

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 83 OF 2016
ALONGWITH
INCOME TAX APPEAL NO. 84 OF 2016
ALONGWITH
INCOME TAX APPEAL NO. 85 OF 2016
ALONWITH
INCOME TAX APPEAL NO. 463 OF 2016
ALONGWITH
INCOME TAX APPEAL NO. 465 OF 2016

The Principal Commissioner of
Income Tax (Central)-4 Appellant
V/s.
M/s. Acquatic Remedies Pvt. Ltd. Respondent

* * * *

Mr. N.C. Mohanty, Advocate for the appellant.

Mr. F.V. Irani a/w. Mr. Atul Jasani, Advocate for the
respondent.

CORAM :- M.S. SANKLECHA, &
 SANDEEP K. SHINDE, JJ.

DATE : 30TH JULY, 2018.

P.C. :-

1. These Appeals under Section 260A of the
Income Tax Act, 1961 (the Act), challenge the common
impugned order dated 17th April, 2015 passed by the
Income Tax Appellate Tribunal (the Tribunal). The

common impugned order relate to Assessment Years 2005-06 to 2011-12. These five appeals are in respect of Assessment Years 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10.

2. The Revenue has urged the following identical questions of law in all these five Appeals, for our consideration:

(A). *Whether, on the facts and in the circumstances of the case and in law, the Tribunal is justified in deleting the addition made under Section 68 of the Act, without appreciating the fact that the assessee had failed to discharge its onus in terms of Section 68 of the Act by not furnishing evidence to substantiate the genuineness of the transaction, identity and creditworthiness of the shareholders/investors ?*

(B) *Whether, on the facts and in the circumstances of the case and in law, the Tribunal has erred in deleting the addition of 5% of cash purchases as profit by way of*

discount, without appreciating the fact that the assessee had failed to furnish supporting evidence to prove the identity of the party and genuineness of such purchases ?

(C) Whether, on the facts and in the circumstances of the case and in law, the Tribunal has erred in deleting the addition of 2% as unexplained expenses by way of commission/service charges paid for arranging accommodation bills ?

Brief Facts :

3. On 1st September, 2009 a survey was conducted on M/s. Globe Pharma by the Investigation Wing of the appellant-Revenue. During the course of the survey, it was found that M/s. Globe Pharma was issuing bogus accommodation bills to various concerns including the respondent-assessee and its sister companies. Consequently, on 9th September, 2010 a search operation was conducted on the premises of the respondent and its sister companies.

4. Consequent to the above, notice under Section 153B of the Act was issued to the respondent for Assessment Years 2005-06 to 2009-10. Thereafter, assessment orders dated 30th March, 2013 were passed under Section 153(3) read with 153A of the Act by the Assessing Officer for Assessment Years 2005-06 to 2009-10 making additions under the following heads :-

- (a) on account of introduction of share capital as unexplained cash credit under Section 68 of the Act ;
- (b) on account of bogus purchases;
- (c) on account of commission paid at 2% for accommodation bills ; and
- (d) on account of cash discount at 5% on cash purchases.

5. Being aggrieved, the respondent filed appeals before the Commissioner of Income-Tax (CIT (A)) from the assessment orders dated 30th March, 2013 for the

subject assessment years. In Appeal, the CIT(A) for subject Assessment Years confirmed the addition on account of unexplained cash credit under Section 68 of the Act relating to introduction of share capital. However, the CIT (A) by common order dated 19th September, 2014 partly allowed the Appeal to the extent of deleting commission of 2% in respect of the share capital and on account of 5% discount on purchases in respect of share capital. This, while upholding the assessment orders dated 30th March, 2013 under Section 68 of the Act.

6. Being aggrieved, both the Revenue, as well as, the respondent-assessee filed Appeals to the Tribunal. The respondent challenged the impugned order of the CIT(A) to the extent, it upheld the addition under Section 68 of the Act on account of share capital and in respect of part confirmation on account of commission and cash discount. The Revenue challenged the order of the CIT (A) on account of part

deletion on account of commission and cash discount in respect of share capital. The Tribunal, by the impugned order dated 17th April, 2015 allowed the Appeal of the respondent on issue of cash credit and also in respect of commission and cash discount as held by the CIT (A) while dismissing the Revenue's Appeal.

7. The appellant-Revenue is in appeal before us from the order dated 17th April, 2015 of the Tribunal for the Assessment Years 2005-06 to 2009-10.

8. **Regarding Question (A) :**

(a). Mr. Mohanty, Learned Counsel appearing for the Revenue challenges the order dated 17th April, 2015 of the Tribunal on this issue on the following grounds :

(i) that the identity and creditworthiness of the shareholders is not established; and

(ii) the genuineness of the transaction not being established, the Tribunal ought not to have allowed the respondent-assessee's

appeals for the Assessment Years 2005-06 to 2009-10.

(b). So far as the identity is concerned, we find that the persons who invested in the shares of the respondent-assessee had PAN numbers allotted to them which was made available by the respondent to the Assessing Officer. Besides, the shareholders had also filed Affidavits before the Assessing Officer pointing out that they had invested in the shares of the respondent-assessee out of their own bank accounts. Copies of acknowledgement of Return of Income of the shareholders was also filed. The respondent also requested the Assessing Officer to summon the shareholders. These evidences have not been shown to be incorrect. Therefore, this objection with regard to identity of the shareholders not being established does not survive.

(c) So far as, the creditworthiness of the

investors is concerned, Mr. Mohanty seeks to rely upon the decision of the Delhi High Court in the case of **Commissioner of Income-Tax Vs. Nipun Builders & Developers Pvt. Ltd. 350 ITR 407**. This, in support of his submission that the source of the funds of the shareholder-investor in the respondent-assessee's company was not considered by the Tribunal. Thus, where the creditworthiness of the investor is not established by finding out the source of the source, the deletion of cash credit was not justified. We are concerned in these Appeals with Assessment Years prior to Assessment Year 2013-14. It was only with effect from 1st April, 2013 i.e. from the Assessment Year 2013-14 that a proviso was added to Section 68 of the Act which required the person investing in shares of any Company to satisfy, if required by the Assessing Officer, the source of the funds which enabled the investments in shares. Infact, our Court in **Commissioner of Income Tax-1 V/s. M/s. Gagandeep Infrastructure Pvt. Ltd.** (Income Tax Appeal No. 1613

of 2014) rendered on 20th March, 2017 and in **The Pr. Commissioner of Income Tax-5 V/S. M/s. SDB Estate Pvt. Ltd.** (Income Tax Appeal No. 1356 of 2015) rendered on 27th March, 2018 has held that the requirement to explain the source of the source of the funds in respect of the investment as shareholders in which the public are not substantially interested as share application money is only prospective as it is introduced w.e.f. 1st April, 2013. The Delhi High Court in the case of *Nipun Builders and Developers* (supra), held the creditworthiness of the shareholder was not accepted, as the source of the funds of the shareholder was not explained. This was for a period prior to Assessment Year 2013-14 and the subsequent introduction of the proviso to Section 68 of the Act was not considered by the Delhi High Court. We are bound by the decisions of this Court in *Gagandeep Infrastructure Pvt. Ltd.* (supra). Besides, before the Delhi High Court in *Nipun Builders and Developers* (supra), the identity of the shareholders was not established as the summons sent were

returned with a remark 'no such company" and the same was confirmed by the Inspector of the Income-Tax Department. No PAN of the shareholder was also submitted before the Assessing Officer. It was in the above context, that the Delhi High Court decision was rendered. Thus, completely different facts from the present case, where even affidavits of the shareholders were filed who on oath stated that the investment in the respondents was made from their Bank Accounts. Thus, the initial burden was discharged by the respondent in respect of creditworthiness of the investor and nothing has been shown by the Revenue to doubt the same and/or steps taken and result thereof. Thus, this objection of lack of creditworthiness of the shareholder also does not survive.

(d). So far as the genuineness of the investment by the shareholders is concerned, Mr. Mohanty placed reliance upon the statement dated 9th September, 2010 of Kamlesh Jain who was an employee, as well as, the

shareholder of the respondent-assessee and on the fact that during the course of the search, certain blank transfer forms were found in the possession of the respondent-assessee. Besides, it is submitted that the shares were supposed to be finally transferred to the family members of the Directors of the respondent assessee company at a discounted price. We note that, the impugned order of the Tribunal records the fact that copies of the share application form, share allotment Register and Bank Statements showing receipt of funds were on record. Moreover, all the shareholders had filed Affidavits declaring the fact that they are investing in the respondent-Company by issuing of cheques from their Accounts. As pointed earlier, the PAN details of the shareholders was also submitted to the Assessing Officer. Moreover, the statement of Kamlesh Jain dated 9th September, 2010 relied upon by the Revenue in terms, deals with his investment in a group company viz. Aqua Formations (P) Ltd and not with the investment made in respondent-assessee Company.

Infact, the statement very categorically states that, he did not intend to purchase any shares of Aqua Formulations (P) Ltd. but no such declaration is made in respect of the investment made by him in the respondent-assessee Company. The statement dated 9th September, 2010 made by Kamlesh Jain does not in any manner, state that the investment made in the respondent-assessee Company was an investment which he did not want to make. So far as the shares allegedly/supposedly being taken by the members of the family of the Director of the respondent is concerned, the statement made by Mr. Jain dated 9th September, 2010 is not with regard to the respondent, Company but in respect of its sister company. Thus, there is no conclusive evidence in support of the above submission in the context of the respondent. In any case, this would not necessarily lead to a conclusion that the original investment made by the shareholder in the respondent-assessee was not genuine. This, at the highest, may give rise to suspicion but it does not prove

that the investment made originally in the respondent- assessee's Company was not genuine. Thus, not in the nature of cash credit as alleged by the Revenue.

(e). In fact, the impugned order of the Tribunal, on examination of facts, has come to the conclusion that the investment made by the shareholders is not hit by Section 68 of the Act. It records, that the entire basis of the Revenue's case is based on surmise that the respondent was taking bogus purchase bills and cash was introduced in the form of share capital without any evidence in support. Therefore, the view taken by the impugned order of the Tribunal on facts is a possible view.

(f). Thus, this Question as proposed does not give rise to substantial question of law. Thus, not entertained.

9. **Regarding Question no.(B) :**

(a). The contention of the Revenue is that, when purchases have been made in cash, the respondent would have necessarily received a discount on the price from the seller of the goods. According to Mr. Mohanty for the Revenue, cash purchases from the grey market would necessarily be at a discount.

(b). The above submission on behalf of the appellant-Revenue is not supported by any material on record. It proceeds, as held by the impugned order of the Tribunal, purely on the basis of surmise that the cash purchases would necessarily involve a discount which has been offered to and availed of, by the respondent-assessee. This submission is not backed by any cogent or demonstrative evidence.

(c). In the above circumstances, the view taken by the Tribunal on this issue is an entirely possible view on the facts and calls for no interference.

(d). Thus, this question, as proposed also does not give rise to any substantial question of law. Thus, not entertained.

10. Regarding Question No.(C) :

(a). The Assessing Officer had made an addition on account of commission paid at 2% for obtaining accommodation bills treating the same as unexplained expenditure. The accommodation entries, according to the Assessing Officer were taken to enable showing bogus purchases and use the cash to make investment through dummy shareholders.

(b) However, before us, there is no challenge to the impugned order of the Tribunal holding that the additions on account of bogus purchases is not sustainable. In such a case, there is no reason why the 2% commission would have been allegedly paid on accommodation bills. Thus, there is no unexplained expenditure as even according to the Revenue, before

us, there are no bogus purchases.

(c). Thus, the view taken by the Tribunal in the present facts is a possible view and therefore this Question does not give rise to any substantial question of law. Thus, not entertained.

11. Accordingly, all five Appeals are dismissed.

No order as to costs.

(SANDEEP K. SHINDE, J)

(M.S. SANKLECHA, J)

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

सर्वश्री नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य एवं अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER AND

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं/ I.T.A. No. 6356/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2005-06

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	बनाम/ Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 305/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2005-06

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	बनाम/ Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 6357/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2006-07

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	बनाम/ Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 306/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2006-07

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	बनाम/ Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza,
--	---------------------	---

		Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
--	--	---

आयकर अपील सं/ I.T.A. No. 6358/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2007-08)

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	<u>बनाम/</u> Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 307/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2007-08)

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	<u>बनाम/</u> Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 6359/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2008-09)

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	<u>बनाम/</u> Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 308/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2008-09)

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	<u>बनाम/</u> Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 6360/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2009-10)

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	<u>बनाम/</u> Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No.309/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2009-10)

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	<u>बनाम/</u> Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 6361/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2010-11)

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	<u>बनाम/</u> Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 310/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2010-11)

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	<u>बनाम/</u> Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 6362/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2011-12)

M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075	<u>बनाम/</u> Vs.	The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020
--	---------------------	--

आयकर अपील सं/ I.T.A. No. 311/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2011-12

The DCIT, Cent Cir. 8(2), Aayakar Bhavan, Mumbai-400 020	बनाम/ Vs.	M/s. Aquatic Remedies Pvt. Ltd., 218/219, Kailash Plaza, Vallabaug Lane, Ghatkopar (E), Mumbai-400 075
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCA 3876G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri Kishan Vyas
प्रत्यर्थी की ओर से/Respondent by:		Shri Rajiv Khandelwal Shri Neelkanth Khandelwal

सुनवाई की तारीख / Date of Hearing :01.04.2015

घोषणा की तारीख /Date of Pronouncement :17.04.2015

आदेश / O R D E R

PER BENCH:

ITA Nos. 6356 to 6362/M/2014 and ITA Nos. 305 to 311/M/2015 are cross appeals by the assessee and the Revenue for Assessment years 2005-06 to 2011-12. This bunch of appeals were heard together and are disposed of by this common order for the sake of convenience.

2. Before going into the grievance of the rival parties, it would be pertinent to understand the facts of the case first.

3. A survey was conducted at the office premises of M/s. Globe Pharma on 1.09,2009 by the Investigation wing of the Income tax department. During the course of survey proceedings, it came to the

notice of the Investigating Officer that M/s. Globe Pharma was issuing bogus accommodation bills to various concerns and the assessee in question alongwith its sister company was one of the beneficiaries of the accommodation bills. A search operation was conducted on 09.09.2010 in the business premises of the assessee and its sister concerns. The operation also covered the residence of the directors. Consequent to the search, the total additional income disclosed by the Directors of the assessee companies was at Rs. 25.35 crores which was namely 24 crores in the hands of the present assessee and Rs. 1.35 crores in the hands of Aquatic Formulations Pvt. Ltd.

3.1. The offer of the undisclosed income covered assessment years 2004-05 to assessment year 2010-11. The offer covered the accommodation bills taken by the assessee from M/s. Globe Pharma and others and it can be better understood by the following chart.

Name	F.Y 04-05	FY 05-06	FY 06-07	FY 07-08	FY 08-09	FY 09-10	FY.10-11	Total
Globe Pharma	10031783	13116698	17614166	24380594	18901698	26576407	105000	110726346
Premier Trading	Nil	Nil	21911140	17836	35041386	421760	Nil	57392122
S.S.Pharmachem	Nil	Nil	Nil	11146915	24780520	4420657	911488	41259580
Yash Chem	Nil	Nil	Nil	Nil	Nil	18750134	11887079	30637213
Total	10031783	13116698	39525306	35545345	78723604	53062758	12903567	242909061

3.2. The AO noticed that the assessee has paid taxes for A.Y. 2010-11 after the search action at Rs. 15 lakhs only which meant that the assessee has not paid the taxes on the additional income disclosed during the course of search operation.

3.3. Notice u/s. 153A of the Act was issued and served upon the assessee. The return of income in compliance to notice issued was filed declaring income respectively for A.Y. 2005-06 to A.Y. 2011-12. The

assessment u/s. 143(3) r.w. Sec. 153A was completed by the AO after making additions under the following head:

- i) Addition on account of introduction of share capital treated as unexplained cash credit u/s. 68 of the Act.
- ii) Addition on account of unproved and bogus purchases u/s. 37(1) and 69C of the Act.
- iii) Addition on account of commission @ 2% paid for purchasing accommodation bills, treated as unexplained expenditure within the meaning of Sec. 69C.
- iv) Addition on account of cash discount @ 5% on account of cash purchases taxed as undisclosed income of the assessee.

4. The additions were seriously contested before the Ld. CIT(A). The Ld. CIT(A) confirmed the additions made u/s. 68 of the Act. In respect of addition on account of commission and cash discount, the Ld. CIT(A) gave relief in so far as the commission related to the share capital of the assessee and the cash discount related to the share capital of the assessee.

5. The assessee is in appeal in respect of the additions made u/s. 68 of the Act and in respect of part confirmation of the addition on account of commission and cash discount.

6. The Revenue is in appeal against the part deletion of the addition made on account of commission and cash discount.

7. We have heard the rival submissions, carefully perused the orders of the authorities below and have given a thoughtful consideration to the relevant documentary evidences brought on record in the form of voluminous paper book. Let us start with the additions made u/s. 68 of the Act in respect of share capital introduced during the year and treated

as unexplained cash credit. The following specific queries were raised on this issue and a show cause notice was served on the assessee.

“In respect of introduction of share capital/ premium or share application money received in your company please furnish subscribers details along with following further details:

a) Copies of minutes of the board meeting held and recorded for raising these funds,

b) Supporting bank statements,

c) Details of any dividend paid by the company from the date of investment to till date.

d) Details of the past performance of the company and its present earnings justifying the amount of premium which had been charged and supported by the copies of annual reports,

e) Details of any comparable instances of the companies in this line of business commanding or having charged such a premium on their share value during the year under consideration.

f) Whether you have relied an advice of any financial consultant or institution in justifying the share premium amount fixed. If so furnish names and addresses of the persons and a copy of any report availed from them in this regard and any fees etc paid to them.

g) Details of the net worth as disclosed by the balance sheet, the potential earnings as disclosed by earnings per share or protestations of future prospects Justifying the premium per share. If such a figure was fixed in consultation with experts or financial institutions , furnish complete details thereof.

h) If no consultation took place on the issue, the factors considered for fixing the rate of premium with any reference point to past records, present earnings or future prospects of the company.

i) Any documentary evidence suggesting that the objective was to attract genuine investors by pegging the premium at a realistic level and bring in large amounts of funds in the form of share premium;

j) The Central Government had notified the Unlisted Public companies (Preferential Allotment) Rules, 2003 which apply to issue of shares on preferential basis and/ or through private placement by a company in pursuance of a resolution passed under sub-section (1 A) of Section 81 of the Companies Act, 1956 and to the issue of shares to promoters and their relatives either in public issue or otherwise. Please state whether in compliance with the provisions of the Rules, that an explanatory statement was placed before the shareholders at the AGM held if any and any indicators as to the basis or the date on the basis of which the pricing was arrived at; furnish the documentary evidences in support of your claims.

k) Furnish a copy of the Resolution authorizing the issuance of shares under Section. 81 (1A) of the Companies Act, 1956 and intimation given to the Registrar of Companies.

l) Complete documentary support with regard to fulfillment and compliance to provisions of section 78 of Companies Act 1956 detailing the utilization of the securities premium towards the intended purposes as specified in the said section.

m) Copies of share application form issued and received with dates.

n) Details of allotment of shares to these persons if any during the year or in the subsequent period with proof.

o) Name and address of the share registrar of your company.

p) Furnish a copy of the attendance register for the AGM held and in case the person attending the AGM is not a director furnish a copy of the relevant proxy authorization forms or any communication to the share holders in regard to the convening of the AGM and proof of the dispatch of the share certificates.

All the details proving the sources of income for the investors, their identity, creditworthiness and genuineness of the transaction".

8. A further show cause notice was issued and served on the assessee for the following points:

“In connection with the assessments in your case for the assessment years 2005-06 to 2011-12 you are required to furnish following information.

1. Allotment of shares:

It is claimed by you that during the financial years 2005-06 to 2009-10, relevant to AY's, 2006-07 to 2010-11 you have claimed receipt of share investment from various parties as per the Annexures enclosed. The brief details of the share investment claimed to have been received by you are as under:

<i>F.Y.</i>	<i>No. of Shares</i>	<i>Value of each share (Rs.)</i>	<i>Amount of share investment received (Rs.)</i>
<i>2004-05</i>	<i>1,99,946</i>	<i>10</i>	<i>19,99,460/-</i>
<i>2005-06</i>	<i>4,90,000</i>	<i>10</i>	<i>49,00,000/-</i>
<i>2006-07</i>	<i>27,90,000</i>	<i>10</i>	<i>2,79,00,000/-</i>
<i>2007-08</i>	<i>20,00,000</i>	<i>10</i>	<i>2,00,00,000/-</i>
<i>2008-09</i>	<i>20,00,000</i>	<i>10</i>	<i>2,00,00,000/-</i>
<i>2009-10</i>	<i>16,80,000</i>	<i>10</i>	<i>1,68,00,000/-</i>
		<i>Total</i>	<i>9,15,99,460/-</i>

In this regard you were asked several times by way of notices issued u/s. 142(1) to prove the genuineness of allocation of shares and receipts of share investments in to the company. You were requested to prove the genuineness of these transactions by producing the parties who have claimed to have invested alongwith all the necessary documentary evidences showing the identity and credit worthiness of the investors and genuineness of the transactions. However, you have not complied to the requirements of the notices. No investor was produce for verification. In view of your failure to prove the genuineness of receipts of share capital you are hereby requested to show your cause as to why the entire share application money / share investment claimed to have been received from various parties should not be treated as none genuine and therefore why the same should not be treated as your unexplained investment u/ s. 68 of the Income Tax Act, 1961 in the respective years of receipt".

9. The assessee filed a detailed reply vide letter dt. 28.2.2013 which was a common submission for assessment years 2005-06 to 2010-11.

The reply filed by the assessee read as under:

“ We are in receipt of your letter dated 25. 2, 20 13. In connection with the same we have to state and submit as under for your kind and sympathetic consideration.

1. *At the outset it is submitted that there is an error in the letter inas much the number of shares issued in F. Y. 2007-08 is only 2,00,000 (Two Lakhs) shares and not 20,00,000 (Twenty Lakh Shares) as mentioned in your letter.*

2. *We have already given complete details in respect of the shares issued by us. Your kind attention is invited to letters filed during the assessment proceedings for A. Y. 2005-06 - 2011-12. Complete details of Share Application Money received alongwith Share Allotment Register, Copies of Minutes Book, Relevant Bank Statements, Copies of Share Application forms, Notices of Meetings have been filed during the course of the assessment proceedings. Complete documentary evidences in form of Confirmation Letters, PAN Card, Acknowledgement of Return of Income, Memorandum and Articles of Association, etc. (as applicable) have been submitted in respect of each of the Shareholders.*

3. *As regards producing the shareholders for verification it is submitted that it is beyond our legal powers to enforce the attendance. We have requested them to present themselves before your good self and submit the necessary evidence in respect of the share application. They have assured us that they shall appear before you and make the necessary submissions. You are most humbly requested to issue summons u/s.131 / Notices u/s133(6) and obtain whatever further information that you may require from these shareholders.*

4. *In any case since we have already discharged the primary onus of proving the Identity of shareholders, genuineness of the transactions and capacity or the shareholders. It is submitted that as far as share capital is concerned the onus of the Assessee is only to prove the identity of the share holders which is more than sufficiently discharged.*

5. *On the facts of the case we submit that the position of the Share applicants are as under:-*

a) *All the share applicants are existing assessees.*

b) *Some of the shareholders are companies which are registered with the Registrar of Companies.*

c) The share applicants have filed their respective confirmations and are genuine existing persons.

d) The investments have been made by them by account payee cheques.

e) The assessee company is not accountable for the share applicants depositing money in their accounts before investing by cheques.

f) The assessee company has no means to produce the shareholders physically.

6. We have the Assessee Company has prima facie established the genuineness of the Share application money received by it. The initial onus of proving existence of the subscribers and the fact that the subscribers had infact contributed Share application money has been established on the basis of the various legitimate documents submitted during the course of the assessment proceedings.

7. At this stage we submit that in case of Share application money received one has to establish the identity of the persons and there is no further requirement. In the case of ACIT V/ s. Anima Investment Ltd. 73ITD 125 (Delhi)(TM) it is held that addition on account of share application money cannot be made if identity of shareholders is established and no further enquiry has to be made.

8. In the case of Allen Bradley India Ltd. V/ s. Dy. CIT, 80 ITD 43 (Delhi) it is held that :-

In the case of limited companies the jurisdiction of the Assessing Officer would be limited only to see whether the identity of the shareholders is established and whether they exist or not. Once the identity is established, then, possibly no further enquiries need to be made. From section 68A, 72, 75 and 77 of the Companies Act it very clear that any company who invites application for allotting the shares to public, is entitled only to issue shares against the applications received by it. As per section 72 of the Companies Act, a company can only seek certain limited information from the shareholders.

However, in the case of Standard Cylinders (P.) Ltd. V/s ITO 1988/ 24 ITD 504 (Delhi), the Tribunal has held that company cannot

even seek information from the shareholders regarding the source of their investment in the those shares.

9) *In this case, the assessee has discharged the onus that lay on it and, hence, no addition can be made under section 68 of the Act. Even otherwise, as the assessee company has not started its business activity, the question of earning undisclosed income does not arise. In CIT Vs P.K.Noorjahan (supra), the Hon'ble Supreme Court, in a case where the assessee had no source of income, held that an addition cannot be made under section 69 and the word "may" used in section 69 cannot be read as "shall". It held that "the ITO is not obliged to treat such source of investments as income in every case where an explanation offered by the assessee is found to be not satisfactory and that discretion has to be exercised keeping in view the facts and circumstances of a particular case". In that case, the Tribunal held that even though the explanation about the nature and source of purchases money was not satisfactory but in the facts and circumstances of the case, it is not possible for that aseeseee to earn the amount invested in the properties. It held that, by no stretch of imagination, could the assessee be credited for having earned this income, in the course of assessment year not was she in a position to earn it for a decade or more. The case was of a Muslim lady who is aged about 20 years in the case on hand, the assessee company was in the process of setting-up of a project and has not commenced production during the year and there was no possibility of the assessee company earning any such income during the course of this assessment year. The receipt in question being receipt of share premium, is a capital receipt and cannot be brought to tax. As already held, the addition is not warranted under section 68 of the Act. Hence, we uphold the order of the first appellate authority and dismiss this ground raised by the assessee”*

10. The explanation and the detailed submissions made by the assessee did not find any favour from the AO. The AO proceeded by dismissing the submissions made by the assessee and treating the introduction of the share capital as unexplained cash credit u/s. 68 of the Act.

REASONS FOR NOT ACCEPTING ASSESSEE’S CONTENTION;

- a) The assessee has been found to have taking accommodation bills on account of purchases which mean that the assessee

was making payment for the purchases and receiving the cash back. The cash so received is reintroduced in the company in the form of share capital.

- b) The summons issued to the alleged share holders were returned back unserved.
- c) The assessee has not discharged the onus cast upon it by virtue of Sec. 68 of the Act.
- d) Since the assessee failed to discharge the burden of proof, the addition u/s. 68 is justified.

11. Now let us see the relevant portion of the submissions made by the assessee to see whether the assessee has successfully discharged the onus cast upon it by Sec. 68 of the Act. In its letter dt. 28.1.2013 filed with the Office of the DY. CIT, Central Circle-45 on 4.2.2013 and exhibited at page-100 of the paper book assessee states:-

- .2(a) Copies of share application forms are enclosed herewith. Copy of account of share capital account is enclosed herewith.
- b) Share allotment register was found and seized during the course of the search and is lying with your goodself (please refer Annexure A-3 of the panchanama dt. 9.9.2010).
- c) It is most respectfully submitted that the distinctive numbers have been given to share issued to M/s. Pet Plastics Ltd. We have not entered into any agreement for purchase of shares.
- f) Relevant bank statements in respect of the fund received from share holders are enclosed herewith.

q) Copies of share application forms for the respective share issued during the year are enclosed herewith.

12. In addition to the above details filed by the assessee, we find that the assessee has also furnished affidavit from the share holders. A sample affidavit has been incorporated by the AO at pages 22 and 23 of the order. It can be seen from the affidavit that all the deponents have furnished their Permanent Account No.

13. These clinching evidences have been discarded by the AO for the following reasons:

- i) The assessee has admitted the undisclosed income during the course of search. Now the Directors have retracted from the statement made which is not acceptable.
- ii) Blank share transfer forms were found at the time of search which clearly show that the shares were supposed to be bought back by the family members of the group at a discounted price.
- iii) There are evidences of assessee getting cash back on account of bogus accommodation bills relating to purchases reintroduced in the form of share capital.

14. These observations made by the AO for making the additions u/s. 68 of the Act have been confirmed by the Ld. CIT(A). To justify these additions, the Ld. Departmental Representative has relied upon the decision of the Hon'ble Delhi High Court in the case of Empire Builtech Pvt. Ltd. 366 ITR 110 and CIT Vs Nipun Builders & Developers Pvt. Ltd. 350 ITR 407.

15. Per contra, strong reliance was placed by the Ld. Counsel on the decision of the Hon'ble Delhi High Court in the case of Orbital Communication (P) Ltd. 327 ITR 560, Hon'ble Supreme Court in the

case of Orissa Corpn. Pvt. Ltd. 159 ITR 78, Tribunal Delhi Bench in the case of Srajan Buildtech Pvt. Ltd. in ITA No. 4748/Del/2009 and Delhi Bench in the case of M/s. Jansampark Advertising & Marketing Pvt. Ltd. In ITA No. 4839/Del/2009.

16. In the case of Orissa Corpn. Pvt. Ltd (supra), the Hon'ble Supreme Court has held that *"in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesses. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the respondent had discharged the burden that lay on it, then it would not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which the conclusion could be arrived at, no question of law as such arose. The High Court was right in refusing to state a case."*

17. Similarly in the case of Orbital Communication (P) Ltd. (supra), the Hon'ble High Court has held that *"merely because the assessee failed to produce creditors, share application money could not be regarded as undisclosed income of the assessee u/s. 69 of the Act."*

18. The Co ordinate Bench of Delhi ITAT had the occasion to decide a similar issue in the case of Srajan Buildtech Pvt. Ltd (supra), it would be

relevant to extract the relevant portion of the order of the Ld. CIT(A) which read as under:

"We have heard rival arguments of both the parties and carefully perused the records and case laws citations placed before us. Ld. DR submitted that the Assessing Officer rightly held that the assessee company has raised share capital from the seven companies situated at Delhi by way of accommodation entries and also the assessee company has failed to give satisfactory explanation in respect of the addition of Rs.50 lakh to its share capital. The DR has placed reliance on the judgment of Hon'ble Jurisdictional High Court of Delhi in the case of Commissioner of Income Tax vs Nova Promoters & Finlease (P) Ltd. (2012) 342 ITR 169 (Delhi) and requested that the impugned order may kindly be set aside by restoring that of the Assessing Officer.

Replying to the above submissions, the counsel for the assessee submitted that the Assessing Officer called several details and documents from the assessee which were duly submitted by the assessee in the form of confirmation from the distributors of the share application money and the assessee also submitted details of PAN No. and addresses of the corporate office. In addition to that the counsel for the assessee also submitted that all transactions were routed through banking channels and the share application money was paid through cheque and assessee submitted bank statements and other supporting evidence before the authorities below. The counsel supported the impugned order and submitted that this appeal of the revenue is devoid of merits in view of judgment of Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax vs Fair Finvest Ltd. in ITA No. 232/2012 dated 22.11.2012 and another recent judgment in the case of Commissioner of Income Tax vs Gangeshwari Metal Pvt. Ltd. in ITA 597/2012 delivered on 21.01.2013.

On careful consideration of the above submissions of both the parties and ratio of the judgment cited before us in the light of facts and circumstances of the case, at the outset, we observe that DR has not disputed the point that the assessee company had submitted confirmation from all the seven private limited companies situated at Delhi along with their PAN Nos., addresses and copies of the bank statement. The DR has also not disputed the point that share application money was routed through banking channels. From the assessment order, we observe that the

Assessing Officer issued notices u/s 133(6) of the Act to all the seven companies out of which notices in respect of four companies were received back unserved and remaining three companies did not reply to the Assessing Officer. Subsequently, the Assessing Officer asked various details, documents and evidence from the assessee and the assessee complied with the same. From a bare reading of the assessment order, we are unable to see any action from the Assessing Officer which shows that the Assessing Officer ever tried to verify the details, documents and evidence submitted by the assessee except an act of issuance of the notices u/s 133(6) of the Act.

In the case of C.I.T. vs Fair Invest Ltd. (supra), the Hon'ble Jurisdictional High Court of Delhi has held as under:-

“6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68.

7. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (supra).

8. *The decision in this case is based on the peculiar facts which attract the ratio of Lovely Exports (supra). Where the assessee adduces evidence in support of the share application monies, it is open to the assessing officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators; such a link was shown to be present in the case of Nova Promoters & Finlease (P) Ltd. (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under section 68, the ratio of Lovely Exports (supra) is attracted, irrespective of the facts, evidence and material.”*

*Further in the case of Gangeshwari Metal Pvt. Ltd.(supra), the Hon’ble Jurisdictional High Court of Delhi considered the ratio of the judgment of **Hon’ble Apex Court in the case of Commissioner of Income Tax vs Lovely Export (P) Ltd. 319 ITR (ST) 5(SC)** and its own judgment in the case of **Commissioner of Income Tax vs Nova promoters & Finlease (P) Ltd.(2012) 342 ITR 169 (Del)** and held as under:-*

“Mr. Sabharwal, appearing on behalf of the revenue/ appellants sought to place reliance on a Division Bench decision of this Court in CIT v. Nova Promoters and Finlease (P) Ltd.: (2012) 342 ITR 169 (Del.). However, ongoing through the said decision in Nova Promoters and Finlease (P) Ltd.(supra) we find that the facts are clearly distinguishable. In fact, in Nova Promoters and Finlease (P) Ltd. (supra) itself this Court has observed, in the context of Lovely Exports (P) Ltd. (supra), as under: - “The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders’ register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be

made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assesseees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan - a smokescreen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.

(underlining added)

As can be seen from the above extract, two types of cases have been indicated. One in which the assessing officer carries out the exercise which is required in law and the other in which the assessing officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the

latter category. Here the assessing officer, after noting the facts, merely rejected the same. This would be apparent from the observations of the assessing officer in the assessment order to the following effect: -

“Investigation made by the Investigation Wing of the Department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs. 55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tried to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance sheet, etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the Department. As such entries of Rs.55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately.”

The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case. However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on the part of the assessing officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be

made under section 68 of the Act. Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law.”

In the case of Gangeshwari Metal Pvt. Ltd. (supra), their Lordships held that two types of cases have been indicated, one in which the Assessing Officer carries out exercise which is required in law and the other in which the Assessing Officer sits back with folded hands till the assessee exhausts all the material in its possession and then the Assessing Officer comes forward to merely reject the same on presumption. From the above citation and peculiar facts and circumstances of the case, we observe that the ratio of the judgment of Hon’ble Apex Court in Nova Promoters and Finlease (P) Ltd. (supra) falls in the former category where the Assessing Officer carries out the necessary exercise which is required as per law and other statutory provisions and that is why Hon’ble Apex Court decided the case in favour of the revenue.

However, the facts of the present case are clearly distinguishable and fall in the second category where the Assessing Officer sits back with folded hands till the assessee exhausts all its exercise by submitting required details, evidence and documentary material in its possession related to the disputed issue and then Assessing Officer comes forward to merely reject the submissions, details, documents and evidence submitted by the assessee merely on presumption, surmises and conjectures without making any further inquiry or verification of the same. In the present case, the Assessing Officer simply issued notice u/s 133(6) of the Act to the share applicant’s private limited company situated at Delhi and subsequently the Assessing Officer asked various particulars and details from the assessee and the assessee company submitted written confirmations including PAN No., bank statement and other details to establish the genuineness of the transaction. We also observe that the DR has not disputed the point that the share application money was received by the assessee through banking channels. 12. In view of above, we hold that the Assessing Officer did not bother to verify or examine the evidence, documents and details submitted by the assessee in support of his contention and the same remained unverified. The Assessing Officer proceeded to reject the submissions and other details and evidence of the assessee without any verification and made an addition of Rs. 50 lakh u/s 68 of the Act. In this situation, we are inclined to hold that the action of the Assessing Officer was not sustainable in the light

of recent judgment of Hon'ble Jurisdictional High Court of Delhi in the case of Commissioner of Income Tax vs Gangeshwari Metal Pvt. Ltd. (supra) and the Commissioner of Income Tax(A) rightly held that the Assessing Officer has not given any basis for his observation regarding so-called accommodation entries."

19. In the facts of the case of Empire Builtech Pvt. Ltd. (supra), the summon issued were returned unserved with a remark "no such company" even the Inspector went to the address and confirmed that no such company exist however in the case in hand, there is no evidence on record to show that physical verifications were done by the Officer. On the contrary, we find that there is no adverse inference drawn in respect of affidavit filed by the assessee in support of establishing the genuineness of the share capital.

20. Further, a close perusal of the submissions made by the assessee during the course of the assessment proceedings show that the transactions have been made in cheque duly reflected in the bank statements and we find that no adverse inferences have been drawn in this respect nor we find that any verification from the bank have been made by the AO for making the impugned addition. The entire addition have been made only on the basis of admission of the Director during the course of search proceedings. However, we find that the admission was made on 9.9.2010 and retracted by the Director on the very next day i.e. 10.9.2010. Further, the addition is based on the surmises that assessee was taking bogus purchase bills and the cash was reintroduced in the form of share capital. However, there is no demonstrative evidence brought on record which could justify the additions made by the AO.

21. Considering the entire factual matrix, in the light of the judicial decisions discussed elsewhere and in the light of the evidences produced

by the assessee, we set aside the order of the Ld. CIT(A) and direct the AO to delete the additions made u/s. 68 of the Act for all the assessment years under this appeal.

22. Now let us consider the additions made on account of bogus purchases through accommodation bills. Initially survey was conducted at the premises of M/s. Globe Pharma wherein the Inspecting Wing found M/s. Globe Pharma giving accommodation bills. Pursuant to this information, a search action was conducted at the premise of the assessee. Initially one of the directors admitted and offered additional income on account of bogus purchases, however on the very next day, the same Director retracted from his statement. At this juncture, we are not going into the merits or otherwise of the admission and retraction.

22.1. Let us see the facts of the case. The Revenue has alleged the assessee of taking bogus purchases and accommodation bills on account of such purchased. In our considered opinion this refers to two possibilities.

- 1) A person is purchasing goods from another person without any bill and then taking purchase bills from a third person to show the quantities purchased. Under this category, there is physical movement of goods.
- 2) A person is not purchasing any goods but simply taking bills showing purchases. Under this category, there is no physical movement of the goods.

23. Keeping in mind the above possibilities, we are not sure whether assessee's case falls in the first category or second category. In our understanding of the facts of the present case in all probability the

assessee's case falls in the first category i.e. goods have been purchased from one party and bills have been taken from another party and there is physical movement of goods. Our view is also fortified by the facts that there is no adverse inference in so far as sales are concerned. If the assessee had not purchased goods, then how it has effected the sales. It is more important so because the assessee is trading in pharmaceutical products which have batch Nos. embedded on it and it cannot be sold without performing the formalities of FDA and other relevant laws relating to the pharmaceutical business.

24. So one thing is clear that assessee was actually purchasing goods and selling them. We have also gone through the audited statement of accounts. We find that the trading results are quantified and so also the closing stock. No adverse inferences have been drawn in these respect. The additions have been made purely on presumptions and surmises and the statement of third party i.e. M/s. Globe Pharma and others who may be providing accommodation bills but the trading account of the present assessee do not show anything which could suggest that the purchases are bogus as there is no adverse inferences in so far as sales are concerned. Without purchases there cannot be any sales. Considering all these facts in totality, we do not find any merit in respect of the additions made on account of alleged bogus purchases which are based merely on the statements backed by no cogent/demonstrative material evidences on record. We, therefore, set aside the findings of the Ld. CIT(A) and direct the AO to delete the additions made on account of bogus purchases/accommodation bills from all the assessment years under this appeal.

25. Proceeding further, the next addition relates to the alleged 2% commission on account of getting accommodation bills for which the Ld.

CIT(A) has given part relief to the assessee. Since we have categorically held that the additions on account of bogus purchases cannot be sustained on the facts of the present case and accordingly we have deleted the same, there remains no reason why the addition on account of alleged 2% commission should be sustained. We, therefore direct the AO to delete the addition made on account of alleged 2% commission in entirety for all the years under this appeal.

26. The next addition is @5% of alleged cash discount which the assessee might have earned on making cash payment on account of purchases.

27. This addition has been made on the premise that when a person makes purchases by making cash payments, the seller invariably gives certain discount to the person. Since the AO presumed that the assessee is making purchases on down payment, the assessee must have earned 5% discount on cash purchases. This entire presumption of facts in itself show that the entire addition has been made on conjectures/assumption. There is no demonstrative material evidence on record to show that the assessee has been made cash purchases and has earned cash discount. We, therefore, direct the AO to delete the additions made on this account from all the assessment years under this appeal.

28. The additional ground of appeal pertaining to the addition of Rs. 43,46,518/- on account of alleged peak cash credit for A.Y. 2010-11.

29. A close perusal of the assessment order shows that the additions have been made on account of alleged bogus purchases/accommodation bills obtained from M/s. Globe Pharma and M/s. S.S.Pharmachem, Premier Trading Co. and Yash Chem.

30. Elsewhere, we have categorically held that there is no demonstrative evidence to justify the additions made on account of bogus purchases/accommodation bills. We, therefore do not find any reason for upholding this addition. We, therefore direct the AO to delete the addition on this account.

31. In the result, the appeals filed by the assessee are allowed and the cross appeals filed by the Revenue are dismissed.

32. Before parting and for the sake of completeness of our adjudication, the assessee has strongly objected to the application of Sec. 153A of the Act stating that there are no evidences found at the time of search, therefore, no addition can be made u/s. 153A of the Act.

33. We have allowed the appeal purely on the peculiar facts of the case therefore we do not find it necessary to decide the same issues on the application of law. Further, for similar reasons, we decline to adjudicate on the admission vis-à-vis retraction of the admissions made during the course of the search, for the similar issues which have been decided on the strength of the peculiar facts of the case.

34. In the result, the appeals filed by the assessee are allowed and the cross appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 17th April, 2015

Sd/-
(AMIT SHUKLA)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated :17th April, 2015

व.नि.स./ RJ , Sr. PS

Sd/-
(N.K. BILLAIYA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai