how the aforesaid document formed the basis of the additions made under Section 68 of the Act. The Appellant finally submitted that the seized material identified as GCL-HD-1 was not incriminating at all but instead it was a regular business document duly recorded in the books of accounts as well as the corporate records and information contained therein was also available in the public office of the ROC. In order to bring home its contentions, the Appellant has also referred to rationes of certain judicial pronouncements which have been considered and would be referred at relevant places in this order.

Be that as it may be, in this case, a shareholding pattern of the Appellant company was purportedly discovered during the course of search and the AO had treated the aforesaid share holding pattern as an incriminating document. On the other hand, the Appellant has submitted that the aforesaid shareholding pattern of the Appellant is not an incriminating document.

In this regard, it is noted that the word "incriminating" does not find mention in Section 132 or in Section 153A or even in Section 153C of the Act. Nor has the said word been defined in the Act. Further, as per Section 153A of the Act, the jurisdiction of the AO was clearly to assess the true and correct "total income" of the Appellant, and, which was to be necessarily based on some material. Also, what is incriminating could itself be a matter of dispute. What is incriminating for one may not be so for the other, so that the same, imbued with subjectivity, cannot decide the jurisdictional aspect. Yet, again, the same, though relevant and incriminating, may get wholly or partly explained in assessment, i.e. on the basis of the additional materials gathered or called for or produced by the assessee itself or otherwise explained by it during assessment proceedings. At the same time, there could be times when some material maybe

found during the course of a search but the said material is not seized. So, can the same be declared as non-incriminating? These are questions essentially of fact and not of law.
As is evident, the aforesaid form MGT-7, along-with its annexure(s), showing the purported shareholding pattern of the Appellant was filed by the Appellant with ROC after duly affixing, the digital signature of the Managing Director of the Appellant and the aforesaid form was further verified and certified by a competent Company Secretary who had also, in turn, affixed her digital signatures. Further, an image of the relevant challan dated 28/11/2017 through which the aforesaid Form MGT-7 was filed by the Appellant with ROC is also reproduced hereunder for reference:
……..
It is noted, from a perusal of the aforesaid Form MGT-7 as well as the challan through which the aforesaid form was filed by the Appellant with ROC, that the said form was filed by the Appellant on 28/11/2017 and in the case of the Appellant the date of search was 12/12/2017. Thus, it is vivid and conspicuous that the aforesaid form containing the shareholding pattern of the Appellant was well in the public domain, accessible not only to the public authority with whom it was filed (i.e. ROC) but also to the other users of the financial statements as well as public at large. It is also noted that, in-case the aforesaid purported shareholding pattern of the Appellant was in any way incriminating, then in that case the Appellant, to incriminate itself, would have surely not furnished the aforesaid form/ details in the said manner with ROC. Rather it is worth appreciating that a competent Company Secretary in practice had duly affixed his/her digital signatures with the aforesaid form and this would only go on to prove that the purported details were duly verifiable from the books of accounts of the Appellant as well as other records and documents and registers maintained by the Appellant in accordance with the various provisions of the Companies Act,1956/Companies Act 2013. It is needless to state that in-case the purported shareholding pattern would have been incriminating or would not have been in consonance with the records and books of accounts of the Appellant, then, In that eventuality, a competent Company Secretary would not have risked his/her career by digitally certifying the aforesaid shareholding pattern, coined by the AO as an "incriminating" material.

It is noted that the material referred by the AO as "incriminating material" is not incriminating in nature as it is rather a declaration of the facts pertaining to the Appellant. The "shareholding pattern" merely contains the details of the persons who are holding the shares of the company. It is further noted, from the "shareholding pattern" alleged by the AO as "incriminating", that the aforesaid "shareholding pattern" indeed refers to the share capital of the Appellant organized by the respective groups and, in any case, the entries related to the receipt of share capital subscription as well as allotment of share capital was duly disclosed in the regular books of accounts of the Appellant and therefore are part of the regular records of the Appellant. It is further noted that the increase in the share capital was being reflected by the Appellant in the Appellant's audited Annul Accounts filed by the Appellant with the ROC and that the details of Increase in share capital subscription was also being reflected in the Income Tax Returns of the Appellant filed with the Department.

It is further noted that the Appellant was duly declaring the shareholding pattern (i.e. the names and number of share held by each shareholder) with ROC regularly and further the details of the shareholder were also being stated in the audited Annual Accounts of the Appellant in accordance with the requirements of the governing law. It is not in dispute thatthe shareholding

pattern of the Appellant was already available before the Assessing Officer along with the Return of Income. Therefore, by any stretch of the imagination, it cannot be said that the purported shareholding pattern fled by the Appellant is an incriminating material found during the search as claimed by the AO.

If the argument of the O to hold the "share-holding pattern" of the Appellant, as disclosed to the Registrar of Companies, as "incriminating" was to be accepted and allowed, then, in that eventuality, every single filing (read Form 2 or MGT-7 or Annual Return here) of such details of the share-holders with the Registrar of Companies would be "incriminating" in nature and render every single corporate amenable to a search and seizure operation and, thereafter, to assessments or re-assessments under Section 153A/153C of the Act. In other words, this would completely demolish the checks and balances imposed on various authorities under the Income Tax Act, 1961 and would open wide the flood-gates to anarchy wherein every single company could be searched and assessed/re-assessed simply on the basis of compliances made with Registrar of Companies. This, I believe, cannot be the intention of the Hon'ble Legislature and cannot be countenanced under the Rule of Law.

It is pertinent to note that it was only vide show-cause notice dated 27/12/2019 that the AO had confronted the Appellant with respect to his observation regarding the purported shareholding pattern and the relevant observation as contained in the show-cause, as aforesaid, is being reproduced hereunder:

> “In the electronic seized material marked as GCL-HD-1, it is seen that the capital in the company Goldstone Cements Ltd has been brought in by three major promoter groups, i.e., "UFM Group" headed by Sh. Mahabir Prasad Jain (Silchar), "More Group" headed by Sh. Prakash Kumar More and thirdly, Sh. Mahavir Prasad Jain of Guwahati. However, these individuals have not brought in all the capital in their own names but through a number of shell companies, The mention of group-wise share capital and share premium introduction into the assessee company is itself incriminating material that money was routed through multiple shell companies and invested into the assessee company."

The aforesaid show-cause notice was fixed for final hearing / opportunity on 28/12/2019 at 11:00 am. Notwithstanding the fact that the time permitted to the Appellant to respond was too short, it is noted that in this case the relevant assessment folders were also perused and it is evident that the AO had not conducted any enquiry qua the purported shareholding pattern from any of the aforesaid 3(three) groups. Thus, it is clear that in this case, the AO was swayed by merely coining the purported share holding pattern as an incriminating material and, thereafter, the AO resorted to additions under Section 68 of the Act.

In view of the above discussion and for the reasons stated above and respectfully following the judgments of various authorities, discussed above including those relied upon by the Appellant, it is held that the purported shareholding pattern of the Appellant was not an incriminating document and that the said shareholding pattern of the Appellant was duly verifiable from the books of accounts and other records, including returns and forms filed by the Appellant with ROC, prior to the date of search.”

9.15 Having examined the contents of GCL-HD-1, we find ourselves in agreement with the above findings of the Ld. CIT(A) that this document was a share-holding pattern document prepared by way of secretarial compliance report, which as the assessee has shown, was filed along with the company's annual return in Form MGT-7 on 28-11-2017 with the Registrar of Companies and was therefore available in the public domain (much prior to the date of search). It is found to contain the details of the name of shareholders, their amount and percentage of shareholdings. In our considered view, this document was a regular business document having no incriminating content whatsoever. Nothing whatsoever has been brought on record by the Revenue to correlate or link as to how the contents of this statement led to unearthing of unexplained cash credit by the AO and therefore the aforesaid factual finding of the Ld. CIT(A) remains uncontroverted. Hence, we do not see any reason to interfere with the order of the Ld. CIT(A) on this aspect and hold that the seized document GCL-HD-1 did not constitute incriminating material or evidence.

9.16 For the reasons discussed in the preceding paragraphs and the judicial precedents as discussed above, we hold that the seized document GCL-HD-1 referred by the AO for justifying the addition/s made u/s 68 of the Act in the orders impugned before us, did not constitute 'incriminating material' and therefore no addition/s was legally permissible in the assessments framed u/s 153A for the AYs 2011-12 to 2015-16 for which the assessment did not abate, when the search was conducted on 22-12-2017. The assessee thus succeeds on Question (B) as well. Accordingly Ground No. 3 of the Revenue's appeal for AYs 2011-12 to 2015-16 thus stands dismissed.

10. Now we proceed to adjudicate Question (C).

(C) Whether the Joint Commissioner of Income-tax, Guwahati had validly granted approval u/s 153D of the Act and therefore whether the consequent order passed u/s 153A/143(3) was sustainable in law or not ?

Ground No. 2 of Cross Objection for AY 2011-12
Ground No.1 of Cross Objection for AY 2012-13
Ground No.1 of Cross Objection for AY 2013-14

Ground No.1 of Cross Objection for AY 2014-15
Ground No.1 of Cross Objection for AY 2015-16
Ground No.1 of Cross Objection for AY 2017-18

10.1 In this ground, the assessee has challenged the validity of the assessments framed u/s 153A/143(3) of the Act for AYs 2011-12 to 2015-16 & 2017-18 on the ground that the approval u/s 153D of the Act was granted the Ld. JCIT/Addl. CIT in a casual and mechanical manner, which according to the assessee, rendered all the orders impugned before us to be a nullity.

10.2 It is noted that, the AO had issued a detailed questionnaire enquiring about the details of share capital only on 04-11-2019. The AO thereafter made enquiries from the shareholders by issue of notices u/s 133(6) of the Act dated 27-11-2019. The Ld. AR pointed out that, the Director of the assessee was personally examined u/s 131 of the Act on 28-11-2019. After making these necessary enquiries, the AO finally issued the show cause notice requiring the assessee to explain as to why the share application monies received in these years should not be assessed by way of unexplained cash credit on 27-12-2019, which was a Friday. In response, the appellant had furnished a detailed explanation along with supporting on Saturday, 28-12-2019. According to Ld. AR, the AO forwarded the draft assessment orders, each running in 44 pages, for all the seven assessment years together, seeking approval of the Joint Commissioner of Income-tax Range-3, Guwahati, only on 30-12-2019. The said Official gave his administrative approval u/s 153D of the Act vide letter No. F. No. JCIT/Range-3/Ghy/2019-20/2264 on the same date i.e. 30-12-2019. Upon obtaining the approval, the AO passed all the orders on the same date in the evening, all of which bear time stamps between 5.30 PM to 6 PM. Taking us through these sequence of events, the Ld. AR contended that it was impossible for the JCIT to have objectively examined draft orders along with the voluminous assessment folders in a few hours and therefore, according to him, the approval had been mechanically granted by the Jt. CIT u/s 153D of the Act. Relying on the decision rendered by the Mumbai Bench of this Tribunal in the case of Arch Pharmalabs Ltd vs ACIT [2021 4 (TMI) 533], he urged that since the

approval was granted by Jt.CIT without due application of mind, the same rendered the orders impugned before us to be non-est and a nullity. Per contra, the Ld. DR supported the order of the Ld. CIT(A) on this issue.

10.3 Having perused the material available before us in light of the judicial precedents on this subject, it is noted that the relevant copies of the letters addressed by the AO to the Jt.CIT and the letters of approval issued by the latter are not available on record, which are necessary to adjudicate this particular issue. Moreover, since we have already held the orders passed u/s 153A/143(3) of the Act and the additions made therein to be unsustainable in law for the reasons set out above, we are not inclined to return our findings with regard to this legal issue raised in the cross objections as the same has now become academic in nature. So this issue is left open without our finding on it. Accordingly, Ground No. 2 of all the cross objections are dismissed as infructuous.

11. Now we proceed to decide the issue (D).

(D) Whether the assessee had discharged its onus of establishing the identity and creditworthiness of the share subscribers and substantiating genuineness of the transactions and therefore whether the additions made u/s 68 of the Act on account of share application monies received by the appellant was tenable on facts and in law ?

Ground No. 1 & 2 of Revenue's appeal for AY 2011-12
Ground No. 1 & 2 of Revenue's appeal for AY 2012-13
Ground No. 1 & 2 of Revenue's appeal for AY 2013-14
Ground No. 1 & 2 of Revenue's appeal for AY 2014-15
Ground No. 1 & 2 of Revenue's appeal for AY 2015-16
Ground No. 1,2 & 3 of Revenue's appeal for AY 2017-18

11.1 It is noted that the reasoning/findings recorded by the AO in the orders for AYs 2011-12 to 2015-16 & 2017-18 for making addition/s u/s 68 of the Act is verbatim same. The AO had drawn up a common summary statement in all the assessment orders setting out the details of the share application monies received by the assessee in the AYs 2011-12

to 2015-16 & 2017-18, whose source of source, according to him was not properly explained. The statement giving investor wise and assessment year wise details of the addition/s made by the AO u/s 68 of the Act in these AYs are as follows:

A.Y.	Particulars	Amount
2011-12	Hari TrafinPvt Ltd	5,38,35,000
2012-13	Hari TrafinPvt Ltd	50,00,000
	Southern Resources & Holdings Pvt Ltd	2,51,00,000
2013-14	Prefer Infrastructure Pvt Ltd	6,12,00,000
	Capital Steel Trading Pvt Ltd	5,18,00,000
	Consistent Constructions Pvt Ltd	55,00,000
2014-15	Prefer Infrastructure Pvt Ltd	6,38,50,000
	Capital Steel Trading Pvt Ltd	8,88,00,000
	Consistent Constructions Pvt Ltd	2,44,49,990
	Transparent Tie Up Pvt Ltd	4,51,99,980
2015-16	Remote Marketing Pvt Ltd	49,99,995
	Bonus Dealers Pvt Ltd	1,30,00,000
2017-18	Orchid FinleasePvt Ltd	1,75,54,848
	Shantidham Marketing Pvt Ltd	32,94,00,000

11.2 The AO further referred to the statements of one alleged entry operator Shri S.K. Agarwal and reproduced extracts thereof, to conclude that, few of the above named shareholders were controlled and managed by these so-called entry operators, which according to him, further proved that the share application monies obtained from these few companies were in the nature of accommodation entries provided by them, to route assessee's own unaccounted monies. The AO also set out three flow charts, which according to him, were cash trails, in support of his conclusion that the share application monies received by the assessee represented its own routed unaccounted monies. The AO accordingly made additions u/s 68 of the Act on account of share capital received by the assessee.

11.3 At the time of hearing, Shri Dudhwewala pointed out that the AO had made independent enquiries from each of the shareholders, named in the above table, and all of them had complied with the AO's requisition u/s 133(6) of the Act. Taking us through the documents filed by them inter alia including IT acknowledgments, audited financial statements, bank statements etc., he pointed out that each of the shareholders held valid PAN and had sufficient own surplus funds and therefore, their identity & creditworthiness stood substantiated. He also showed that each of the shareholder/share applicants had provided the details of their respective sources of funds in the manner as desired by the AO, and therefore it could not be said that the proviso to Section 68 remained un-satisfied. He further submitted all the shareholders belonged to the same promoter group, who had invested in the capital of the assessee across several year/s and therefore the genuineness of the transactions and rationale for making investment also stood proved. He also furnished a summary chart giving the details of funds infused by these shareholders across several years/s to show that the AO himself had accepted the identity and creditworthiness of these same shareholders and the genuineness of the funds received from them in other years and/or partially accepted the genuineness of share capital received in the same year. Taking us through the relevant supporting documents, he urged that, when on same set of facts & circumstances, the AO had accepted these shareholders and their source of funds to be genuine in preceding/subsequent years and/or partially in the same year, the AO's action of disputing their genuineness only qua the additions made in the orders impugned before us, were ex-facie perverse and untenable. He further brought to our notice the assessment orders passed u/s 143(3) in the matters of some of these shareholders/share applicants to show that even the AOs of the shareholders also did not doubt or question the genuineness of the investments made by them in the assessee. He also pointed out that the Director/s of the assessee had also been personally examined u/s 131 of the Act who had affirmed the transactions with the shareholders. He took us through the statement of Director, Shri Vishal Jain, which is placed at Pages 199 to 206 of paper book, to show that nothing adverse came out from his examination, which suggested that the share capital/share application received from these entities were not genuine. The Ld. AR thereafter pointed out several defects and factual infirmities in the statement of Shri S.K. Agarwal, relied upon by the Revenue. He

further submitted that, inspite of the Director of the assessee being personally present before him, the AO never confronted him with the statements of the alleged entry operator but instead used it behind his back, which according to him, was impermissible in law. He further dissected each of the flow charts set out by the AO at Pages 17 to 20 of the assessment order and argued that none of them even remotely suggested that the alleged cash deposits found, that too in 5th or 6th source, represented unaccounted monies given by the assessee to these depositors. Shri Dudhwewala thus contended that all these facts considered cumulatively substantiated each of the three ingredients prescribed u/s 68 of the Act, and therefore urged that the addition impugned before us deserves to be deleted.

11.4 Per contra, the Ld. DR, Shri Pandey appearing on behalf of the Revenue relied on the order of the AO. He laid much emphasis on the statement of Shri S.K. Agarwal, which according to him, showed that the share application monies received by the assessee were in the nature of accommodation entries. He also relied on the flow charts, which according to him, showed that, in some instances, the AO was able to find the source of introduction of unaccounted monies of the assessee.

11.5 We have heard both the parties. Before examining the facts pertaining to each year, it is first relevant to understand the provision of Section 68 of the Act under which, the addition has been made by the AO. The said provision reads as under:

> "68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.
>
> Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—
>
> (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
>
> (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10."

11.6 The phraseology of Section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case, the Legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year. The Supreme Court while interpreting similar phraseology used in Section 69 of the Act has held that in creating the legal fiction the phraseology used therein employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as also held by the Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570.

11.7 Hence, the initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 of the Act. These are:

(i) identity of the investors;

(ii) their creditworthiness/investments; and

(iii) Genuineness of the transaction.

11.8 The Revenue’s exercise starts only when these three ingredients are established prima facie by the assessee and the Department is required to investigate into the facts presented by the assessee. As per the statutory provision of Sec 68 of the Act and the judicial procedure laid down by the Hon'ble Courts, it is clear that primarily the burden is on the assessee to discharge that the credit received by it is from the sources whose identity can be proved, the genuineness of the transaction and the creditworthiness of the creditor is also established by supporting relevant material/documentary evidences. If the assessee presents all these details during the assessment proceeding before the AO, the onus shifts to the AO to prove it wrong. If the AO accepts such evidences without finding anything wrong after enquiry, it can be said that assessee has discharged its onus. On the other hand if the AO

presents some contrary evidences and finds fault with the evidence submitted by the assessee, then the onus again shifts upon the assessee to rebut such contrary evidences.

11.9 The next aspect that is to be considered in this case is regarding the proviso to Section 68 of the Act, which was inserted by the Finance Act, 2012 putting further burden upon the assessees to substantiate the "source of source" of funds. We note that the proviso to Section 68 of the Act was inserted by the Finance Act, 2012 and it was made effective from 01-04-2013 i.e. AY 2013-14 and onwards. For this, reference may be made to the Memorandum as well as the Notes to Clauses of the Finance Bill, 2012 which makes explicitly clear that the Parliament had introduced the proviso to Section 68 of the Act prospectively and the same was made applicable only from AY 2013-14 and onwards. Useful reference in this regard may also be made to the judgment of the Full Bench of the Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Limited (367 ITR 466) where the Hon'ble Supreme Court categorically held that any legislation which imposes new obligation or new duties or a new levy shall have to be necessarily treated as prospective in nature.

11.10 We may also gainfully refer to the following decisions wherein the Hon'ble Constitutional Courts have held that the proviso to Section 68 of the Act, introduced by the Finance Act, 2012 with effect from 01-04-2013 will not have retrospective effect.

(i) CIT Vs Gagandeep Infrastructure Private Limited (394 ITR 680) [Bom HC]:

> "We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso…."

(ii) Pr. CIT vs. Apeak Infotech (88 Taxmann.com 695) [Bom HC]:

> Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in CIT v. Gagandeep Infrastructure (P.) Ltd. [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 (Bom.) has while refusing to entertain a question with regard to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.

11.11 We thus find that the Ld. CIT(A) had rightly held that the proviso to Section 68 of the Act, introduced by the Finance Act, 2012,was applicable only from AY 2013-14 and onwards, and therefore the said proviso cannot be held applicable in AYs 2011-12& 2012-13. Meaning thereby, the assessee was under no obligation to substantiate the source of funds of its shareholders in AYs 2011-12& 2012-13 and to that extent, the AO's reasoning justifying the addition/s u/s 68 of the Act in these two AYs for want of explanation regarding "source of source" of funds is held to be erroneous.

11.12 As regards AYs 2013-14 to 2015-16 & 2017-18, we note that even though the Parliament has inserted the proviso in Section 68 by the Finance Act 2012 with effect from 01-04-2013, it should be borne in mind that, there is no change or amendment in the substantive provision of Section 68 of the Act in terms of which, if any sum is found by the AO to have been credited in the books of an assessee in the relevant financial year, then when called upon by him (AO) to explain the nature and source of the credit; and pursuant to which if the assessee fails to explain to the satisfaction of AO the nature and source of the credit, then the AO may treat the credit as income chargeable to tax. In other words, if the assessee is able to explain the nature and source of the credit to the satisfaction of AO, then the AO cannot use this provision to charge the credit appearing in the books of the assessee as income for the purpose of taxation under the Act. It is a settled position of law that 'satisfaction' contemplated in Section 68 of the Act is that of a reasonable prudent person (AO) and not that of an unreasonable person. So, when the AO calls upon the assessee to explain the nature and source of the credit found in assessee's books, then initial burden is on the assessee to bring material on record to show the nature and source of the credit i.e. identity, creditworthiness and genuineness of the transaction in question. Once an assessee is able to discharge its initial burden, then the onus shifts to the AO to disprove/rebut the

material adduced by the assessee to substantiate the nature and source of the credit transaction. And if the AO is not able to disprove/rebut the evidence brought on record by the assessee to prove the nature and source of the credit entry, then Section 68 of the Act cannot be applied by the AO. This position of law, we note remains the same even after the insertion of the proviso in Section 68 by the Finance Act, 2012, wherein additional requirement/burden is brought in by the Parliament in the cases of an assessee which is a corporate entity (not being a company in which the public are substantially interested) who claims to have received share application money, share capital, share premium or any such amount, then with effect from 01-04-2013, while giving the explanation to the AO regarding the nature and source of such sum credited in its books, the share subscribers have to offer the proof of 'source of source' of the share application money, share capital, share premium. In other words from AY 2013-14 and onwards, in the event if an assessee company, when called upon by the AO to explain the nature of the credit in its books, claims that the credit entry is share application money, share capital and share premium, then the additional requirement of law as per the proviso to Section 68 of the Act is that the share subscriber should be able to show the source from which it was able to invest in the assessee company. And if the 'source of source' of share application/capital/premium is shown to AO and if he is unable to rebut or disprove the same, then the deeming fiction set out in Section 68 will not apply.

11.13 Having regard to the above legal position, we now proceed to examine the facts of the case on hand. We note that the assessee, when called upon by the AO to explain the nature and source of the credit entries for the respective AYs, has discharged its burden by furnishing the necessary details inter alia including the name, PAN, address of the share subscribers, details of share application monies received, shares allotted along with bank statements evidencing that all payments were received through banking channel. After going through the details submitted the AO had made verification/enquiries u/s 133(6) of the Act from the shareholders, who in response had filed copies of their Income-tax Acknowledgments, financial statements, bank statements, explanation regarding source of their funds, copies of assessment orders etc. in support of their identity, creditworthiness and genuineness of these transactions. Thus, the inference that flows from the aforesaid

facts is that the initial burden imposed under section 68 of the Act stood discharged. The details filed by the assessee were cross verified by the AO from the shareholder and no infirmity was pointed out in the same, except making a bald statement that the "source of source" of funds of the application monies was not properly explained. Having perused the orders impugned before us in light of the documents furnished by the shareholders, we find that the AO only looked with suspicious the "source of source" brought to his notice and other than making a bald statement that "source of source" was not fully explained, the AO failed to bring any material or evidence on record, which suggested that the amount credited in the books of the assessee did not belong to the shareholder but that of the assessee. For this, let us now into the relevant facts of each investor/s which invested money in the company in the form of share capital along with share premium.

(A) M/s Hari TrafinPvt Ltd (AY 2011-12& 2012-13 - Rs.5,38,35,000/-& Rs.50,00,000/-)

(i) It is noted that during AY 2011-12, the assessee had received share application monies of Rs.20,65,00,000/-from M/s Hari TrafinPvt Ltd. Qua the application monies aggregating to Rs.15,26,65,000/-,it is interesting to note that the AO accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of only Rs.5,38,35,000/-.Similarly in AY 2012-13, the assessee had received share application of Rs.75,00,000/- from this shareholder and the AO partly accepted the genuineness of the same shareholder to the extent of Rs.25,00,000/- but added the remaining sum of Rs.50,00,000/- as unexplained cash credit. We find that the AO had not given any reasons for adopting such an action in relation to the same shareholder. Moreover the Ld. AR pointed out that the AO accepted as genuine the share application monies of Rs.50,00,000/-, Rs.99,99,670/-, Rs.2,19,99,915/- and Rs.22,32,00,000/- received by the assessee from the very same shareholder in the subsequent AYs 2013-14 to 2015-16 & 2017-18 respectively and that similar documentation were filed before him, to explain the nature & source of source of funds [similar documents were furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to AO's notice u/s 133(6) of the Act].We note that in all these subsequent AYs (supra), the identity and creditworthiness of the

same share subscriber and genuineness of the transactions with this shareholder have been accepted by the AO. Even the Ld. DR was unable to refute this fact. Hence, we hold that when on the same set of facts/documents, the AO had accepted the identity & creditworthiness of same shareholder and also the genuineness of the transactions in the subsequent years, the action of the AO in disputing the genuineness of the transaction with the same shareholder, that too partly, in the relevant AYs 2011-12 & 2012-13 is held to be conspicuously perverse.

(ii) We further note that at pages 365 – 609 of the paper book, the details of M/s. Hari Trafin Pvt. Ltd. are set out. This company is a registered Non-Banking Financial Company (NBFC) with the Reserve Bank of India (RBI) having CIN: U67120WB1995PTC068649. The AO had issued notice u/s 133(6) dated 27.11.2019 upon this shareholder requiring it to provide the following details of the shares subscribed in the assessee in the FYs 2008-09, 2010-11, 2011-12, 2013-14, 2014-15 & 2016-17:

With regard to the shares subscribed above, please furnish the following information/documents:

1. Details of sources of funds used to make the share application.
2. Dates of transfer of share application money with regard to each share allotment separately.
3. Supporting bank account statements for all your bank accounts, audited accounts including balance sheet and P&L Account, and ITR.
4. In case the source of funds is loan/share capital & premium, please furnish the name, PAN, address and bank account number of the lender/share applicant.
5. In case the source of funds is by sales/turnover please specify what was the item traded, please furnish the name, PAN, address and bank account number of each buyer, Please furnish purchase and sales ledgers, along with supporting bills/vouchers.
6. Shareholding pattern of the company for the financial years 2010-11 to 2017-18.
7. Name, Pan, Address of each directors date of appointment of each present director.

(iii) It is noted that, in response to the said notice, the shareholder company submitted its reply along with relevant evidences, copy of the letter is available at Pages 367-368 of the Paper-book. After perusing the details, we find that assessee had furnished all the requisitioned documents including audited financial statements, Income Tax returns,

extracts of bank account, details of source of funds as well as the share-holding pattern and director details for all the above FYs as sought for by the AO. The shareholder company is found to hold PAN-AAACH6716P and is assessed under the jurisdiction of ITO, Ward 12(3), Kolkata. On examination of the audited financial statements for FY 2010-11 & 2011-12 which is available at Pages 373-386 and Pages 415 to 426 of the Paper-book, it is noted that the company had reported turnover from trading in shares & securities and interest income which aggregated to Rs.1,16,72,041/-& Rs.1,70,93,016/-. The company also had sufficient funds to cover the cost of share capital invested in the assessee. It is noted from Schedule C - Investments for both the years, that the shareholder held investments in several blue chip securities listed on the stock exchange, which further fortifies their creditworthiness. Shri Dudhwewala thereafter invited our attention to the Schedule F - Loans & Advances of FYs 2010-11 & 2011-12 to show that this shareholder was the core investment company of UFM Group [promoter of the assessee] and it had advanced loans only to the entities, which belonged to the UFM Group. The bank statement of the shareholder is found placed in the paper book at Page 411-413&440-441, which reveals that there is no deposit of cash and all transfers have been made through proper banking channels. Although we note that there was no obligation for the assessee to discharge the source of source of funds in AYs 2011-12 & 2012-13, but it is noted that the shareholder had provided the explanation regarding the source of source of funds received by the assessee, in the exact manner as sought for by the AO in the notice u/s 133(6) of the Act, which is available at Page 414& 442 of the Paper book. It is noted from the explanation provided that the source of funds of the shareholder was primarily share application monies received by this company and/or loans received earlier, details of which along with name, PAN & address are found to be set out in Pages 414 & 442of the paper-book. Sri Dudhwewala has rightly pointed out that the AO did not doubt the ‘source of source’ of funds of the assessee but the ‘source of source’ of funds of the shareholder, M/s Hari TrafinPvt Ltd viz., the source of funds in the hands of M/s Godavari VincomPvt Ltd, which had repaid back the loan taken from M/s Hari TrafinPvt Ltd, which in turn, was paid to the assessee by way of share capital/share application monies. We do

countenance this action of AO for the reason that the assessee is not required to prove beyond the source of source of the receipt of funds in form of share capital/share application. Hence, we find that the source of source of funds in both AYs 2011-12 & 2012-13 stood explained.

(iv). It is also noted that shareholder was subjected to income-tax scrutiny u/s 143(3) of the Act in AYs 2012-13 and 2017-18, and during these years it had infused fresh sum of Rs.75,00,000/- and Rs.22,32,00,000/- towards the share capital of the assessee company. It is noted that in none of the assessment orders, copies of which are found placed at Pages 604-608 of paperbook, did the AO of the shareholder draw any adverse inference regarding the source of investments made by the shareholder in the assessee company. In the circumstances when the source of funds of the investor had been accepted to be genuine by the AO of the investor, we hold that the AO, in the present case, was unjustified in holding that the source of source of funds remained unexplained.

(v) Shri Dudhwewala pointed out that M/s Hari TrafinPvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the statement of the director of the assessee, Shri Vishal Jain, who is also the director of this shareholder and whose statement was recorded under oath by the AO on 28-11-2019, copy of which is found placed at Pages 199 to 206 of the paperbook. Perusal of the statement shows that the director had also affirmed the transactions between M/s Hari TrafinPvt Ltd and the assessee and nothing adverse came out from his statement. We thus do not find any defect nor any falsity or infirmity in the documents submitted before the AO to substantiate the nature and source of the credit entries.

(vi) As regards the alleged cash trail of Rs.155 lacs in relation to M/s Hari TrafinPvt Ltd, which has been extracted at Pages 18& 19 of the impugned order, Shri Dudhewewala had rightly pointed out that, the cash trail to the extent of Rs.50 lacs viz.,

Rs.25 lacs, Rs.5 lacs and Rs.20 lacs received by the assessee from M/s. Hari TrafinPvt Ltd on 26.12.2012, 27.12.2012 & 28.12.2012 respectively, which pertained to FY 2012-13 i.e. AY 2013-14 and did not pertain to the relevant AYs 2011-12 & 2012-13 and therefore this particular trail was irrelevant in as much as the AO has accepted the genuineness of the share application monies received from M/s. Hari Trafin Pvt Ltd in AY 2013-14 and thereby himself disregarded this cash trail in the facts of the present case. With regard to the balance trail of Rs.105 lacs viz., Rs.80 lacs & Rs.25 lacs received by the assessee from M/s Hari TrafinPvt Ltd on 26.09.2010 and 16.11.2010, perusal of the flow chart, shows that the AO himself had traced the source of the monies credited to the assessee's account. The AO was not only able to identify the names of the payer companies but was also able to identify and establish the bank accounts of the source as well as source of source from which payments were received by the assessee. Both the source as well as the source of source is noted to be within the banking system only and there is no cash deposit found. It is true that there were cash deposits at the end of the 5th or 6th layer of the transaction, but we find merit in the Ld. AR, Shri Dudhwewala's contention that there was no evidence or material or nexus whatsoever brought on record by the AO to show that the cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee. We thus find that the cash trails extracted by the AO cannot be sufficient to draw adverse inference against the assessee.

(vii) For the reasons discussed in the foregoing, it is held that the assessee had discharged its burden of substantiating the identity, creditworthiness and genuineness of the transaction involving receipt of share application monies from M/s Hari TrafinPvt Ltd. and the AO could not rebut or find any infirmity in the documents to substantiate the identity, creditworthiness and genuineness of the share transaction other than cash deposit at the 5th or 6th layer of transaction which also the AO failed to show any material/nexus of the assessee to the cash deposited, we hold that preponderance of probability is in favour of assessee and no adverse view can be taken against the assessee in the facts and circumstances discussed supra.

(B) Southern Resources & Holdings Pvt. Ltd. (AY 2012-13 – Rs.2,51,00,000)

(i) We note that at pages 610-645 of the paper book, the details of M/s. Southern Resources & Holdings Pvt Ltd are set out. From the reply furnished by this shareholder in response to the notice u/s 133(6), it is noted that this shareholder is a private limited company having PAN AAECS8302A and CIN: U65999WB1995PTC075240, which regularly filed its return of income and is assessed under the jurisdiction of ITO Ward 9(2), Kolkata. The shareholding pattern of the company shows that it also belonged to one of the promoter group i.e. More Group of the assessee. Hence, the rationale behind making of investment by this shareholder in the assessee stands explained. From the audited financial statements, which is found placed at Pages 630 to 641 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.34,18,34,638/- as on 31-03-2012 which corroborates with the investment of Rs.3,38,00,000/- made by the shareholder during the relevant year. The shareholder had also reported turnover from trading in shares & securities and interest income, which was in excess of Rs.493 lacs. Accordingly, the creditworthiness cannot be doubted. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date and is not struck-off or non-existent. To substantiate the source of source of funds, it is noted that the shareholder had furnished the bank statement for the relevant period, which is found placed at Page 613-619 of the Paper book. On examination of the same, it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The details of source of source of funds received by the assessee were provided by the shareholder, in the manner as requisitioned in the notice u/s 133(6) of the Act viz., name, PAN & address of the payer i.e. the share applicant/lender/ borrower who had paid the sum, along with the specified dates of receipt and the corresponding bank statements evidencing bank account details of the said payers, which is available at Page 611-612 of the Paper book. We thus find merit in the contention of the Ld. AR that, when all the details regarding source of source of funds, in the manner as desired by the AO, had been provided by the shareholder, then

the AO's allegation that the genuineness of the source of source of funds was not established, was unjustified. It is noted that the source of funds of the shareholder was primarily refund of loans advanced earlier and/or sale of investment holdings, details of which are available on record. Having regard to the aforesaid facts, we find that not only did the assessee discharge its burden of proving the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(ii) We further note that, this shareholder had paid aggregate sum of Rs.3,38,00,000/- towards share capital of the assessee in the relevant AY 2012-13, and the AO had accepted the identity & creditworthiness of this shareholder and genuineness of the transactions to the extent of Rs.87,00,000/- but doubted the genuineness of balance sum of Rs.2,51,00,000/-. It is noted that similar documentation in as much as even the explanation regarding source of source of funds for the entire sum of Rs.3,38,00,000/- was furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to the AO's notice u/s 133(6) of the Act. We find that no reasons were given by the AO for adopting two different yardsticks in relation to the same shareholder. Even the Ld. CIT, DR was unable to shed light on this cherry picking action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application of Rs.87,00,000/- paid by them, his action of not accepting the balance sum of Rs.2,51,00,000/-, is held to be not tenable/un-reasonable/irrational without any cogent evidence/material to disprove or hold otherwise.

(C) Consistent Constructions Pvt. Ltd.(AY 2013-14& 2014-15 – Rs.55,00,000/- & Rs.2,49,49,990/-)

(i) We note that at pages 646-681 of the paper book, the details of M/s. Consistent Constructions Pvt. Ltd. have been set out. From the reply furnished by this shareholder in response to the notice u/s 133(6), it is noted that this shareholder is a private limited company having PAN AADCC0716H and CIN: U45400WB2007PTC115770, which regularly files its return of income and is assessed under the jurisdiction of ITO Ward

9(3), Kolkata. The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. The director of the shareholder is also the promoter-director of the assessee. Hence, the rationale behind making of investment made by this shareholder stands explained. From the audited financial statements, which is available at Pages 667 to 676 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.14,19,91,122/- which corroborates with the investment made by the shareholder. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date.

(ii) As regards the source of source of funds, Sri Dudhwewala pointed out that not only the AO's averment disputing its genuineness viz., by stating that, *sale proceeds of shares were not established*, was factually erroneous but accordingly to him, the same was a sweeping remark in as much as AO did not point out the specific instance/item whose genuineness was not established. It is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 651 to 666 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The shareholder, also provided the details of source of source of funds in the manner as desired by the AO in the notice u/s 133(6) of the Act, which is found placed at Pages 649 to 650 of the Paper book. Perusal of the same shows that the immediate source of funds of the shareholder was primarily refund of advances made earlier (proceeds from sale of investments was comparatively lower), details of which along with name, PAN & address are found to be set out in Pages 649 to 650 of the paperbook. Moreover, even in relation to the proceeds received on sale of investments, which were invested by this shareholder in the assessee company, it is noted that complete details of the respective buyer/s were provided by the shareholder, in the manner as sought for by the AO in the notice u/s 133(6) of the Act. Neither the AO nor the Ld. CIT, DR was able to pin-point out as to what was the defect therein based on which these sale proceeds had been held to be non-genuine or for that matter which detail/document had not been submitted by the shareholder, which otherwise would have discharged the genuineness of the source

of source of funds. Having regard to the aforesaid facts therefore, we find that not only did the assessee discharge its burden of proving the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(ii) It was also brought to our notice that this shareholder had originally paid share application monies to the tune of Rs.4,00,00,000/- in the preceding AY 2012-13. In the income-tax assessment of the assessee for AY 2012-13, the AO had accepted the identity and creditworthiness of this shareholder and also the genuineness of the source of source of funds of Rs.4,00,00,000/-received by the assessee from this shareholder. It is observed that, the shares were not allotted in AY 2012-13and therefore the shareholder was refunded back the entire sum of Rs.4,00,00,000/- in AY 2013-14. Thereafter, the shareholder had again re-infused the sums of Rs.55,00,000/- & Rs.2,49,49,990/- in the assessee company in AYs 2013-14 & 2014-15. Having regard to these background facts, we find that when the source of source in respect of the original payment of Rs.4,00,00,000/- had been accepted by the AO, then its subsequent re-payment and receipt back by the assessee again in AYs 2013-14 & 2014-15 could not be doubted or be said to be unexplained. This action of AO thus cannot be countenanced being irrational. So, we are of the view that assessee has discharged its primary burden to establish the nature and source of source of credit and there being no evidence or material to rebut the same in the hands of AO, we are inclined to accept the identity, creditworthiness and genuineness of the share transaction.

(D) Prefer Infrastructure Pvt. Ltd. (AY 2013-14& 2014-15 – Rs.6,12,00,000/- &Rs.6,38,50,000/-)

(i) We find from pages 682-709 of the paper book, the details of M/s. Prefer Infrastructure Pvt. Ltd. are set out. From the reply furnished by this shareholder in response to the notice of AO u/s 133(6) of the Act, it is noted that this shareholder is a private limited company having PAN AAECP2657B and CIN: U45400WB2007PTC115882, which regularly files its return of income.The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. The director of the shareholder is also the

promoter-director of the assessee. Hence, the rationale behind making of investment made by this shareholder cannot be doubted. From the audited financial statements, which is found placed at Pages 698 to 707 of the paperbook, it reveals that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.1253 lacs which is sufficient to make the investment. From a perusal of the MCA Master Data of the company it is evident that the company is 'Active' till date. As regards the source of source of funds, it is noted that the shareholder company had placed on record the copy of the bank statement for the relevant period, which is found placed at Page 688 to 697 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The shareholder is noted to have also provided the details of source of source of funds in the exact manner as sought for in the notice of AO u/s 133(6) of the Act, which is found placed at Pages 685 to 687 of the Paper book. Perusal of the same shows that the source of funds of the shareholder was primarily refund of loans advanced earlier and/or sale of investment holdings, details of which are available on record. Neither the AO nor the Ld. CIT, DR was able to pin-point out as to what was the defect therein based on which these source of source of funds had been sweepingly held to be non-genuine or for that matter which detail/document had not been submitted by the shareholder, which otherwise would have discharged the genuineness of the source of source of funds. We are thus unable to countenance the action of the AO. Having regard to the aforesaid facts, we find that not only did the assessee discharge its burden of proving the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained. So without any specific infirmity being pointed out by the AO, no adverse view ought to have been taken against this share transaction.

<u>(E) Captain Steel Trading Pvt. Ltd. (AY 2013-14&2014-15 –Rs.5,18,00,000/- & Rs.8,88,00,000/-)</u>

(i) We note from pages 710-735of the paper book, the details of M/s. Captain Steel Trading Pvt. Ltd. which are set out therein. From the reply furnished by this shareholder in response to the notice of AO u/s 133(6), it is noted that this shareholder is a private limited company having PAN AADCC0752B and CIN: U51109WB2007PTC115933, which regularly files its return of income. The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. The director of the shareholder is also the promoter-director of the assessee. Hence, the rationale behind making of investment made by this shareholder need not be doubted. From the audited financial statements, which is found placed at Pages 724 to 733 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.1420.83 lacs which corroborates with the investment made by the shareholder. The MCA Master Data of the company, which is also available on record from which it is evident that the company is 'Active' till date. As regards the source of source of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 718 to 723 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The shareholder, also provided the details of source of source of funds in the exact manner as sought for in the notice of AO u/s 133(6) of the Act, which is found placed at Pages 713 to 717 of the Paper book. Perusal of the same shows that the source of funds of the shareholder was primarily refund of loans advanced earlier and/or sale of investment holdings, details of which are available on record. Both the AO and even the Ld. CIT, DR was unable to pin-point out the specific defect in the details provided by the shareholder qua its source of funds, for which it was being alleged to be non-genuine. We are thus unable to countenance the action of the AO. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(ii) As regards the alleged cash trail of Rs.35 lacs in relation to M/s Captain Steel Trading Pvt Ltd., a perusal of the flow chart, shows that the AO himself had identified

the source of the monies credited to the assessee's account. The AO was not only able to identify the names of the payer companies but was also able to identify and establish the bank accounts of the source as well as source of source from which payments were received by the assessee. Both the source as well as the source of source was within the banking system only and there is no cash deposit found. It is true that there were cash deposits at the end of the 5th or 6th layer of the transaction, but we find that there was no evidence/material whatsoever brought on record by the AO to show that the cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee and even the AO failed to bring any nexus with the assessee with that of the proprietary concern. In the absence of any adverse material based on the preponderance of probability, we are of the view that assessee has discharged its burden. We thus find that nothing turns around because of the cash trail unless the AO brings on record that the cash deposited was that of assessee's or the depositor had nexus with the assessee. Since there is no infirmity in the documents produced by the assessee to prove the nature and source of credit entry no adverse view is legally sustainable.

(F) Transparent Tie Up Pvt. Ltd. (AY 2014-15- Rs.4,51,99,980/-)

(i) We note from pages 736-760 of the paper book, the details of M/s. Transparent Tie Up Pvt. Ltd. are set out. Perusal of the reply furnished by this shareholder in response to the notice of the AO u/s 133(6) of the Act, shows that this shareholder is a private limited company having PAN AACCT7185L and CIN: U52100WB2007PTC116798, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 9(1), Kolkata. The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. Hence, the rationale behind making of investment made by this shareholder need not be doubted. From the audited financial statements, which is found placed at Pages 724 to 733 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.1807 lacs which corroborates with the investment made by the shareholder. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date. As regards the source of source

of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 756 to 758 of the Paper book from which the source of source of funds are verifiable. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(G) Remote Marketing Pvt. Ltd. (AY 2015-16 – Rs.49,99,995)

(i) We note from pages 761-802 of the paper book, the details of M/s. Remote Marketing Pvt. Ltd. are set out. Perusal of the reply furnished by this shareholder in response to the notice of AO u/s 133(6) of the Act, shows that this shareholder is a private limited company having PAN AADCR1140G and CIN: U51109WB2005PTC102287, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 4(1), Kolkata. In the last return of income filed for AY 2019-20, the shareholder had declared total income of Rs.18.45 lacs. From the audited financial statements, which is found placed at Pages 772 to 782 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.682.79 lacs which more than sufficient to make investment with the shareholder. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date. As regards the source of source of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 801 to 802 of the Paper book along with statement giving explanation regarding the source of source of funds. It is noted that the shareholder had sold the investments held in M/s.Sesa International Ltd and out of these proceeds it had re-invested in the capital of assessee company. The shareholder has provided copy of Form-2 of M/s. Sesa International Ltd, which is available at Pages 764 to 769 of paper book, to substantiate its investment holdings in the shares of this company. The copy of sale bill evidencing sale of shares is found to be available at Page 763 of paper book. Having regard to the aforesaid facts, we find that

not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained. The AO has not been able to rebut the evidence/material placed by the assessee to prove the identity creditworthiness and genuineness of the share transaction. So, in the absence of any material to the contrary applying the principle of preponderance of probability the assessee's claim needs to be accepted.

(H) Bonus Dealers Pvt. Ltd. (AY 2015-16 – Rs.1,30,00,000/-)

(i) It is noted that during AY 2015-16, the assessee had received share application monies of Rs.3,02,00,000/- from M/s Bonus Dealers Pvt Ltd. qua the application monies aggregating to Rs.1,72,00,000/-, and the AO has accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of only Rs.1,30,00,000/-. It is noted that similar documentation in as much as even the explanation regarding source of source of funds for the entire sum of Rs.3,02,00,000/- was furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to the AO's notice u/s 133(6) of the Act. When this is the position, we wonder as to how the AO could believe part of the share transaction and disbelieve other part. We find that AO has not adduced any material to justify such a stand with the same shareholder. Even the Ld. CIT, DR was unable toshed light on this apparent irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application to the tune of Rs.1,72,00,000/- paid by them, his action of not accepting the balance sum of Rs.1,30,00,000/-, is held to be arbitrary/un-reasonable/irrational.

(ii) Further, we note that at pages 803-966 of the paper book, the details of M/s. Bonus Dealers Pvt. Ltd. are given therein. This company is having PAN: AAECB2227R and having CIN : U52390AS2010PTC01704. It is noted that, in response to the notice issued by the AO u/s 133(6) of the Act, the company submitted its reply along with relevant evidences, copy of the letter is found placed at Pages 806 & 807 of the Paperbook. After perusing the details, it is noted that assessee had furnished all the

requisitioned documents including audited financial statements, Income Tax returns, extracts of bank account, details of source of funds as well as the share-holding pattern and director details as sought for by the AO. On examination of the audited financial statements for FY 2014-15 which is found placed at Pages 827-859 of the Paperbook, it is noted that the company had sufficient funds to the tune of Rs.16,48,61,838/- to cover the cost of share capital invested in the assessee. The bank statement of the shareholder also available in the paper book at Page 817-826,reveals that there is no deposit of cash and all transfer have been made through proper banking channels. It is noted that the shareholder had provided the explanation regarding the source of source of funds received by the assessee, in the exact manner as sought for by the AO in the notice u/s 133(6) of the Act, which is found placed at Page 808-816 of the Paper book. Upon examining the same, it is noted from the explanation provided that the source of funds of the shareholder was primarily the share of profit received from its partnership firm M/s LalitPolyweave LLP, which belonged to the UFM Group. It is further noted that some of the sources of funds were the proceeds received on redemption of fixed deposits held with banks. Even where the source of funds were the proceeds received on sale of investment holdings, it is noted that the shareholder had provided complete details along with name, PAN & address of the payer. We thus find that even the source of source of funds stood explained.

(iii). It is also noted that shareholder was subjected to income-tax scrutiny u/s 143(3) of the Act in 2017-18, a copy of the assessment order is found placed at Pages 951 to 956 of the Paper book. This proves the genuine and bona fide existence of the shareholder and also establishes the veracity of the investments held by it in the assessee company.

(iv). Shri Dudhewewalapointed out that M/s Bonus DealersPvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the details of the directors of the shareholder, which is available at Page 966 of the paper book, from which it is noted that Shri Vishal Jain, who is also the director of the assessee. Perusal of the statement of Shri Vishal

Jain, which was recorded under oath by the AO on 28-11-2019, shows that the director had also affirmed the transactions between M/s Bonus DealersPvt Ltd and the assessee and nothing adverse came out from his statement. And the AO could not find any defect nor falsity or any infirmity in the documents submitted before the AO.

(v). In the light of the aforesaid discussion, it is held that the assessee had discharged its burden of substantiating the identity, creditworthiness and genuineness of the transaction involving receipt of share application monies from M/s Bonus Dealers Pvt Ltd. and also the source of source of funds. And the AO could neither rebut the same nor bring any contrary evidence to shift the onus. So, we accept the share transaction with this share holder.

(I) OrchidFinlease Pvt. Ltd. (AY 2017-18 – Rs.1,75,54,848)

(i) We note from pages 1057-1144 of the paper book, the details of M/s. Orchid FinleasePvt Ltd are set out. Perusal of the reply furnished by this shareholder in response to the notice issued u/s 133(6) of the Act, shows that the shareholder is a registered non banking finance company (NBFC) holding certificate of registration No. B.08.00108, having PAN AABCG9438Q and CIN: U65929AS1996PTC004898, which regularly filed its return of income and is assessed under the jurisdiction of ITO Ward 3(1), Guwahati. It is noted that this shareholder had actually advanced loan to the assessee of Rs.2,55,00,000/- in the earlier FY 2015-16 pursuant to a loan cum share purchase agreement dated 11-01-2016. Copy of the said agreement and board resolution approving the same is found placed at Pages 1065 to 1069 of the paperbook. We further note that the said company has provided detailed break-up of loans advanced along with the bank statement evidencing the advancement of loan, copy of which is enclosed at Pages 1070 to 1073 of the paperbook. It is noted that the net owned funds of the company was in excess of Rs.2611 lacs and therefore it is evident that the company had sufficient networth to justify the loan advanced to the assessee. The details of source of source of loan advanced to the assessee was also provided by the shareholder, which is found placed at Pages 1060-1062 & 1074-1080 of the Paper book. It is noted that the

source of funds of the shareholder for advancement of such loan was mainly the proceeds of Rs.1,95,50,000/- received on sale of investment holdings in M/s VRC Technologies Pvt. and M/s Parasmani Planning & Development Pvt. Ltd. to M/s Darkwell Dealers Pvt. Ltd., details of which along with copies of sale bills are found placed at Pages 1074-1080 of the paperbook.

(ii) In the relevant FY 2016-17, M/s Orchid Finlease Pvt. Ltd. did not pay any fresh sum to the assessee company. From the documents available on record, it is noted that the assessee vide Board Resolution dated 04-05-2016 had exercised their right available under the loan agreement to convert the unsecured loan into equity shares. Having regard to the fair market value of the shares determined in accordance with Rule 11UA, the company allotted 4,04,761 equity shares at Rs.63 per share to this shareholder. Copy of the allotment letters issued by the assessee are found placed at Pages 1063 & 1064 of the Paperbook. Having regard to these facts, we therefore note that there was no fresh credit received by the assessee in the relevant AY 2017-18 from M/s Orchid Finlease Pvt. Ltd. It was a case where the unsecured loan has been converted into equity capital by way of journal entry.In absence of there being any fresh credit received during the relevant year, the provisions of Section 68 of the Act could not have been invoked or applied in AY 2017-18. For this, we find support in the decisions of the Hon'ble Calcutta High Court in the case of Jatia Investment & Company vs CIT (206 ITR 718) and Hon'ble Madhya Pradesh High Court in the case of VISP Pvt. Ltd. (265 ITR 202). We therefore hold that the Ld. CIT(A) had rightly held that no addition was warranted u/s 68 of the Act in relation to the conversion of loan into equity to the extent of Rs.1,75,54,848/- in AY 2017-18.

(iii). Even otherwise, it is noted that the explanation regarding source of source of funds to the extent of Rs.1,95,50,000/- was payments received from M/s Darkwell Dealers Pvt. Ltd. It is noted that the AO chose to believe this source of source to the extent of Rs.19,95,152/-and disbelieved sum of Rs.1,75,54,848/-.We find that no reasons were given by the AO for believing some sums and disbelieving some sums in relation to the same source of source of funds. Even the Ld. CIT, DR was unable to throw light on this

apparent irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the source of source to the extent of Rs.19,95,152/- paid by them, his action of not accepting the balance sum of Rs.1,75,54,848/- cannot be countenanced.

(iv) Perusal of alleged cash trail prepared by the AO in relation to M/s Orchid FinleasePvt Ltd, shows that it was the source of source of M/s Darkwell Dealers Pvt. Ltd. where cash deposits in the account of the payers to the extent of Rs.97,67,000/- were found. Hence, going by this chart, suspicion, if any, gets raised qua the source of source of M/s Darkwell Dealers Pvt. Ltd and not the assessee. There was no evidence whatsoever brought on record by the AO to show that the cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee or any evidence regarding nexus with the assessee. We thus find that this cash trail extracted by the AO in his order raises doubt but due to lack of any adverse material to connect the assessee with the proprietary concern, no adverse view can be taken against the assessee.

(v) For the reasons discussed in the foregoing, it is held that the assessee had discharged its onus of substantiating the identity, creditworthiness and genuineness of the transaction with M/s Orchid FinleasePvt Ltd. and also the source of source of funds.

(J) Shantidham Marketing Pvt. Ltd. (AY 2017-18 – Rs.32,94,00,000)

(i) We note from pages 1145-1266 of the paper book, the details of M/s. Shantidham Marketing Pvt. Ltd. are set out. It is observed that the AO had issued notice u/s 133(6) dated 27.11.2019 upon this shareholder requisitioning several details and inter alia requiring it to substantiate its source of funds out of which it paid the share application monies to the assessee. Perusal of their response reveals that the shareholder belongs to the UFM Group of companies (promoter of the assessee) and is engaged in the business of promoting and marketing of cement and trading of poly weave bags. The shareholder is a GST registered entity having PAN AAOCS2874F and CIN: U51909AS2010PTC012266, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 2(1), Kolkata. The shareholder had explained the

strategic business objective behind infusion of share capital into the assessee company, for the reason that it was in the last leg of completion and commissioning of its cement plant. It is noted that the investment was made at the fair market value computed in terms of Rule 11UA of the Rules. Copy of the valuation report is found placed at Pages 1255 to 1264 of the paperbook. Therefore, the justification regarding share premium stands fulfilled.

(ii) It is noted that during AY 2017-18, the assessee had received share application monies of Rs.55,62,50,814/- from M/s Shantidham Marketing Pvt Ltd. qua the application monies aggregating to Rs.22,68,50,814/-, the AO has accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of Rs.32,94,00,000/-. We find that no reasons were ascribed by the AO for believing some sums are correct and disbelieving some part of share transactions from the same shareholder, particularly when similar documentation in as much as even the explanation regarding source of source of funds were furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to AO's notice u/s 133(6) of the Act. The AO has instead made a bald assertion that some of the source of source of funds remained unexplained without giving any cogent basis or reasoning whatsoever. When confronted with this fact, even the Ld. CIT, DR was unable to explain this irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application of Rs.22,68,50,814/- paid by them, his action of not accepting the balance sum of Rs.32,94,00,000/-, is held to be un tenable/un-reasonable/irrational being arbitrary.

(iii) From the audited financial statements furnished, which are found placed at Pages 1180 to 1195 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.46,42,76,005/- as on 31-03-2017 which is sufficient to cover the cost of investments made by the shareholder during the relevant year. As regards the source of source of funds, it is noted that the

company had placed on record the copy of the bank statement for the relevant period at Page 1161 to 1179 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The details of source of source of funds received by the assessee were also provided by the shareholder, in the manner as prescribed in the notice u/s 133(6) of the Act, which is found placed at Page 1157 to 1160 & 1245 to 1254 of the Paper book. It is noted that the source of funds of the shareholder was primarily deposits from channel partners and/or sale of investment holdings, details of which along with name, PAN & address are found placed at Pages 1245 to 1254 of the paperbook.

(iv) Shri Dudhewewala pointed out that M/s Shantidham MarketingPvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the details of the directors of the shareholder, which is available at Page 1155 of the paper book, from which it is noted that Shri Vishal Jain, who is also the director of the assessee. Perusal of the statement of Shri Vishal Jain, which was recorded under oath by the AO on 28-11-2019, shows that the director had also affirmed the transactions between M/s Shantidham MarketingPvt Ltd and the assessee and nothing adverse came out from his statement. When enquired about the source of funds of the shareholders, the Director stated that the shareholder was engaged in the business of marketing of clinkers and cement in North Bengal, Bhutan and Nepal and that the names, addresses and PANs of the payers had been provided to the AO so that the AO can make enquiries from the respective source of sources. It is also noted that upon insistence of the AO, the Director collated and furnished various supporting documents viz. which includes invoices, bank statements as well as confirmations from the payers of the shareholders in support of source of source of funds under the cover of his letter dated 21.12.2019, which is found placed at Pages 1267 to 1507 of the paperbook. Having perused the same, we find that the assessee had furnished relevant evidences in support of the source of source of funds and that even the AO was unable to point out any defect nor any falsity or infirmity in the documents submitted before him.

(v) It is also noted that this shareholder was also subjected to income-tax scrutiny u/s 143(3) of the Act in AY 2017-18. Perusal of the assessment order, copy of which is at Pages 1265-1266 of paper book, shows that the AO of the shareholder did not draw any adverse inference regarding the source of investments made by the shareholder in the assessee company. In the circumstances when the source of funds of the investor had been accepted to be genuine by the AO of the investor, we hold that the AO, in the present case, was unjustified in holding that the source of source of funds remained unexplained. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

11.14 In light of the above, we now proceed to examine whether the decision of the Hon'ble Supreme Court in the case of **Pr.CIT v. NRA Iron & Steel (P) Ltd (412 ITR 161)** relied upon by the Ld. DR is apt in the facts and circumstances of the present case? For this, let us so examine the principles laid down by the Hon'ble Supreme Court in the case of **Pr.CIT v. NRA Iron & Steel (P) Ltd (supra)** and whether it is applicable to the present facts of the case or not. In the decided case, the assessee-company received share capital and premium of Rs.17.60 crores in all from nineteen parties (six from Mumbai, eleven from Kolkata and two from Guwahati). The shares had a face value of Rs.10/- and were subscribed by the investor-companies at a premium of Rs. 190 per share. The AO made the addition of Rs. 17.60 crores after carrying out various inquiries as under-

(i) To verify the veracity of the transactions, the notices were served on three investor-companies namely Clifton Securities Pvt. Ltd.-Mumbai, Lexus Infotech Ltd.-Mumbai, Nicco Securities Pvt. Ltd. Mumbai but no reply was received.

(ii) The address with respect to a company namely Real Gold Trading Co. Pvt. Ltd.-Mumbai was not correct.

(iii) The notice could not be served on two investor-companies, namely Hema Trading Co. Pvt. Ltd.-Mumbai, Eternity Multi Trade Pvt. Ltd.-Mumbai.

(iv) Submissions from nine companies were received (Neha Cassetes Pvt. Ltd.-Kolkata, Warner Multimedia Ltd. Kolkata, Gopikar Supply Pvt. Ltd. Kolkata, Gromore Fund Management Ltd. Kolkata, Bayanwala Brothers Pvt. Ltd. Kolkata, Shivlaxmi Export Ltd. Kolkata, NatrajVinimay Pvt. Ltd. Kolkata, Neelkanth Commodities Pvt. Ltd. Kolkata, Prominent Vyappar Pvt. Ltd. Kolkata), however, they had not given any reasons for paying such a huge premium.

(v)The details of share purchased and the amount of premium were not specified by certain companies, namely Super Finance Ltd. Kolkata, Ganga Builders Ltd. Kolkata. Furthermore, these companies had not enclosed the bank statement.

(vi) In addition to above, AO found that:

a. Out of the four companies at Mumbai, two companies were found to be non-existent at the address furnished.

b. With respect to the Kolkata companies, nobody appeared nor did they produce their bank statements to substantiate the alleged investments.

c. Guwahati companies - Ispat Sheet Ltd. and Novelty Traders Ltd., were found non-existent at the given address.

d. None of the investor-companies appeared before the A.O.

11.15 It was in light of the above conspectus of facts that it was held by the Hon'ble Apex Court, that the Assessee-Company failed to discharge the onus required under Section 68 of the Act. However in the case on hand, we find that, the assessee and all the shareholders had discharged the onus casted upon them under the provisions of Section 68 of the Act which has been elaborated in the preceding paragraph.

11.16 In our humble understanding therefore, we note that the decision in the case of NRA Iron & Steel (P.) Ltd. (supra) is based on facts. Hence, this judgment can be applied only on those cases having similar facts and circumstances and not other cases having different facts and circumstances. In this regard, we draw support and guidance from the judgment of Hon'ble Calcutta High court in the case of CIT v. Peerless General Finance & Investment Co. Ltd (282 ITR 209) wherein it was observed that, the binding nature of a decision is of two kinds - one is in relation to the facts and the other is in relation to the principles of law. A principle of law declared would be treated as precedent and binding on all. The finding of facts would bind only the parties to the decision itself and it is the ultimate decision that binds. Where facts are distinguishable, such as, in the present case, all the notices were served upon the shareholders, which were duly complied with, and the director of the shareholders was also personally examined who confirmed the transactions, hence the bonafide existence of the shareholders has been proved. They were regular Income-tax assessee and the shareholders long after investment, has been continued to be assessed by the Income Tax Department. The shareholders details & DIN of directors of are available on record which shows that the all investees are family-held group entities, share premium charged is support by valuation reports, adequate creditworthiness on the basis of assets, income streams etc. along with source of source of the funds for investment have also been substantiated, etc., therefore, the ratio laid down in the decision in NRA Iron & Steel (P.) Ltd. (supra) cannot be applied in the facts of the present appeal.

11.17 In this regard, we draw support and guidance form the judgment of Hon'ble Bombay High Court in case of Pr. CIT v. Ami Industries (India) (P.) Ltd. (424 ITR 219) where it was held as under:

> "17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that non-responding to notice would not ipso facto mean that the creditors had no credit worthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and credit-worthiness of the creditors were available, without any infirmity in such evidence and the explanation required under section 68 of the Act having been discharged, Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

19. In appeal, Tribunal noted that before the Assessing Officer, assessee had submitted the following documents of the three creditors:—

(a) PAN number of the companies;

(b)Copies of Income-tax return filed by these three companies for assessment year 2010-11;

(c)Confirmation Letter in respect of share application money paid by them; and

(d)Copy of Bank Statement through which cheques were issued.

20. Tribunal noted that Assessing Officer had referred the matter to the investigation wing of the department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the investigation wing was received, Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the investigation wing, it was mentioned that the companies were in existence and had filed income tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted credit worthiness of the three creditors. Finally, Tribunal held as under:—

"5.7 As per the provisions of Section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following-

(a) Identity of the creditor

(b)Genuineness of the transaction

(c)Credit-worthiness of the party

(i)In this case, the assessee has already proved the identity of the share applicant by furnishing their PAN, copy of IT return filed for asst. year 2010-11.

(ii)Regarding the genuineness of the transaction, assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and

the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii)Regarding credit-worthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their Board of Directors.

(iv)Regarding source of the source, Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, assessee need not to prove the source of the source.

(v)Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent company's own income from undisclosed sources.

Accordingly, no addition can be made u/s.68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In NRAIron& Steel (P.) Ltd. (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

23. Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and credit-worthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. Appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

24. Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost.”

11.18 We find similar facts and circumstances were involved before the Kolkata Bench of this Tribunal in the case of Baba Bhootnath Trade & Commerce Ltd in ITA No. 1914/Kol/2017 dated 1st April 2019. In the decided case the assessee had raised share subscription monies of Rs.2.04 crores. Complete details were furnished in the course of assessment. Notices u/s 133(6) & 131 of the Act were also complied with by the respective shareholders. The AO, however,in disregard of these materials, assessed the entire sum of Rs.2.04 crores by way of unexplained cash credit on the premise that the companies did not have any creditworthiness or business rationale to invest in the assessee company. On appeal before this Tribunal; the Revenue supported the order of the AO relying on the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd (supra).This Tribunal however noted that the judgment of the Hon'ble Supreme Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd (supra) was distinguishable on facts in as much as in that case, the AO after making extensive enquiries had found and established that most of the investor companies were non-existent and that some of the investor companies did not produce their bank statements which was imperative to prove the source of funds for making investments. On the facts of the decided case, this Tribunal notes that not only had the shareholders furnished all relevant documentary evidences, but even the details of source of monies were provided and both the enquiries u/s 133(6) & 131 of the Act were met by the shareholders. This Tribunal accordingly deleted the addition made u/s 68 of the Act. The relevant findings are as under:

> "6.17. Finally the ld DR placed reliance on the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd reported in 103 taxmann.com 48 (SC) wherein the decision on addition made towards cash credit was rendered in favour of the revenue. We have gone through the said judgement and we find in that case, the ldAO had made extensive enquiries and from that he had found that some of the investor companies were non-existent which is not the case before us. Certain investor companies did not produce their bank statements proving the source for making investments in assessee company, which is not the case before us. Source of funds were never established by the investor companies in the case before the Hon'ble Apex Court, whereas in the instant case, the entire details of source of source were duly furnished by all the respective share subscribing companies before the ld AO in response to summons u/s 131 of the Act by complying with the personal appearance of directors. Hence the decision relied upon by the ld DR is factually distinguishable and does not advance the case of the revenue."

11.19 Gainful reference may also made to the following findings of this Tribunal in the case of M/S. Blue Lotus Designers Pvt. Ltd. vs ITO in ITA No.941/Kol/2017 which involved somewhat similar facts as involved in the present case.

> "5. Learned departmental representative at this stage quoted hon'ble apex court's decision in PCIT vs. NRA Iron & Steel Pvt. Ltd. in Civil Appeal No. 2463 of 2019 dated 05.03.2019 restoring such unexplained cash credits addition in the nature of the share capital / premium invoking accommodation entry providers. We note that their lordships had come across an instance of the concerned assessee having failed to satisfy the above stated three parameters (supra) whereas the facts in the instant case sufficiently reveal that this taxpayer had duly discharged its onus and also responded to section 131 summons. We therefore reject the Revenue's arguments supporting lower authorities' action and delete the impugned un-explained cash credits addition of 2,01,50,000/-. The assessee succeeds in its sole substantive grievance."

11.20 For the reasons as aforesaid and on the given facts of the case, we thus hold that the assessee had discharged the burden casted upon it under Section 68 of the Act and it had also substantiated the source of source of funds of the share application received in all the years. Hence, the averments made by the AO in this regard, in the orders impugned before us, are found to be untenable.

11.21 It is further noted that, to support the additions made u/s 68 in relation to share application monies received from M/s Captain Steel Trading Pvt. Ltd., M/s Consistent Construction Pvt. Ltd., M/s Prefer Infrastructure Pvt. Ltd, M/s Remote Marketing Pvt. Ltd., M/s Southern Resources and Holdings Pvt. Ltd. &M/s Transparent Tie up Pvt. Ltd., the AO had relied on the statements dated 13-12-2017&06-05-2018 of alleged entry operator, Shri S.K. Agarwal. According to the AO, he had admitted to being engaged in the business of providing accommodation entries to various beneficiaries inter alia including the assessee. This according to AO further substantiated the addition made by him u/s 68 of the Act. On appeal, the Ld. CIT(A) discarded the AO's reliance on these statements since he had denied the assessee the opportunity to cross examine them.

11.22 After careful analysis of the documents placed before us and after examining the statements of the so-called entry operator, which the AO had selectively extracted in the assessment order, we find that the adverse view taken by the AO bereft of any merit because, our examination of statements showed nowhere had he admitted of receiving any

unaccounted cash from the assessee and in lieu thereof the cheques were issued. However, certain facts brought to our notice, which we will discuss infra, will show that his statement cannot be relied upon.It was brought to our notice that the so-called entry operator was not even a shareholder or director in any of these share applicant companies. In the statement dated 06-05-2018, Shri Agarwal had allegedly named eight (8) shareholders of the assessee company. We find that out of the eight (8) shareholders, the AO himself has accepted three (3) shareholders as genuine namely, M/s Abhinandan Complex Pvt Ltd, M/s Improve TradecomPvt Ltd and M/s Sanket Sales Pvt Ltd to be genuine bodies corporate and also accepted the share application monies received by the assessee from these three bodies corporate. Hence, we wonder as to how the AO himself believed some shareholders against whom Shri Agarwal made statement and how the AO drew adverse inference against few others on the strength of statement of Shri Agarwal. No cogent reason has been given by AO for his action of finding fault with/cherry picking of some share holders on the strength of same statement. Moreover, in the answer given by Shri Agarwal in the statement dated 06-05-2018, he names Mayur Ply Group to be the beneficiary of the accommodation entries and not the assessee. Accordingly, for the reasons aforesaid, this statement of Shri Agarwal does not inspire confidence to take a view against the shareholders company in the light of the documentary evidence and for the reasons stated infra.

11.23 Coming to the selective extracts of the statement dated 13-12-2017, it is noted that the AO himself has observed that Mr. Agarwal in this statement had stated on oath that Gangwal Group had made investments through his entities and not the assessee. Further, in this statement, Shri Agarwal allegedly names two (2) shareholders of the assessee company viz., M/s DhawanVinimayPvt Ltd, in which he himself was a Director, and M/s Transparent Tie Up Pvt Ltd in which Mr. Ritesh More was a Director. It is surprising to note that, having regard to this averment, the AO accepted M/s DhawanVinimayPvt Ltd, to be a genuine body corporate and did not make any addition in relation thereto but disbelieved the genuineness of the transaction withM/s Transparent Tie Up Pvt. Ltd. in which admittedly Mr. Agarwal was neither a director nor a shareholder. These facts considered cumulatively render the AO's act of relying on these statements to be factually perverse.

11.24 We also note that although the statements of the entry operator were used in evidence, the AO had never personally examined him to verify the correctness of the facts nor did he afford the assessee an opportunity to cross examine him. Shri Dudhewewala took us through the statement of the Director of the assessee recorded under oath before the AO on 28-11-2019 and showed that even when the Director had personally appeared before the AO, he was never confronted with these statements nor was he afforded any opportunity to cross examine Shri Agarwal. It is also noted that the assessee in their response to the SCN had sought cross-examination of Shri Agarwal, whose statements the AO was choosing to rely upon. The AO however at Para 18 of his order rejected this plea holding it to be a peripheral issue. This act of the AO, denying the assessee an opportunity to cross examine Shri Agarwal was a serious infirmity which rendered the addition/s made by the AO, by relying on such statements collected at the back of the assessee, to be null and void. In this regard, we refer to the following findings recorded by the Hon'ble Apex Court in the case of **Andaman Timber Industries Ltd vs Commissioner of Central Excise in Civil Appeal No. 4228 of 2006** reported in **(2015) 62 Taxman 3 (SC)**,which reads as under:

> "According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected."

11.25 The AO was both under obligation and duty to bring on record the true and correct facts because while discharging the duties as an Assessing Officer, he was expected to function both as an investigator and adjudicator. In his role as an investigator, he was under obligation to investigate fully and truly the relevant facts; and as an adjudicator he was required to be fair, just and to ensure that the principles of natural justice are implemented by granting opportunity of examining/furnishing, the adverse material/evidence gathered by him to the affected party and facilitate an opportunity to cross examine the maker of the adverse oral testimony. Unless the oral evidence is tested on the touch-stone of cross-examination, the veracity of the evidence cannot be believed and it cannot be acted upon to the disadvantage of assessee. Failure of AO to give opportunity to the assessee to cross examine renders his reliance on the statement of Shri Aggarwal a nullity, as held by Hon'ble

Supreme Court in Andaman Timber (supra). We thus note that before passing the assessment order, the AO failed to perform his twin duties, that of the investigator and adjudicator, resulting in the addition/s being vitiated in law.

11.26 We may in this regard, gainfully refer to the decision of Hon'ble Apex Court in the case of CIT Vs Odeon Builders Pvt Ltd reported in 418 ITR 315 involving similar facts as involved in the present case. In the decided case, the Revenue had disallowed the purchases made by the assessee holding it to be bogus based on statement given by a third party. On appeal, the Ld. CIT(A) noted that on one hand the assessee had discharged its initial burden of substantiating the purchases by producing all relevant documentary evidences which it was ordinarily required to maintain in the regular course of business, whereas on the other hand, the Revenue had denied the opportunity of cross examination to the appellant. The Ld. CIT(A) therefore held the purchases to be acceptable and deleted the disallowance made by the AO. On the self-same reasoning this Tribunal and later on the Hon'ble High Court also dismissed the appeal of the Revenue. On further appeal, the Hon'ble Supreme Court also concurred with the findings of the Ld. CIT(A) and did not find any infirmity in the orders passed by the lower appellate authorities and accordingly dismissed the appeal of the Revenue. The relevant portion of the judgment of the Hon'ble Supreme Court reads as under:

> "3. However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs. 19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating:
>
> "Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs. 19,39,60,866/-, is directed to be deleted."

> 4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT."

11.27 It is by now a settled proposition of law that where in the revenue proceedings any inference is drawn against the assessee on the basis of statements of any third person then such inference is legally unsustainable if opportunity of cross examining the Departmental Witness is not granted to the affected person. In this regard, we may make useful reference to the decision of the Hon'ble Bombay High Court in the case of CIT Vs Reliance Industries Ltd (102 taxmann.com 372). In this case the assessee had claimed deduction for consultancy charges paid to one S, a Consultant. On the basis of statement recorded from S. in the course of search conducted u/s 132, the AO held that S did not render any service to the assessee and therefore the deduction claimed for consultancy charges paid was not allowable. The Tribunal held that the disallowance; based solely relying on the statement of S, recorded in the course of search without there being any independent material; was not justified. On appeal by the revenue the Hon'ble Bombay High Court upheld the order of the Tribunal. In this judgment, it was thus in principle held that unless & until there is a corroborative evidence or material to substantiate the statement of a third party, it is not open for the Tax Authorities to draw conclusions against the assessee solely based on the statement recorded in the course of search. The relevant findings of the Hon'ble High Court are as follows:

> "Question Nos.1 and 2 are elements of the same issue and relate to the addition of Rs. 3.39 crores (rounded off) made by the Assessing Officer by disallowing expenditure of the said sum incurred by the respondent-assessee in form of payments to one Shri S.K. Gupta. The Assessing Officer on the basis of statement of said Shri Gupta recorded during search operations held that the said person had not rendered any service to the assessee-company so as to receive such payments. CIT (Appeals) however deleted the addition inter-alia on the grounds that Shri S.K.Gupta had retracted the statement recorded during search, that the assessee-company had pointed out range of services provided by Shri Gupta and that the Assessing Officer had no other material to disallow the expenditure. The Tribunal in further appeal by the revenue confirmed the view of the CIT (Appeals) independently coming to the conclusion that the Assessing Officer was not justified in making the addition. It was noted that Shri Gupta retracted his statements within a short time by filing an affidavit. Subsequently, his further statement was recorded in which he also reiterated the stand taken in affidavit. The Tribunal

also referred to the decision in case of the Dy. CIT v. Link Engineers (P.) Ltd. [IT Appeal No. 968 & 2248 (Delhi) of 2011] in whose case also a similar issue of genuineness of payment to Shri S.K. Gupta had come up for consideration. The Tribunal noted that in such a case also the Tribunal had held in favour of the assessee.

3. Having heard learned counsel for the parties and having perused documents on record, we notice that the entire issue is based on the appreciation of materials on record. CIT (Appeals) and the Tribunal concurrently held that there was sufficient evidence justifying the payment to Shri S.K.Gupta, a Consultant and that the Assessing Officer other than relying upon the retracted statements of Shri Gupta recorded in search, had no independent material to make the additions. No question of law arises.*"*

11.28 Similar view was expressed by the Hon'ble Gujarat High Court in the case of CIT Vs Kanti Bhai Ravidas Patel (42 taxmann.com 128), wherein it was observed as follows:

"5. We have heard rival contentions and gone through the material on record. Ld. A.O. has used third party statement of Vikas A. Shah in framing the assessment. The statement of Shri Vikas A. Shah recorded under Section 131(1A) not under Section 132 of the IT Act on 14/03/2005 and 19/04/2005. The ld. A.O. had used this statement without allowing cross examination of Vikas A. Shah which is against the principle of natural justice. This land had registered document and the value has been accepted as to correct by registering authority to the charge of stamp duty. There was no material or evidence that any on money was paid by the appellant on the transaction. Ld. A.O. had not referred this land to the DVO for determining the market value on date of registration. The statement given by Vikas A. Shah was self service statement without any supporting evidence. There was no search carried out on the appellant. The seized papers were found in the possession of Shri Vikas A. Shah. The third person evidence cannot be base for addition on the basis of any entries therein. The ld. CIT(A) had also considered following decisions.

I. Prathana Construction (P.) Ltd. v. Dy. CIT [2001] 70 TTJ 122 (Ahd.)

II. Asstt. CIT v. Prabhat Oil Mills [1995] 52 TTJ 533 (Ahd.)

III. Jindal Stainless Ltd. v. Asstt CIT [2009] 120 ITD 301 (Delhi)

After considering all the facts and legal position of this issue, we do not find any reason to intervene in the order of the CIT(A). Accordingly, we uphold the order of the CIT(A)."
6. It is required to be noted that the order passed by the ITAT in the case of the co-purchaser-Abhalbhai Arjanbhai Jadeja was further carried before this Court by way of Tax Appeal No. 233/2013 and other allied appeals and it is reported that vide order dated 03/04/2013, the Division Bench of this Court has dismissed the said appeal confirming the order of deletion of similar addition in the case of Abhalbhai Arjanbhai Jadeja-co- purchaser.
7. In view of the above, when in the case of the co-purchaser, similar addition came to be deleted by the CIT(A), which came to be confirmed up to this Court, it cannot be said that the tribunal1 has committed any error in dismissing the appeal preferred by the revenue and consequently confirming the order passed by the CIT(A) deleting the addition of Rs.92,00,000/- made on account of unaccounted investment. No question of law, much less substantial question

of law arises in the present Tax Appeal. Hence, the present Tax Appeal deserves to be dismissed and is accordingly dismissed."

11.29 We also rely on the following observations of the Hon'ble Rajasthan High Court in the case of CIT Vs A L Lalpuria Construction Pvt. Ltd (32 taxmann.com 384);

"2. The revenue has preferred instant appeals U/s 260A of Income Tax Act,1961 ("Act, 1961") assailing judgment of the Tribunal dt.31.03.2010 affirming order of Commissioner (Appeals) dt. 05.03.2008, with modification that on the statement of KripaShanker Sharma, the income of Rs. 5 Lacs was assessed in the hands of assessee and it was observed by the Tribunal that the statement of KripaShanker Sharma was never confronted and no documentary evidence was supplied to the assessee, in absence whereof the income in the hands of the assessee on the basis of statement of KripaShanker Sharma deserves deletion.

3. The assessee as alleged carried out construction activities and disclosed income from sub-contract and investment in building construction. After the search U/s 132 of the Act,1961 was carried out on 12.04.2005 in the case of another assessee M/s. B.C. Purohit& Company at Jaipur & Kolkata, evidence was gathered and from the investigation it revealed that in the garb of tax consultation the owners and employees of this group were running the racket of providing accommodation entries of gifts, loans, share application money, share investment and long term capital gains in shares. It will be relevant to record that the present assessee might have been in consultation with M/s. B.C. Purohit& Company and a member of the group and has drawn inference regarding providing accommodation entries and the assessing officer was of the view that details made available by the assessee as regards unsecured loans and share application money, reference of which has been made in para-4 of its order, appears to be the accommodation entries and the present assessee was middle man and invoking Sec.68 of the Act, it was considered to be part of the income in the hands of the assessee. However, on appeal preferred before the Commissioner (Appeals) by the assessee U/s 143(3) r/w 147 of the Act, 1961 all the factual statements were examined at length and the Commissioner (Appeals), after due appreciation of material which came on record, observed that from independent enquiry the copies of bank account were obtained by the assessing officer and found that for clearing of the cheques issued by these companies either cash was deposited in the same account or in another account of the group company in fact was M/s. B.C. Purohit of which the present assessee was considered to be one of the group member. However, it was further observed that summons issued U/s 131 of the Act were served upon all such applicant/ creditors and their confirmation letters were filed and the companies were assessed to tax being the private limited companies, the existence of their separate legal entity ordinarily could not have been doubted. However on the basis of statement of KripaShanker Sharma which was recorded by the search authorities as regards accommodation entries, a sum of Rs.5 Lacs was assessed in the hands of present assessee alone and as regards other income, it was not considered to be in the hands of the present assessee. Obviously the department being aggrieved preferred appeal before the Tribunal and at the same time, the present assessee filed cross objection regarding part of the income, to the extent of a sum of Rs.5 Lacs, as being recorded in the hands of present assessee on the basis of statement of KripaShanker Sharma. The Tribunal while appreciating the factual matrix came on record observed that after the summons were issued U/s 131 of the Act,1961 to

the applicant/creditors and their confirmation letters were filed and the companies were assessed to tax being private limited companies the existence of their separate legal entity ordinarily could not have been challenged more so when the identity of existence of the investor is not disputed and accordingly upheld the view of Commissioner (Appeals), at the same time further observed that merely on the basis of oral statement of KripaShanker Sharma recorded before the search authorities that the assessee provided accommodation entries was not sufficient for the income to be assessed for a sum of Rs.5 Lacs in the hands of the assessee and while allowing the cross objection filed by the assessee dismissed the appeal preferred by the revenue under order impugned.

4. We have heard the parties at length and of the view that what has been observed by the Commissioner (Appeals) & the Tribunal appears to be based on factual matrix and there appears no substantial question of law arises which may require interference by this Court to be examined in the instant appeal.

5. Consequently, the instant appeals are wholly devoid of merit and accordingly stand dismissed."

11.30 In view of the above judicial precedents (supra), we are of the considered view that the AO's failure to personally examine the witness and his denial to allow the assessee opportunity to cross examine the Departmental witness on whose statements he was relying upon was a serious & fundamental flaw which resulted in the additions made u/s 68 of the Act to be a nullity as held by the Hon'ble Supreme Court in Andaman Timber (supra).

11.31 For the elaborate reasons as discussed in the foregoing, we therefore hold that the all additions made u/s 68 of the Act in AYs 2011-12 to 2015-16 & 2017-18 were untenable both on facts as well as in law and was therefore rightly deleted by the Ld. CIT(A). Accordingly these grounds of the Revenue stand dismissed.

12. Now we take up the Question (E)

(E) Whether the AO had rightly computed interest u/s 234A of the Act ?

Ground No. 3 of Assessee's Cross Objections for AY 2011-12

Ground No. 2 of Assessee's Cross Objections for AY 2012-13

Ground No. 2 of Assessee's Cross Objections for AY 2013-14

Ground No. 2 of Assessee's Cross Objections for AY 2014-15

Ground No. 2 of Assessee's Cross Objections for AY 2015-16

Ground No. 5 of Assessee's Cross Objections for AY 2017-18

12.1 This ground taken in the Cross Objections relates to levy of interest u/s 234A of the Act. According to Ld. AR Shri Dudhwewala, the AO had grossly erred in levying interest u/s 234A of the Act with reference to the original due date of filing of return of income u/s 139(1) of the Act as opposed to the due date in terms of notice u/s 153A of the Act. We note that the dates of issuance of notices u/s 153A and filing of return of income in response thereto were as follows:

Asst Year	Notice u/s 153A	Filing of ROI
2011-12	11.09.2019	15.11.2019
2012-13	11.09.2019	11.10.2019
2013-14	11.09.2019	11.10.2019
2014-15	11.09.2019	17.10.2019
2015-16	11.09.2019	11.10.2019
2016-17	11.09.2019	11.10.2019

12.2 Under Sub Section (3) of Section 234A of the Act, an assessee is required to pay interest under Section 234A only when the return of income is filed after the expiry of the time limit set out in notice issued under Section 153A of the Act and even in such circumstance the interest is levied only for the period commencing on the day following the expiry of the time prescribed in notice under Section 153A of the Act upto the date of filing of return of income. We find that the AO had wrongly taken the due date of filing of return in response to the notices issued under Section 153A of the Act dated 11.09.2019 to be the original due date u/s 139 of the Act i.e. 30.09.2011 for AY 2011-12, 30.09.2012 for AY 2012-13 and so on, rather than the day following the expiry of the time limit prescribed in notice under Section 153A of the Act, resulting in erroneous and excessive levy of interest u/s 234A of the Act. The AO is accordingly directed to re-compute the levy of interest u/s 234A of the Act in terms of sub-section (3) of Section 234A of the Act i.e. from the date on which the time limit for filing of return of income in response to notices u/s 153A of the Act dated 11.09.2019 had expired. This ground therefore stands allowed for statistical purposes

13. Question (F) i.e. Ground No. 2 of the assessee's Cross Objection for AY 2017-18 was not pressed at the time of hearing and therefore the same is hereby dismissed.

14. Having regard to our above findings deleting the addition of Rs.34,69,54,848/- made u/s 68 of the Act in AY 2017-18, Questions (G) & (H) i.e. Ground Nos. 3 & 4 of assessee's Cross Objection for AY 2017-18 has become academic in nature and is therefore dismissed as infructuous.

15. Question (H) i.e. Ground No. 6 of the Cross Objections relates to adjustment of seized cash of Rs.61,73,000/- by way of self-assessment tax in the hands of the assessee in AY 2017-18. The Ld. AR Shri Dudhwewala brought to our notice that the assessee had filed a petition dated 28-02-2020 before the AO requesting him to adjust this seized cash of Rs.61,73,000/- against their tax liability for AY 2017-18. Having regard to the provisions of Section 132B(iii) of the Act, the AO is accordingly directed to grant the credit of seized cash by way of self-assessment tax in accordance with law. This ground therefore stands allowed for statistical purposes.

16. In the result the appeals of the Revenue in ITA Nos. 126-131/Gau/2020stands dismissed and the cross objections of the assessee in CO Nos. 03 to 08/Gau/2020 stands partly allowed.

Order is pronounced in the open court on 10th December, 2021

Sd/-	Sd/-
(P. M. Jagtap)	(Aby. T. Varkey)
Vice President	Judicial Member

Dated: 10.12.2021

JD(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ACIT, Circle-1, Guwahati.

2 Respondent – M/s. Goldstone Cements Ltd., Vill/ Musiang Lamare (Old) Khliehriat, East Jayantia Hills, Meghalaya-793200

3. CIT(A), Guwahati-2, Guwahati .

4. CIT-

5. DR, ITAT, Guwahati

/True Copy, By order,

Senior Pvt. Secy.