INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3741, 3742, 3743, 3744, 3745 & 3746/Del/2019
(Assessment Year: 2012-13 to 2017-18)

Agson Global Pvt. Ltd, A-25, Nirman Vihar, New Delhi	Vs.	The Assistant Commissioner of Income Tax , Central Circle-28, New Delhi
(Appellant)		(Respondent)

ITA No. 5264, 5265, 5266, 5267, 5268 & 5269/Del/2019
(Assessment Year: 2012-13 to 2017-18)

The Assistant Commissioner of Income Tax , Central Circle-28, New Delhi	Vs.	Agson Global Pvt. Ltd, A-25, Nirman Vihar, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri S. K. Tulsiyan, Adv Ms. Abha Agarwal, FCA Ms. Puja Somani, ACA
Revenue by:	Shri Sanjay Goyal, CIT DR Shri K. S. Rawat, ACIT (AO)
Date of Hearing	06/08/2019
Date of pronouncement	31/10/2019

O R D E R

PER BENCH

1. These are the 12 cross appeals filed by the assessee and the learned Assessing Officer involving similar issue in case of one assessee for all 6-assessment years. Both the parties argued them together raising similar arguments on these issues for concluded assessment and abated assessment. Therefore, these all appeals are disposed of by this common order.
2. The parties agreed that AY 2012-13 is a lead Assessment Year and facts relating thereto were adverted by them. It was stated that identical additions were made in the hands of the assessee company for AY 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18. In case of AY 2017-18 there

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is also a separate addition other then the identical addition as mentioned in Ay 2012-13 , which would be dealt with by both the parties independent and separate manner as the facts and circumstances leading to that additions were different. For ascertaining the status of each of the assessment, it is important to note that on 21/3/2017 there was a search on this group including the assessee company.

3. Therefore, we cull out brief facts of the case which shows that assessee is a company [Appellant] who originally filed its return of income u/s 139 (1) of The Income Tax Act, 1961 (hereinafter referred to as The Act) on 31/10/2013 declaring income of INR 60285750/–. Assessment u/s 143 (3) of the act was made on 24/3/2015 at the assessed income of INR 245285750/-, wherein an addition of INR 185,000,000 was made because of unexplained share capital and share premium.

4. On appeal before the learned CIT – A, per order dated 31/3/2016, the above addition was deleted. Against this, ld AO did not prefer further appeal. So, assessment for assessment year 2012 – 13 was concluded.

5. Status of other assessment years is as under:-

   a) AY 2013-14 assessment u/s 143 (3) is completed as per order dated 31/3/2016 wherein the returned income of the assessee of INR 7 2289816/– was accepted.

   b) AY 2014 – 15, assessment u/s 143 (3) of the income tax act was passed on 28/12/2016 accepting the returned income of the assessee at INR 1 31641113/–.

   c) For assessment year 2015 – 16 assessee filed its return of income on 30/3/2017 declaring income of INR 1 58775950/– which is pending on the date of search on 21/3/2017.

   d) For assessment year 2016 – 17 assessee filed its return of income on 29/12/2017 declaring income of INR 3 55009894/–, which was pending on the date of search on 21/3/2017.

   e) For assessment year 2017 – 18 the return of income was filed by the assessee on 29/12/2017 declaring an income of INR 6 81855980/–

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which was pending for assessment as on the date of search on 21/3/2017.

6. A search and seizure operation was carried out on 21/3/2017. For AY 2012-13, Notice u/s 153A of the act was issued on 6/8/2018. Assessee filed return of income, which was originally filed, on 28/8/2018. AO noted that assessment year 2011 – 12 was already settled before the income tax settlement commission (ITSC) order dated 11/3/2016. The assessment u/s 153A was carried out and it was found that assessee has issued share capital at different premium from different assesses on different dates and therefore assessee was asked to prove identity and creditworthiness of these companies. The learned assessing officer found that these companies do not have much operation but have a robust balance sheet. The companies have paid heavy premium per share and there is no rational for paying such a high premium. In the subsequent years after investment in the assessee company, the operations in most of the companies have reduced further. These companies have common directors. The companies are operated by Kolkata based operator. Further, during the course of search blank sign share transfer forms, blank signed power of attorney and other documents necessary for transfer of shares were found and seized. These documents related to the companies from which the assessee is claimed to received share capital and share premium. Thus, the AO noted that the entire transaction is a sham transaction. Mr. Apresh Garg, MD of appellant, was confronted issue of share capital in his statement u/s 132 (4) of the act. In response to question number 22 in statement dated 22/3/2017, he stated that the amounts so received, as share capital is nothing but the assessee's own money that was routed back to the assessee company in the form of share capital. He submitted that assessee has paid through cheque to the depositors, who in turn made deposit of the above sum as share capital with the assessee company. The learned AO further noted that books of all these entities are maintained at the office of the assessee company, however, those books of accounts were not found. During the course of assessment proceedings, assessee was specifically asked to file the

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details of share capital and premium along with supporting evidences. On 14/11/2018, Assessee furnished chart showing name, address, correspondence address, share capital, share premium, total amount received from shareholders, confirmation, bank statement, ITR, . On verification of bank of these parties it was evident that it is own funds of the assessee, which has been routed through these parties by cheques, have been reintroduced in books of accounts of assessee as share capital. The assessee further contested that issue of share capital has already been decided in the completed assessment u/s 143 (3) of the act on 24/3/2015, wherein the addition made by the learned assessing officer out of the total addition has been deleted by the learned CIT – A, No appeal has been preferred before higher forum. It was therefore stated that, in absence of any incriminating documents/evidences found during the course of search, in the concluded assessment for assessment year 2012-13, 13-14 and 14-15, no addition could be made.

7. Further, assessee also submitted that all these cash credits have been duly verified during the original assessment proceedings, only addition was made to the extent of INR 185,000,000, which is deleted by the learned CIT Appeal, against which no appeal has been preferred before the higher forum, therefore, assessee has completely proved identity and creditworthiness of the depositors, source of the money invested in the assessee company, which is the assessee itself, genuineness of the transaction is also proved.

8. In view of this, no addition could have been made in the hands of the assessee, even in case of abated assessments.

9. The learned assessing officer rejected the contention of the assessee and held that most of the shareholders have meager returned income, investors to not have any substantial business activities, absence of substantial fixed assets, absence of strong financials, and absence of date in the documents found during the course of search such as blank share transfer forms etc. Shows that it is a sham transaction. Thus, the learned AO made an addition of INR 4 81987000/– as unaccounted income of the assessee which has

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been introduced into the books in the form of share capital and share premium. The AO further made an addition of INR 9639750/– being 2% of the amount of share capital as commission to obtain share capital. Thus, total addition of Rs 491626740/– was made.

10. The second addition was with respect to the sum of INR 149,200,000/- received during the year from M/s Mahalaxmi Traders, whose financials are obtained and it was found that it does not have financial worth to introduce the sum. The depositor was examined who denied the investment. Such addition was made u/s 68 of the act. In addition, of above, 2 percent on the above sum as commission was also added. Thus, total addition of INR 175814034/– was made.

11. During the course of search, Managing director of the assessee company, Mr. Apresh Garg, in his statement recorded u/s 132 (4) on 22/3/2017, has admitted that it resorted to bogus sale/purchase transactions. The learned AO noted that assessee has undertaken these bogus sale and purchase transaction with these entities to inflate its expenses and suppress taxable income. Such suppression of income has been brought back in the form of share capital. He further noted that assessee has purchased in shell almonds from one company at an average purchase price of 4414 KG whereas the sale price to the same entity was 04/04/2004 KG on average and thus the loss of Rs. one per KG. Thus, the AO noted that Assessee Company is involved in bogus sales and purchases. There was also a shortage of stock by nearly INR 450 crore is against the stock recorded in it is of accounts. Thus 25% of the total purchase price from these parties were added to the total income of the assessee amounting to INR 353,24,93,127/–.

12. Thus, the total income of the assessee was assessed at INR 1 610849810/– against the returned income of INR 60285750/– per order dated 30/12/2018 passed u/s 153A read with section 143 (3) of the income tax act, 1961 passed by the assistant Commissioner of income tax, central circle – 28, New Delhi (the learned AO).

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13. Assessee, aggrieved with the order of the learned assessing officer preferred an appeal before The Commissioner of Income Tax (Appeals) – 29, New Delhi. He passed an order dated 25/4/2019.

14. On the issue of absence of any incriminating material found during the course of search, thus, no addition can be made in case of concluded assessments, he confirmed the addition with respect to share capital holding that statement of the director of the company has been recorded based on the good and cogent material and such statement recorded constitutes incriminating material within the meaning of section 153A of the act. He mainly referred to the seizure of photocopies of few blank share transfer deeds relating to the part of the share capital issued to outsider as well as the statement recorded u/s 132 (4) of the managing director of the appellant company as incriminating material. Thus, he held that the decision of the learned assessing officer passed u/s 153A of the act is not in conflict with the judgment of the honourable Delhi High Court including that of Kabul Chawla and others. He further confirmed the addition with respect to the share capital u/s 68 of the act. He also confirmed the addition because of commission paid allegedly for the above share capital.

15. With respect to the addition because of bogus purchases, he directed the learned assessing officer to submit a remand report giving the periodical gross profit ratio of the assessee as well as the cash deposit in the bank accounts. Based on the gross profit ratio, he held that the appellant had sale/purchase of the similar quantity but instead of showing transactions with the real entities, the transactions were shown in the name of the species entities created by the appellant itself, which were not real but artificial to suppress the profit. He further noted that the entities are also showing the purchases and the sales to and from the appellant of such purchases and sales, which are bogus. Therefore, he noted that the assessing officer was not justified in disallowing 25% of the purchases since it is not a case where only purchases are in doubt and assessee has recorded fictitious sales and purchases to cover up the profits of actual sale and purchases. Therefore he held that in such a situation, in the interest of

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natural justice, it would be reasonable that the trading results to the extent of sale and purchase from the fictitious entities are rejected u/s 145 (3) of the act and the gross profit on the same is estimated. Accordingly gross profit shown by the assessee from its books for different years/periods was recorded and for assessment year 2012 – 13 where the gross profit shown by the assessee was 16.20% from the other parties, he applied that rate on the sales with the alleged bogus parties and restricted the addition to the extent of INR 54,43,23,729/–.

16. Therefore, the learned AO as well as assessee both are aggrieved with the order of the learned CIT – A, are in appeal before us.

17. Similarly for AY 20-13-14 to 2017-18 following addition were made by the ld AO in assessment u/s 153A rws 143(3)of the Act for all these years:-

S l N	Particulars of Additions made by the A.O	A.Y. 2012-13	A.Y. 2013-14	A.Y. 2014-15	A.Y. 2015-16	A.Y. 2016-17	A.Y. 2017-18
1	Addition u/s 68 on a/c of share capital and premium received from:						
	(i) Outsiders/ unrelated parties	48,19,87,000	-	-	-	-	-
	(ii) From alleged associated parties:		-	-	-	-	-
	- Mahalaxmi Traders	14,92,00,000	15,20,00,000	65,30,99,000	24,81,49,800	17,86,74,750	-
	- Sri Balaji Enterprise	-	34,79,50,000	9,55,55,000	11,60,00,100	37,60,99,650	52,23,87,900
	- Vishal Traders	-	-	6,48,90,000	-	-	-
	- Rustagi Exim P. Ltd	-	-	-	-	-	-
	- Vikas International	2,31,66,700	-		-	-	
	(iii) From alleged unknown parties	65,43,53,700	49,99,50,000	81,35,44,000	36,41,49,900	55,47,74,400	52,23,87,900
2	Total addition u/s 68 on account of share capital/ premium	1,30,87,074	99,99,000	1,62,70,880	72,82,998	1,10,95,488	1,04,47,758
	Alleged commission expenses @ 2% on the above	66,74,40,774	50,99,49,000	82,98,14,880	37,14,32,898	56,58,69,888	53,28,35,658
3	Disallowance of alleged bogus purchases (being 25% of purchases from alleged related parties)	88,31,23,282	65,25,24,882	1,79,46,43,207	2,67,93,04,397	2,99,56,36,930	1,21,763
4	Addition u/s 68 on a/c of cash deposited in bank a/cs post	-	-	-	-	-	1,50,53,24,000

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	demonetization						
5	TOTAL ADDITIONS (1+2+3+4)	1,55,05,64,056	1,16,24,73,882	2,62,44,58,087	3,05,07,37,295	3,56,15,06,818	2,03,82,81,421
6	Income as per Return	6,02,85,750	7,22,89,816	13,16,41,113	15,87,75,950	35,50,09,894	68,18,55,980
7	Assessed Income (5+6)	1,61,08,49,806	1,23,47,63,698	2,75,60,99,200	3,20,95,13,245	3,91,65,16,712	2,72,01,37,401
8	Assessed Income (Rounded off to)	1,61,08,49,810	1,23,47,63,700	2,75,60,99,200	3,20,95,13,250	3,91,65,16,710	2,72,01,37,400

18. On appeal before the ld CIT (A) by the assessee , addition u/s 68 on account of share capital were confirmed and addition on account of bogus purchases was restricted to the extent of the appropriate profit rate on such purchases as per finding in AY 2012-13

A.Y.	Addition u/s 68 on a/c of share capital/ premium & alleged commission expenses @ 2% thereon		Addition on a/c of alleged bogus purchases	
	Made by the A.O	Sustained by the C.I.T(A)	Made by the A.O	Sustained by the C.I.T(A)
2012-13	66,74,40,774	66,74,40,774	88,31,23,282	54,43,23,729
2013-14	50,99,49,000	50,99,49,000	65,25,24,882	23,50,36,945
2014-15	82,98,14,880	82,98,14,880	1,79,46,43,207	54,71,66,863
2015-16	37,14,32,898	37,14,32,898	2,67,93,04,397	72,00,54,941
2016-17	56,58,69,888	56,58,69,888	2,99,56,36,930	1,08,45,52,031
2017-18	53,28,35,658	53,28,35,658	1,21,763	4,87,053
TOTAL	**3,47,73,43,098**	**3,47,73,43,098**	**9,00,53,54,461**	**3,13,16,21,562**

19. The assessee has raised the following grounds of appeal in ITA No. 3741/Del/2019 for the Assessment Year 2012-13:-

"1. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) has erred in law and on facts in upholding the assessment made u/s. 153A of the Act in spite of the fact that no incriminating documents whatsoever was found/seized during the search operation u/s. 132 of the Act which is sine qua non for making any additions in an assessment framed u/s. 153A of the Act.

2. That in view of the facts and in law, since no incriminating material was found in the course of search and the unabated assessment years

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remained undisturbed, the AO was wrong in invoking the provisions of section 153A of the Act and recomputing the income of the current assessment year.

3. That on the facts of the case and in law, the Ld. CIT(A) erred in confirming the order of the learned AO in adding the share capital received and allotted during the year amounting to Rs.48,19,87,000/- as unexplained cash credit u/s. 68 of the Act in the hands of the assessee in spite of the fact that no incriminating material was found in the course of search and all the required information/evidences in support of such share transactions were furnished during the course of assessment and ingredients of provisions of sec. 68 required to be satisfied by the assessee were fulfilled in respect of the impugned share allotment transactions.

3.a That on the facts of the case, the learned CIT(A) failed to consider that the issue of share capital and premium of Rs.48.,20.0.0,000/- had already been examined and considered in the original assessment order passed u/s 143(3) of the Act dated 24-03-2015 wherein out of the sum of Rs.48.20 crores, a sum of Rs. 18.50 crores was added to the income of the assessee and on appeal by the assessee, the preceding learned CIT(A) vide his order dated 31- 03-2016 had deleted the said addition made by the learned AO and the department had not filed any further appeal before the Hon'ble ITAT in this regard and as such, this issue has attained finality, therefore no addition could have been made in the absence of any incriminating documents.

3b. That on the facts and in law the Ld. CIT(A) erred in confirming the action of the learned AO in adding the sum of Rs.96,39,740/- as commission paid for arranging the share capital money without any evidence found in the course of search evidencing any such payment, more so when the transaction does not relate to the present assessment year.

3c. That on the facts and in law, no incriminating material was found in relation to the share capital issued during the year to invoke the provisions of section 68 of the Act in an assessment made u/s 153A of the Act read with section 143(3) of the Act.

4 That on the facts of the case and in law the learned CIT(A) erred in confirming the action of the learned AO, without any discussion in the appellate order, in adding the share application money received during the year amounting to Rs. 14.92.00.000/- as unexplained cash credit u/s. 68 of the Act in the hands of the assessee in spite of the fact that no incriminating material was found in the course of search and all the required information/evidences in support of such share transactions were furnished during the course of assessment and ingredients of provisions of sec. 68 required to be satisfied by the assessee were fulfilled in the impugned share allotment transactions.

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5 That on the facts and in law the learned CIT(A) erred in confirming the action of the learned AO, without any discussion in the appellate order, in adding the sum of Rs.17,23,66,700/- received as share application money in the preceding years and the said preceding years were a part of the proceedings before the Hon'ble Settlement Commission and therefore cannot be brought to tax in the present assessment year u/s 68 of the Act.

5a That section 2451 of the Act makes the order of the Settlement Commission under section 245D (4) conclusive in respect of matters covered by it and these findings are not liable to be reopened or reviewed either in proceeding under this Act or in any other proceedings.

5b That on the facts of the case and in law the learned CIT(A) erred in confirming the action of the learned AO in adding the sum of Rs.34,47,334/- as commission paid for arranging the share capital money without any evidence found in the course of search evidencing any such payment, more so when the transaction does not relate to the present assessment year.

6. That on the facts of the case and in law, the ld CIT(A) erred in confirming the addition of an amount of Rs. 54,43,23,729/- on the allegation of bogus purchases out of the total addition of Rs. 88,31,23,282/- made by the ld AO on this account.

6a That on the facts of the case and in law, the Ld. CIT(A) erred in accepting the contention of the learned AO that the transactions with M/s Mahalaxmi Traders, M/s Shree Balaji Enterprises, M/s Vikas International, M/s Vishal Traders and M/s Rustagi Exim Pvt Ltd were bogus without any basis for the same nor any evidence having found in the course of search for drawing such adverse conclusions.

6b That on the facts of the case and in law, the Ld. CIT(A) erred in treating the transactions with M/s Mahalaxmi Traders, M/s Shree Balaji Enterprises, M/s Vikas International, M/s Vishal Traders and M/s Rustagi Exim Pvt Ltd as bogus and thereby computing GP on the sales to them @ 16.20%, being the GP wrongly calculated by the AO on the other transactions accepted as genuine by him.

6c. That on the facts of the case and in law, the Ld. CIT(A) erred in accepting the incorrect GP @ 16.20% as calculated by AO and applying the same on the alleged bogus sales made to the alleged bogus parties.

6d That on the facts of the case and in law, the Ld. CIT(A) erred in assuming that the appellant had made sales to other parties and had booked them in the name of bogus parties when no such evidence was found in the course of search nor such allegation was made by the learned AO in the assessment order.

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6e That on the facts of the case, the Ld. CIT(A) erred in not giving cognizance to the replies filed by the alleged bogus parties in response to the notices issued by the learned AO u/s 133(6) of the Act to them during the course of assessment and the learned AO could not point out any infirmity between the books of the appellant and the replies received from the alleged bogus parties.

6f That on the facts of the case and in law, the Ld. CIT(A) erred in relying on the purported statement recorded of Shri Apresh Garg, Director of the company u/s 132(4) of the Act on 23-03-2017 inspite of the fact that the said statement was immediately retracted by him since the contents of the impugned statement were incorrect and the same was forcefully signed by him.

7 That the learned CIT(A) erred in sustaining the assessment order passed by the learned AO u/s 153A of the Act read with section 143(3) of the Act wherein admittedly the said order was not based on his own judgment and belief but was made under pressure and force of the Coordination Committee comprising of AO, ACIT, ADIT(Inv) and JCIT(Inv) whereas the AO himself in his letter addressed to ADIT(Inv) had clearly admitted the impugned additions as unwarranted, thereby the whole order is erroneous, bad in law and liable to be quashed.

8 That the order of the Ld. CIT(A) being not based on the facts of the case of the appellant and being contrary to law, should hence be quashed and the appellant company be given such relief or reliefs as prayed for."

20. Identical grounds have been raised by the assessee for Ay 2013-14 to 2017-18 except in case of 2017-18 where in ground no 5 is with respect to addition of sales u/s 68 of Rs. 73.13 Crores

21. The revenue has raised the following grounds of appeal in ITA No. 5264/Del/2019 for the Assessment Year 2012-13:-

1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in restricting the addition on account of bogus purchase to the extent of Rs. 54,43,23,729/- only as against the total addition of Rs. 88,31,23,282/- made at the GP rate disclosed by the assessee. The Ld CIT(A) ignoring the fact that the assessee was engaged in unaccounted sale and purchase the gross profit @25% of bogus purchase whereas, the Ld CIT(A) has restrict disallowance to the extent of estimated GP @16.20% .

2. That the grounds of appeal are without prejudice to each other."

22. Identical grounds have been raised by the ld AO for Ay 2013-14 to 2016-17 except in case of 2017-18 where in ground no 1 is with respect to addition of sales u/s 68 of Rs. 77.40 Crores deleted by the ld CIT (A).

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23. The assessee has made an application for admission of additional ground of appeal for assessment year 2012 – 13 to A.Y. 2017 – 18 identically

"Additional Ground of Appeal

1. That on the facts and in the circumstances of the case and in law, the CIT (A) erred in rejecting the books of 's account of the assessee by invoking section 145 (3) of the income tax act, 1961 in relation to the transactions with the alleged related party the order on the basis of surmises and conjectures although the search and seizure operation u/s 132 (1) in case of the assessee, the assessment proceedings and enquiry conducted by the AO u/s 142 (2) as the further enquiry conducted by the learned CIT (A) u/s 250 (4) did not lead to any adverse material whatsoever contrary to the entries recorded in the regular books of accounts of the assessee.
2. That further, the CIT (A) erred in invoking section 145 (3) of the act without complying with the mandatory requirement of law of issuing prior show cause notice and allowing the assessee and about opportunity of being heard on materials, if any, transferred to be relied upon by him in support of the interest as rejection of the books and the consequent best judgment assessment u/s 145 (3) of the act."

24. He submitted that these are the additional grounds, which are going to the root of the matter, jurisdictional on issues, legal in nature, and therefore they deserve to be admitted. He submitted that both these issues are arising from the order of the learned CIT – A. He submitted that the powers of the CIT A with respect to finding out the new source of income as well as rejection of the books of account are challenged. He therefore submitted that these grounds should be admitted. He further submitted that these two additional grounds have been raised in all the six assessment years in appeal of the assessee as they involve identical facts and circumstances. He

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further relied upon plethora of the judicial precedents support its contention.

25. The learned departmental representative vehemently opposed additional grounds raised by the assessee stating that there should not be admitted.

26. We have carefully considered the rival contention and perused the application for the additional ground of appeal of the assessee is wherein the assessee has challenged the power of the learned CIT – A for rejection of the books of accounts by invoking the provisions of section 145 (3) of the act partially with respect to certain transactions of the assessee and that too without issue of notice u/s 251 of the act. Thus the grounds raised by the assessee are illegal in nature and goes to the root of the assessment and additions sustained by the learned CIT – A. Therefore, they are admitted for all these assessment years. They would be dealt with on the merits of the addition when the respective additions would be dealt with.

27. The 1st ground of appeal is as under:-

> "That on the facts and in the circumstances of the case, the learned CIT (Appeals) has erred in law and on facts in upholding the assessment made under section 153A of the act in spite of the fact that no incriminating documents whatsoever was found/seized during the search operation u/s 132 of the act which is sine qua non for making any addition in an assessment framed u/s 153A of the act."

28. Ground no 2 is supporting ground no 1 .

29. Adverting to the above ground of appeal, the learned authorised representative submitted that assessment u/s 143 (3) is concluded by order dated 24/3/2015. The search took place in case of the assessee on 21/3/2017. Therefore, the assessment for this year remains concluded hence it does not abate. He also submitted that accordingly for assessment year up to AY 2015-16 are unabated assessments, Therefore, any addition or adjustment to the total income of the assessee can only be made if there is any incriminating material found during the course of search. Thus, he stated that in absence of any incriminating material

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found, the concluded assessment could not be disturbed even after search. He further submitted that addition u/s 68 of the income tax act or addition of unaccounted purchases made by the learned AO for assessment year 2012 – 13 to A .Y. 14 – 15 are without any incriminating material. He referred to copies of panchnama placed at page number 1 – 89 of the paper book 1 to show that no incriminating material was found during the course of search. Therefore, he submitted that learned assessing officer cannot make any addition. However, he hastened to add that the learned assessing officer has mainly referred to the seizure of photocopies of few blank share transfer deeds relating to the part of the share capital issued to outsider as well as the statement recorded u/s 132 (4) of the managing director of the appellant company were considered by AO as incriminating material. He further submitted that none of these could be construed as incriminating materials to disturb the unabated assessment years. He submitted that even the statement recorded of the managing director of the assessee company which was made on 22/3/2017 u/s 132 (4) of the act was retracted on 24/3/2017 within 2 days of the recording of the statement and was also placed before the additional director of income tax (investigation) on 31/3/2017. He referred to the retraction statement placed at page number 171 – 175 of the paper book 1 of the assessee. To support its contention he further relied upon the decision of the honourable Bombay High Court in CIT vs. Continental warehousing Corp Ltd and All Cargo Global Logistics Ltd 374 ITR 645 (2015) (BOM). He further relied upon the decision of the honourable jurisdictional High Court in CIT (C) vs Kabul Chawla (Delhi) (2015) 61 taxmann.com 412 and specifically at para number 37 and 38 of that order which held that assessment has to be made u/s 153A only on the basis of incriminating material and in the absence of any incriminating materials, the completed assessment can be reiterated and the abetted assessment are assessment can be made. Thus, he submitted that completed assessments could be interfered by the assessing officer while making the assessment u/s 153A only based on some incriminating material unearthed during the course of search or acquisition

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of documents or undisclosed income or property discovered in the course of search. He also referred to the decision of the honourable jurisdictional High Court in the principal Commissioner of income tax vs. Meeta Gutgutia wherein the special leave petition is dismissed by the honourable Supreme Court reported in (2018) 96 taxmann.com 468.

30. He further submitted that unless there is a specific incriminating material, each of the assessment years in which and additions are sought to be made, the assumption of jurisdiction u/s 153A would be vitiated in law. For this proposition, he referred to the decision of the honourable Delhi High Court in 82 taxmann.com 287 (Delhi) (2017). To support his submission for assessment year 2012 – 13 to 2014 – 15, he referred to plethora of judicial precedents. He further placed into service the decision of the honourable Supreme Court in case of CIT vs. Sinhgad technical education society (2017) 397 ITR 344 (SC) wherein it has been held that where as per the provisions of section 153C of the act, incriminating material which was seized had to be pertaining to assessment year in question and the documents which were seized did not establish any co-relation document -wise with those assessment years, then order passed for initiation of proceedings u/s 153C should be quashed. He further referred to the decision of the honourable Delhi High Court in case of principal Commissioner of income tax, Delhi – 2 vs. Best infrastructure (India) private limited and others in ITA number 11/2017 to 22/2017 (2017) 397 ITR 82 (Delhi) which is in fact, carrying with the decision of the honourable Delhi High Court in CIT vs. Kabul Chawla (supra). He further referred to the decision of the honourable Delhi High Court in case of principal Commissioner of income tax vs. Dharampal Premchand Ltd (2017) 99 CCH 2002 wherein it has been held that when there was no incriminating material seized, each of assessment years, assessment for which were shot to be reopened, addition made in course of proceedings u/s 153A/143 (3) were not warranted.

31. With respect to the contention of the learned assessing officer pertaining to the photocopies of the blank transfer form pertaining to the share capital

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issued, he submitted that the alleged seized material are not incriminating in nature because firstly, they are merely photocopies and not the original documents and secondly they mention the statement of facts. They do not have any transaction date, transaction value and the name of the transaction parties other than the persons who are holding the shares of the company. They are not incriminating in nature. He referred to several judicial precedents wherein such evidences were found during the course of search however, they were not held to be incriminating in nature. He further referred to mainly the decision of the coordinate bench in case of Galaxy rice industries Ltd in ITA number 1451, 52, 53 for assessment year 2007 – 08 – 2009 – 10 dated 1/3/2008 wherein in para number 9.4 the identical situation was discussed, he therefore submitted that it applies squarely to the facts of the case.

32. He further submitted that the statement recorded u/s 132 (4) do not constitute any incriminating materials for the purpose of assessment u/s 153A of the income tax act. He submitted that the statement of the managing director and the statement of Mr. Praveen Agarwal recorded u/s 132 (4) of the act. With respect to the evidentiary value of the statement recorded u/s 132 (4) with respect to assessment in search cases he referred to the decision of the honourable Delhi High Court in CIT vs. Harjeev Agrwal (2016) 290 CTR 263 (Delhi) wherein it has been held that evidence found as a result of search would not take within its sweep statements recorded during search and seizure operations unless they are related to any material found during the course of search. He therefore submitted that there should be a nexus between the statement recorded u/s 132 (4) and evidence/material which are incriminating in nature found during the search. To support his this proposition he relied of the decision of the honourable Delhi High Court in case of principal Commissioner of income tax vs. Best infrastructure (India) private limited wherein it has been held that the statements recorded u/s 132 (4) do not by themselves constitute incriminating material for the purpose of assessment u/s 153A of the act. He further relied upon the decision of the coordinate bench in Brahmputra

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Finlease (private) Ltd in ITA number 3332/del/2017 dated 29/12/2017 to support his contention. He even otherwise submitted that that the managing director of the company retracted his statement immediately on 24/3/2017. He referred to the copy of retraction placed at page number 169 – 171 of the paper book number 1. He further referred to the circular number F. NO. 286/2/2003 – IT (INV) dated 10/3/2003 and 286/98/2013 – IT dated 18/12/2014. He further referred to the decision of the honourable Gujarat High Court in principal Commissioner of income tax vs. Sayumya construction private Ltd (2016) 387 ITR 529 (Gujarat). He further submitted that information gathered with regard to the share application money are the entries with respect to the sum is received by the assessee which are duly disclosed in the regular books of accounts of the assessee and therefore are part of the regular records of the assessee. Hence, it cannot be considered as an incriminating material. He further submitted that the copies of the power of attorney and share application forms are merely photocopies. He further submitted that share application forms even otherwise in original also should be with the assessee company who issued the share capital. He further referred to the order of the learned CIT – A in para number 5.1 and 5.2 of his order waiting that the financial position of the companies who invested in the share capital of the assessee were not discovered during the course of assessment proceedings. He even otherwise submitted that assessing officer himself has stated that their financial has is robust but they have meager income. Thus, even otherwise there financials creditworthiness is established. He further referred to the para number 5.2 of the order of the learned CIT – A wherein he referred to the statement recorded by the investigation wing of third party in altogether different search. He submitted that such a statement recorded in the search of third party could not be considered even otherwise as an incriminating material found during the course of search on assessee. With respect to para number 5.2 of the order of the learned CIT – A wherein it has been held that during the course of search operation in the office of the appellant, certain blank sign share transfer forms, blank sign receipts,

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blank sign the power of attorney and other documents necessary for transfer of shares were found and seized based on which learned CIT – A held that these are the incriminating documents, the learned authorised representative submitted that original copies of the transfer deeds and other papers were not found from the premises of the assessee. The documents found were only the photocopies, which could not have been capable of being acted upon. Those photocopies does not give any right to the assessee over the shares, therefore they are not incriminating in nature. Even otherwise, he submitted that as there was certain negotiation going on with respect to the acquisition of the shares of the assessee from those investors for the future public issue of the assessee, they were found at the premises of the assessee. He otherwise submitted that the shares are still held by those persons. He otherwise stated that the AO has not made any enquiry with respect to this material. With respect to the statement of the managing director of the company he submitted that in statement recorded u/s 132 (4), he never stated that the unaccounted money of the assessee had been routed through various companies in the form of share capital. In fact, he stated that the share capital received from the impugned entities represented amount from the books of the assessee company from the disclosed sources rooted through these entities and received in back in the form of share capital. He submitted that the ultimate source of share application money received by the assessee was from the disclosed source of the assessee itself the transactions were verifiable from the bank account of the party as well as from the bank account of the assessee as the source of money is the assessee himself. Therefore, he submitted that there is no unaccounted money flowing from the assessee to the depositors but the accounted money is flowing to the depositors. He otherwise submitted that the statement of the managing director was retracted. With respect to the amount of INR 149,200,000 he submitted that it was initially paid by the assessee from it disclosed bank account to Mahalaxmi traders as advance, which was written back by Mahalaxmi trader's assessee to the assessee therefore no addition u/s 68 on this court could be warranted. He further

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referred to the deviation report submitted by the learned assessing officer, which clearly held that according to the AO himself addition u/s 68 could not be made. He therefore submitted that the addition made by the learned assessing officer for assessment year 2012 – 13 and 2013 – 14 and 2014 – 15 deserves to be quashed at the very threshold for want of valid jurisdiction u/s 153A of the act.

33. On the merits of the addition of the share capital, he submitted that AO has submitted a deviation report on 20/12/2018 addressed to The Deputy Director Of Income Tax (Investigation) which is placed at page number 368 – 377 of paper book – 1 in para number 3 the learned assessing officer himself has stated that on verification of the records as well as details and evidences filed by the assessee, it is seen that the assessment proceedings u/s 143 (3) of the income tax act, 1961 was conducted for the assessment year 2012 – 13, 2013 – 14 and 2014 – 15 wherein the issue of share capital were examined and verified in detailed by the assessing officer and were partly accepted at that stage. In para number 3 (ii) in deviation report with respect to the share capital returns been stated by the assessing officer that AO had added an amount of INR 185,000,000 to the total income of the assessee company for assessment year 2012 – 13 on account of share application and premium. The above addition of INR 185,000,000 is later on deleted by the learned CIT (A) after examination of the details filed by the assessee. Since the learned CIT – A being a higher authority had duly examined the amount of share capital of INR 185,000,000 is an allowable if there on against which no appeal was preferred by the Department before the income tax appellate tribunal. Therefore, the addition of this amount on the ground of bogus share capital/premium can only be made in the light of incriminating fees material. In the deviation report in para number 3 (iii) the learned assessing officer himself has stated that the chart prepared by the investigation wing is factually incorrect. Therefore, the learned authorised representative submitted that even in the deviation report dated 20/12/2018 the learned assessing officer himself was of the opinion that no addition u/s 68 on account of share capital is warranted for any of the years

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under consideration. He further submitted that such a deviation report dated 20/12/2008 was once again reiterated by the AO and also the additional Commissioner of income tax, CR – 7 in the deviation meeting held on 28/12/2018, the minutes of such meeting were enclosed at page number 381 – 385 of paper book – 1, even after consideration of the reply dated 24/12/2018 of the Deputy Director Of Income Tax (Investigation). Thus the learned AR vehemently stated that when the assessing officer and his superior both are of the view that no addition can be made in the hands of the assessee u/s 68, the whole addition was made on account of the opinion of the deputy director of income tax (investigation) as recommended in the appraisal report. He therefore submitted that assessing officer was not satisfied that addition is deserves to be made u/s 68 of the income tax act. In view of this, he submitted that the addition could not be made u/s 68 in the hands of the assessee.

34. With respect to the issue of bogus purchases from 3 different concerns, the learned assessing officer has relied upon the statement of the managing Dir recorded u/s 132 (4) of the act dated 22/3/2017 to hold that sales and purchases with the alleged parties are bogus, the learned authorised representative submitted that in the deviation report submitted by the assessing officer dated 20/12/2018 he has observed that it would be difficult to make an ad hoc disallowance of 25% of purchases from the aforesaid parties as suggested in the appraisal report. He therefore submitted that even the assessing officer stating that the addition suggested in the appraisal report is not sustainable. He further referred to the argument of the assessing officer that if both purchase and sale from the aforesaid parties are treated as bogus, it will lead to a reduction in the returned income of the assessee instead of an addition which will be detrimental to the interest of the revenue. He therefore submitted that,

(1) There is no additional incriminating evidence for making this addition,

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(2) The deviation report itself suggests that if the addition is made of bogus purchases and sales in the hands of the assessee, it will result into the reduction from the returned income.

He submitted that the reasons for the same is that assessee has booked sales from these parties from assessment year 2012 – 13 to 2017 – 18 of INR 36,20,60,89,783/– whereas the purchases from these parties is amounting to INR 36,02,14,17,848/– thus ultimately for all these years it will result into reduction of the returned income by INR 18,46,71,935/–. Thus, despite the above observation of the learned assessing officer in his deviation report itself, The Deputy Director Of Income Tax (Investigation) as per letter dated 24/12/2018 advised the assessing officer to make an addition on account of alleged bogus purchases at the rate of 25% of purchases from the impugned parties as recommended in the appraisal report. Thus, the learned authorised representative submitted that if the purchases and sales from these parties, which are alleged to be bogus purchases and sales recorded by the assessee are removed, there would be a net reduction in the returned income of the assessee of INR 1 84671935/- in the hands of the assessee. He further stated that there is absence of any incriminating material with the assessing officer on this issue. He submitted that the deviation report shown by the AO clearly states that there cannot be any additions in the hands of the assessee and addition is merely based on the appraisal report. He otherwise stated that the purchases made from these parties have been sold to other parties and the sales made to these parties the goods have been purchased from other parties. Thus, he submitted that one leg of the transaction is accepted as correct by the assessing officer and the other leg of the transaction is held to be bogus. He thus submitted that such addition could not be made. He further submitted that when

i. the assessee maintains the detailed stock register showing quantity wise detail of each item,
ii. purchases are vouched,

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iii. sales are vouched,

There is no reason that this addition can be made in the concluded assessment or even in the open assessment. Coming to the order of the learned CIT – A, he submitted that, the learned CIT – A has found an innovative way, not provided in the income tax act, by invoking the provisions of section 145 (3), without verification of the books of accounts, rejects part of the books of accounts, applies the gross profit rate of the other transactions other than with these parties to the alleged transactions from the tainted parties and makes the addition on account of gross profit. He submitted that above addition has been made by the learned CIT – A

i. without verifying the books of accounts,
ii. without finding any latent patent or glaring defects in the books of accounts,
iii. without rejecting the quantitative tally of the assessee,
iv. without considering the explanation of the assessee that during the course of search the stocks lying at one of the godowns was not at all considered,
v. without issuing any show cause notice,
vi. finding the new source of the income,
vii. partly accepting the books of account and partly rejecting it,
viii. ignoring the principles of natural justice.

He further referred to para number 7.6 of the learned CIT – A wherein it is alleged that stock was found to be short during the course of search. The learned AR submitted that the learned CIT – A has completely ignored the submission of the assessee that the godown of the assessee at a logistic Park Sonipat, Haryana wherein part of the stock of the assessee was not at all covered under the search action. He submitted that stock lying at the said premises was not taken into consideration while arriving at the physical stock as on the date of search resulting in the alleged difference of INR 450 crore. He submitted that in fact there was no actual discrepancy in

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the stock physically lying with the assessee vis-a-vis the stock as per books of accounts. He submitted that had this stock was not available with the assessee, the addition would have been made of INR 450 crore , as shortage of stock could have been found as unaccounted sale of the assessee. He submitted that no evidences were found, that such a shortage of stock was sold by the assessee out of the books of accounts without recording it. He therefore submitted that when one premises was not at all covered in search wherein the stock of INR 450 crore is lying, it has no impact on the alleged transaction with these parties. Therefore, it was stated that the search action in the case of the assessee did not lead to the discovery of any incriminating material indicating that the assessee had recorded any bogus purchases or sales or that the assessee has made any purchase or sales outside the books of accounts. In the course of assessment proceedings, no evidence or material was brought on record by the assessing officer to prove that the transactions with the alleged related parties were bogus. The ad hoc disallowance of 25% of the purchases from the alleged parties was made by the learned assessing officer on mere direction contained in the appraisal report contrary to his own independent view expressed in the deviation report that addition on account of bogus purchases result into the reduction of the returned income. This fact itself shows that, even otherwise, even if the parties are accepted to be alleged bogus parties, the assessee has shown high profit in the return of income with respect to the transaction of purchase and sales from these parties. Thus, he submitted that in the concluded assessment, the addition is made without any incriminating material and in open assessment (abetted assessment); the addition was made without any evidence and contrary to the deviation report of the assessing officer.

35. He further submitted that the additional grounds raised by the assessee are on this point where the learned CIT – A has rejected the books of accounts of the assessee partially without issue of any show cause notice for providing an opportunity of being heard to the assessee before invoking provisions of section 145 (3) of the act. He referred to the provisions of

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section 145 (3) of the income tax act and submitted that where the assessing officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided under subsection (1) has not been regularly followed by the assessee, or income has not been computed in accordance with this standards notified under subsection (2), the assessing officer may make an assessment in the manner provided in section 144 of the income tax act. He therefore submitted that the power of rejection of the books of accounts solely rests with the assessing officer only. He referred to the provisions of section 2 (7A) where the definition of the assessing officer is provided and he submitted that this does not include the power of the learned CIT – A as he is not an assessing officer. He therefore submitted that there is no power available with the learned CIT – A for invoking the provisions of section 145 (3) of the income tax act when specifically the learned assessing officer has tested the method of accounting of the assessee in the original assessment proceedings u/s 143 (3) of the income tax act as well as in the assessment proceedings u/s 153A of the income tax act and he does not find any reason to deviate from the book results. He submitted that it is not the case of the revenue that the assessing officer has not at all referred to the method of accounting employed by the assessee or the correctness and completeness of the books of accounts maintained by the assessee. He therefore submitted that when the learned assessing officer in two consecutive scrutiny assessment u/s 143 (3) and under section 153A of the income tax act, does not find any issue but is satisfied in fact with the correctness and completeness of the accounts of the assessee and as well as the method of accounting employed by the assessee, there is no reason for the learned CIT – A to reject the books of account and work out the appropriate gross profits. He further submitted that there is a defective methodology employed by the learned CIT – A in estimation of the gross profit. He submitted that the learned CIT – A has estimated the gross profit on the alleged transaction with the order identified parties though reflected in the books in the names of the alleged related parties at the lower gross

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profit ratio is cryptic, perverse, illogical and heavily prejudiced against the assessee. He stated that the learned CIT – A while selectively rejecting the trading results in relation to the transactions with the alleged related parties has accepted the trading results of the remaining transaction with the other parties and worked out the gross profit ratio for the assessment year 2012 – 13 to 2017 – 18. The above gross profit ratio is showing of Iran's of 16.20 percentage for assessment year 2012 – 13 to 4.13 percentage for assessment year 2014 – 15. He further stated that the learned CIT – A has once again selectively accepted the gross profit ratio only for the those years where the same appeal is to be higher side and rejected the gross profit ratio for the years where the same appears to be lower side and thus has reached at the result which is not sustainable in law. He submitted that the learned CIT – A selectively rejected the gross profit ratio on transaction with other parties for assessment year 2014 – 15 is not sufficient and adopted the average of the gross profit ratio of the preceding 2 years instead for making the addition. He therefore submitted that the learned CIT – A has accepted one methodology in one assessment year for computing the gross profit and has adopted altogether a different methodology for computing gross profit in different year. He therefore submitted that the approach adopted by the learned CIT – A defies any logic and is clearly perverse and unsustainable in law. He therefore referred to the additional grounds of appeal wherein there is a specific challenge to the invocation of the provisions of section 145 (3) of the act by the learned CIT – A.

36. Thus, the learned authorised representative submitted that in addition in the case of unabated assessment years i.e. Assessment Year 2012 – 13, 2013 – 14 and 2014 – 15 is made without any incriminating evidence. In case of addition assessment years (abetted assessment) for assessment year 2015 – 16, 16 – 17 and 17 – 18 the addition cannot be made on the merits of the issue.

37. The learned CIT DR vehemently referred to the order of the learned assessing officer and the learned CIT – A supporting the order. He submitted that during the course of search, it was observed that the

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assessee has obtained huge share capital and share premium from various entities in different assessment years. He submitted that during the course of search at the office premises of the assessee at Jasola, photocopies of blank signed share transfer forms, blank signed receipts, blank signed power of attorney and other documents necessary for transfer of shares were found and seized. These documents related to companies from which the assessee has claimed to have received share capital and share premium. Together these companies have invested INR 481,900,000 in the target assessee company. Further the managing director of the assessee company was confronted on issue of share capital premium received by the assessee in statement u/s 132 (4) of the act on 22/3/2017 wherein in reply to question number 22 he stated that the amounts received in the form of share capital was nothing but the assessee's companies own money which is rooted back to the assessee company in the form of share capital premium. He referred to the statement of the managing director of the assessee. Therefore, he submitted that for making an addition in the hands of the assessee in case of concluded assessment, there are enough incriminating materials available/found during the course of search. He therefore submitted that the addition of share capital has been made on the basis of the incriminating material found during the course of search thus the learned CIT – A is also correct in holding that the addition u/s 68 with respect to the share capital has been made on the basis of incriminating material found during the course of search u/s 153A of the act and therefore the addition is sustainable on this ground.

38. He further stated that assessee is engaged into the large-scale transaction of bogus sales/purchases with various entities and in statement recorded u/s 132 (4) on 22/3/2017 of the managing director all the concerns were found to be associated with the assessee and the books of accounts on all these are also maintained at the office of the target company. The companies also submitted that all sale and purchases are at the instructions of Mr. Rajesh Garg, the accountant of the assessee. He submitted that these companies do not have any independent existence. He further stated that during the

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course of search the physical stock position of the appellant company was also not telling with the stock recorded in its books of accounts, which further strengthens the fact that the appellant was involved in bogus, sale purchase transactions. He further referred to the transaction of in shell almonds recorded which resulted into profit of INR 1 per KG is transferred to the non-existent entity. He thus submitted that the above stated documents, statements, stock positions lead to unavoidable conclusion that substantial incriminating material was discovered during the course of search. He further referred to the paper book submitted by the assessing officer which contains the statement of the managing director and the various documents such as blank share transfer certificates, affidavits, share application forms, copies of parties bank statement, property sale deeds and other documents which were seized from the premises of the assessee. However he admitted that the assessment for assessment year 2012 – 13 to assessment year 2014 – 15 was completed u/s 143 (3) however the assessments for assessment year 2015 – 16 to assessment year 2017 – 18 are not completed as on the date of search i.e. 21/3/2017 is the time for issue of notice u/s 143 (2) was available to the assessing officer.

39. On the issue of merit of the addition u/s 68 of the income tax act, he extensively referred to the order of the learned assessing officer as well as the learned CIT – A to show that the share applicants do not have much business operation yet have a robust balance sheets, the shares are issued at a heavy premium which is varying from year to year so there is no rational. After the investment made by the investor was the operation in most of the concerns have been reduced further, the share applicants have common directors and further in case of certain companies, the controlling person is given a statement to the investigation wing on 12/11/2012 that these companies have given an accommodation entries. He therefore submitted that coupled with the above evidence the entire transactions are sham transactions are in fact a way to introduce the assessee’s own unaccounted income in the garb of the share capital receipts. He submitted that the share transfer forms are signed by the transfer. He submitted that

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such document should be in possession of the shareholder and not the share issue in companies. He further submitted that transaction of the purchase and sales with respect to four parties is bogus as held by the assessing officer wherein, the profit of the assessee is reduced, reintroduced in the books of the assessee as unaccounted income in the form of share capital. He therefore submitted that in view of this submission the order of the learned CIT – A is based on sound analysis based on the facts available on record and based on incriminating material found during the course of search. With respect to the share capital, he relied upon the decision of the honourable Supreme Court in case of principal Commissioner of income tax vs. NRA iron and steel (2019) 103 taxmann.com 48, decision of the honourable Delhi High Court in NDR promoters private limited (2019) – TIOL – 172 – HC – Del- IT. He also relied on plethora of judicial precedents on the issue of taxability of share capital. On the issue of the validity of the statement recorded u/s 132 (4) of the income tax act he further referred to the decision of the honourable Delhi High Court prominently in Smt Dayawanti vs. CIT (2016) 75 taxmann.com 308 (Delhi) wherein it has been held that where inferences drawn in respect of undeclared income of the assessee was revised on basis of materials found as well as statements recorded by the assessee son in course of search operations and assessee had not been able to show as to how estimation made by the assessing officer was arbitrary or unreasonable, addition so made by the assessing officer by rejecting the books of account was justified.

40. With respect to the addition on account of the bogus purchases, the learned DR vehemently relied upon the decision of NK proteins Ltd vs. CIT (2017 – TIOL – 23 – SC – IT), the decision of the honourable Gujarat High Court in case of NK industries Ltd vs. DCIT (2016) 72 taxmann.com 289 (Gujarat), decision of the honourable Delhi High Court in CIT vs. La Medica (2001) 117 Taxman 628 (Del), decision of the honourable Allahabad High Court in case of Shri Ganesh Rice mills vs. CIT (2007) 294 ITR 316, decision of the honourable Gujarat High Court in case of Vijay proteins Ltd vs. ACIT (2015) 58 taxmann.com 44 (Gujarat), Sanjay oilcake industries vs. CIT (2009) 316

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ITR 274 (Gujarat). The learned departmental representative also referred to the decision of the coordinate bench in ITA number 84 – 85/ Viz/2018 for assessment year 2012 – 0 13 and 2014 – 15 dated 17/10/2018 wherein in para number 8 it has been held that where the assessee is not able to explain the details of unexplained purchases, quantity of the purchases and also the details of unaccounted sales and the source of the unrecorded purchases, the assessee has failed to prove that he made unaccounted purchases and therefore the addition cannot be made on the basis of the gross profit but complete addition of the unaccounted purchases should be made.

41. As per ground number 1 of the appeal of the AO, With respect to the order of the learned CIT – A in rejecting partially the books of accounts and then determining the profit at the rate of gross profit earned by the assessee from other parties with respect to the profit earned on alleged bogus transaction, he submitted that the learned assessing officer has made the addition correctly and therefore the approach of the learned CIT – A in adopting the gross profit rate of 16.20% compared to the 25% disallowance made by the learned assessing officer. He therefore submitted that in the grounds of appeal of the learned assessing officer, it challenges the order of the learned CIT – A in reducing the addition made by the learned assessing officer by deriving the gross profit as unaccounted income of the assessee by applying the rate applicable to untainted parties. He therefore submitted that the order of the learned assessing officer with respect to the alleged purchases should be upheld.

42. The learned authorised representative in rejoinder submitted a point wise rebuttal on the issue raised by the learned departmental representative. With respect to the argument of the learned AR about the seizure of the copies of the blank signed transfer forms, power of attorney et cetera relating to share capital and premium received by the assessee constituting an incriminating material found during the course of search, he submitted that originals were never found at the premises of the assessee during the course of search. He submitted that such originals are always with the

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shareholder and not with the issue company. He submitted that photocopies of the transfer form duly signed by the holder of the shares, undated, without the name of the transferee, without share transfer fees paid thereon, does not have any evidentiary value as such evidence, document cannot be acted upon. He further submitted that photocopy of a document cannot be an evidence. He further stated that in the deviation report by the assessing officer, these evidences were not held to be incriminating evidence. The AO in deviation report has categorically held that the share capital is examined during the course of original assessment u/s 143 (3) of the act for all these years, after that addition made is deleted by the learned CIT – A, against which no appeal has been preferred and therefore no addition is required to be made in the hands of the assessee. He further submitted that why even the photocopies were found at the premises of the assessee, detailed explanation was given that there were some negotiations going on in the past with respect to the acquisition of those shares by the assessee from those investors however, the deal could not materialize and those shareholders are still shareholders of the assessee company. Further blank share transfer forms are only in respect of few of the shareholders from who share capital is received, in case of all the shareholders there is no such evidences found during the course of search. He submitted that even the photocopies with respect to all the shareholders except for 4 – 5 parties, were not found from the premises of the assessee. He submitted that during the original assessment proceedings as well as in the 153A proceedings, assessee has submitted the complete documentary evidences with respect to the permanent account number, bank statements, audited accounts, income tax return, memorandum of articles and articles of Association, confirming the transaction as well as the resolutions, which proves the identity, creditworthiness and genuineness of the share applicants. He submitted that in original proceedings all the shareholders complied with the notices issued by the assessing officer u/s 133 (6) of the act. He therefore submitted that all the queries raised by the assessing officer were directly replied by the shareholders. Thus, according to him,

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the initial onus is discharged by the assessee. He submitted that the learned assessing officer or the learned CIT – A has not made any enquiry with any of the shareholders. He submitted that when the AO does not carry out any enquiry with respect to those shareholders, it does not reject the evidence submitted by the assessee, he does not have a right to make any addition u/s 68 of the income tax act as assessee has discharged initial onus cast upon him.

43. On the issue of the statement u/s 132 (4) of the managing director of the company, he reiterated his submission that same is retracted later on within a short span of 3 days and therefore it does not have any evidentiary value. Even otherwise, he submitted that even if the statement recorded u/s 132 (4) retraction is not considered, assessee has submitted evidence of overwhelming nature such as :-

i. bank statements of alleged parties,
ii. funds flow showing inflow and outflow of funds,
iii. Deviation report of the learned assessing officer wherein he conclusively held that the ultimate source of share application money received by the assessee was from disclosed sources of the assessee itself
iv. All such transactions are verifiable from the bank accounts,
v. source of said capital is directly traced to the bank account of the assessee,
vi. absence of any cash movement,
vii. Complete confirmation of parties with the ITR, bank statements etc

Therefore, addition u/s 68 is not warranted. He further stated that even in the statement, managing director did not say that it is the unaccounted money of the assessee, he stated that the assessee has rooted its own accounted money through banking channel for bringing in share capital, therefore, source of money is the bank account of the assessee and no unaccounted money is routed,, therefore, addition u/s 68 is not warranted.

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44. With respect to the difference in stock, he reiterated his submission that godown of the assessee at Agson Global Logistic Park, Sonepat Haryana, was not covered during the course of search, where part of the stock of the assessee was stored, that stock was not taken into consideration while arriving at the physical stock. Alleged difference of Rs. 450 crore was recorded, but that is the stock at that Godown. Thus, he submitted that there is no difference in the actual stock as well as the book stock. He therefore stated that for assessment year 2012 – 13 to assessment year 2014 – 15, no incriminating material was found during the course of search and thus addition cannot be made.

45. With respect to AY 2015 – 16 to 2017 – 18, he submitted that as assessee has maintained the complete quantitative details of the goods purchased, goods sold no addition can be made in the hands of the assessee. He submitted that deviation report itself suggest that assessee has sold more goods than what is purchased by the assessee. Therefore, if the purchases and sales are excluded, it will result into lower profit in the hands of the assessee then the returned income. Hence, even otherwise no addition can be made. He further referred to the gross profit analysis of similar parties having similar size of the business and the nature of commodities traded therein in case of imperial merchants private limited and Matadin Bhagwan das, he submitted that the average gross profit ratio shown by these parties compared to the gross profit ratio shown by the assessee is much higher. He submitted that the average gross profit ratio shown by them was hardly 2% whereas the assessee has shown the gross profit ratio of 6% with respect to these years. He therefore submitted that even on the comparison of the companies engaged in the similar nature of business with similar size, the book results of the assessee are far better than the comparable company. Even otherwise, he submitted that in absence of any defect in the books of accounts, which is so glaring, obvious, and patent, and latent, which could result in skewing profits of the assessee company, the book results cannot be disturbed.

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46. On hearing the parties, the bench raised a specific query with respect to the addition of share capital and unaccounted purchases that whether all the seized paper referred to in the assessment order are found in originals or were photocopies of the original. The bench made it clear that it wanted to know whether the blank share transfer forms and other forms with respect to the share capital are found and seized in original or mere photocopies.

47. The bench further raised a specific query to the learned DR, where the learned assessing officer was also present during the course of hearing, to know that why a deviation report was filed by the assessing officer and whether any such procedure is laid down or not.

48. The bench further asked the learned CIT DR as well as the learned assessing officer to clarify that in view of the deviation report as well as the appraisal report are differing, then, how the additions are ultimately made in the assessment order.

49. To all these queries, the learned assessing officer submitted a letter dated 6/8/2019.

50. On the 1st issue whether all the seized papers referred to in the assessment order are photocopies or are in original, the learned assessing officer stated that the documents related to unrelated blank share application forms and associated documents such as affidavit, receipts, power of attorney, indemnity bonds and copy of the acknowledgement of the income tax returns of the depositors have been seized during the course of search and seizure proceedings are only Photostat copies. However, he submitted that though these are the 4 a state copies they however depict the fact that unrelated blank share application forms and sale certificates are signed with share, undated special power of attorney and general power of attorney were executive is blank name, the acknowledgement of the income tax returns, certificate of incorporation, bank statement of investing companies show meager amount of income which do not permit this commensurate and justify the quantum of the investment, indemnity bonds although undated without dates, undated money receipts and receipt of shares, undated blank delivery notes and declarations, dividend requests, undated resolution, op

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undated bills and sale ways, list of signatories and undated confirmation of investing parties clearly shows that the documents are incriminating in nature and the assessee has introduced its unaccounted money by way of bogus share capital premium accordingly warranted additions have been made.

51. With request to the deviation report filed, he submitted that on detailed analysis of the documents and the report of the investigation wing (appraisal report) during the course of assessment proceedings, a report was submitted to the authorised officer for his comment and the issues were also discussed in detail in the deviation meeting held with the concerned officer of investigation wing. After discussion at length, the considered view was taken superseding the proposal for deviation and the assessment in case of assessee were made on merits on the basis of the fact and material available on record. He further submitted that deviation note is part of assessment proceedings as per guidelines envisaged in the "INCOME TAX manual of office procedure", volume – II(Technical), Chapter – 3, paragraph 4 at page number 44. He further produces the paragraph of the guidelines as annexure to the letter dated 6/8/2019.

52. On the issue of the addition, he submitted that the assessments were made after taking into consideration the information contained in the appraisal report and corroborating with the same with the material available on record as well as informational information gathered during the course of assessment proceedings. He reiterated that assessment was made after considering all the facts and findings of the case. He extensively referred to all the addition as made in the assessment order. Thus, it was once again contended that addition has been correctly made.

53. We have carefully considered the rival contentions as well as perused the orders of the learned assessing officer and learned CIT – A. For all these years, there are 2 types of additions made by the learned assessing officer.

(1) The 1st addition is with respect to the issue of share capital under section 68 of the income tax act.

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(2) The 2nd issue is with respect to the bogus purchases and thereby addition of the appropriate percentage on such bogus purchases in the hands of the assessee.

Additions of both these types are identically made in 6 different assessment years assessments framed under section 153A of the act. They are starting from assessment year 2012 – 13 and ending on assessment year 2017 – 18. Out of above 6 assessment years, 3 assessment years i.e. Assessment Year 2012 – 13, 2013 – 14 and 2014 – 15 are concluded assessment years and 3 assessment years i.e. A.Y. 2015 – 16, 2016 – 17 and 2017 – 18 are abetted assessment years. There is no dispute between the parties that in case of concluded assessment years, the addition would only be made on the basis of incriminating material found during the course of search. There is no dispute between the parties that in case of abetted assessment years, the addition would be made irrespective of existence of any incriminating material but would only be made as if, it is a normal assessment proceedings.

54. Therefore, the 1st issue that is required to be determined is whether with respect to share capital and bogus purchases for assessment year 2012 – 13 to assessment year 2014 – 15 whether there is any incriminating material found during the course of search not. According to the revenue, the statement of the director of the company as well as the photocopies of blank share transfer forms, power of attorney et cetera found during the course of search from the premises of the assessee are incriminating material. Therefore, addition can be made in the hands of the assessee even in case of concluded assessment, as there is an existence of incriminating material, with respect to the share capital. With respect to share capital in para number 6.3 of the order of the learned CIT – A it is mentioned as under:-

> "6.3 further, from the office of Agson global private limited at JA – 1218 – 1225, 12th floor, DLF tower, Jassal, New Delhi, blank signed share transfer forms, blank signed receipts, blank signed power of attorney and other documents necessary for transfer of share were

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found and seized. These documents related to companies from which the appellant has claimed to have received share capital and share premium."

55. In para number 6.5 the learned CIT – A held as under:-

"6.5 further, Shri Apresh Garg was confronted on the issue of share capital, premium received by the appellant company and in reply to question number 22 of his sworn statement recorded on oath under section 132 (4) of the act on 22/3/2017, he stated that the amount so received in the form of share capital, premium represents the amount is given to various parties, entities in the form of loans or bogus sales/purchases and it was nothing but the appellant company's own money which was rooted back in the books of the appellant company in the form of share capital/premium."

56. During the course of search, in the statement of Mr Apresh garg in question number 16 with respect to the share capital he stated that though he does not remember the exact information about the shareholders but whatever share capital and save premium has been received by the appellant company is basically the money out of the companies sale proceeds which have been rooted back through banking channel through the shareholders which included the employees of the company as well as his other companies. Further, in response to question number 22 of his statement he submitted Trail of the funds from the assessee company through cheque to Vishal traders and from Vishal traders to Mrs Balaji traders and from Shri Balaji traders to the assessee company in the form of share capital. He further stated that the assessee gave cheque to Vishal traders, Vishal traders passed on the cheque to Balaji traders and Balaji traders introduced the same some to the assessee company in the form of share capital. Therefore, it is apparent that involve of the transaction there is no unaccounted income of the assessee, which has been introduced in the books of accounts of the company as share capital. In fact, assessee issued cheques in the form of advances et cetera to various concerns who in turn deposited the money with the assessee through cheque as a share capital

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and share premium. Therefore apparently on the issue of the share capital there is no confession in the statement recorded u/s 132 (4) of the managing director of the appellant company that there is any incriminating material or unaccounted income of the assessee. Further on 24/3/2017 this statement was retracted and communicated on 31/3/2017 to the assistant director of income tax (investigation), unit – 7 (4), 2nd floor, ARA Centre, Jhandewalan extension, New Delhi – 55 with subject headline of search and seizure u/s 132 (1) of the income tax act, 1961 on 21/3/2017 concluded on 23/3/2017 in the name of the appellant company. As per that letter, it was stated that as per annexure A – 1 to annexure A – 8 for the copy of the set of share application money papers were found and seized. According to that letter, the assessee agreed to avail the benefit of the scheme under PMGKY by offering tax on INR 500,000,000. The assessee stated that as the offer was made under tremendous pressure and realized that it was not possible to carry out the above promise for the reason that assessee did not have any undisclosed income or assets and assessee is not capable of paying the huge tax and deposit the above sum and therefore the assessee company made the declaration under the aforesaid scheme of INR 300,000,000 instead of INR 500,000,000, thus the statement made on 23/3/2017 was revised to that extent. Therefore, it is apparent that in the statement made by the managing director of the company and there was no disclosure because of share capital at any point of time. Thus the statement so made which has no disclosure on account of share capital cannot be considered as an incriminating document/evidence for making the addition on account of share capital.

57. The next question that arises is that whether the photocopies of the blank share transfer forms, blank signed receipts, blank signed power of attorney and other documents necessary for transfer of shares which were found and seized, are they incriminating evidences in nature based on them addition can be made on account of such share capital. As per the statement submitted by the assessee out of 36 shareholders, photocopies of such documents were found in case of 12 shareholders and in case of balance 24

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shareholders, no evidences whether incriminating or otherwise were found during the course of search.

58. In the decision of coordinate bench in ACIT, Central Circle-5, New Delhi Vs M/s Gee Ispat Pvt. Ltd., A-28, Sector 19, Rohini, Delhi-110085 [ITA No. 4256/Del/2014 : Asstt. Year : 2005-06 ITA No. 4257/Del/2014 : Asstt. Year : 2006-07 ITA No. 4258/Del/2014 : Asstt. Year : 2007-08 ITA No. 4259/Del/2014 : Asstt. Year : 2008-09 dated 31/5/2018] identical documents were found in Original and bench held that they were not incriminating in nature. In para no 18 (f) it was argued by the ld DR that

> "f) Search at the assessee's premises led to the seizure of blank, share transfer forms duly signed by the allottees and affidavits of some of the companies/persons who were shown as investors in the share capital of the assessee company e.g. pages 9,10,12,15,16, 33, 34, 55, 56, 61 and 62 of annexure AA-1 are blank sign share transfer forms of some of the share allottee companies such as M/s NEPC Industries Ltd, M/s Telstar Editing Pvt. Ltd, and M/s Softgate Technologies Pvt. Ltd, etc"

But in para no para no 24 the coordinate bench held that

> "24. In the present case, since no incriminating material was found, therefore, the addition made by the AO u/s 153A of the Act was not justified."

59. Further in case of 2018 (1) TMI 88 - ITAT DELHI M/S. BRAHMAPUTRA FINLEASE (P) LTD. VERSUS DCIT, CENTRAL CIRCLE -17, NEW DELHI [No.- ITA No. 3332/Del/2017 Dated.- December 29, 2017] the facts were that:-

> "4.5 On the contrary, Ld. CIT(DR) submitted that addition in dispute has been made on the basis of the incriminating material found during the course of search. She referred to page 5 of the assessment order and submitted that alongwith the search proceeding under section 132 of the Act at the premises of the assessee, a survey under section 133A of the Act was also

carried out at the premises of Sh. M.L. Aggarwal, Chartered Accountant located at N-5, Azadpur, Commercial Complex New Delhi and documents including blank signed share transfer form, blank signed money receipts for transfer of shares, blank signed power of attorney, Memorandum and Articles of Association with some ROC papers and copy of bank statements etc. in relation to one of the share applicants, i.e., Edward Supply P. Ltd. were impounded from his premises. The Ld. CIT(DR) submitted that the survey proceedings at the premises of Mr. M.L. Aggarwal was part of the search proceeding at the premises of the assessee and the material impounded was in the nature of incriminating material and therefore the condition of incriminating material found during the course of search is satisfied."

Based on above facts the coordinate bench after considering the statement as well as the above documents held that :-

"4.7.2 In view of above decision, we are required to examine the two conditions. The First condition is whether for the year under consideration, the assessment stood completed before the date of search or not. The second condition is that whether any incriminating material unearthed during the course of the search qua the addition made, which was not already disclosed or made known in the course of original assessment.

4.8 As regard the first condition, the Ld. counsel has already referred to page 105A of the paper book, which is a copy of the assessment order passed under section 143(3) of the Act on 24/11/2009. Since in the case of the assessee search was carried out on 28/09/2010, thus, it is undisputed that assessment was completed prior to the date of search. 4.9 Now regarding the second condition, the Ld. CIT(DR) has mentioned that documents impounded from the premises of Sh. M.L. Aggarwal, Chartered Accountant, during the course of survey proceeding are incriminating material found during the course of search. We do not agree with the contention of the Ld. CIT (DR) that these materials like blank shares transfer forms etc could be termed as found during the course of search at the premises of the assessee. The survey proceedings carried out at the premises of the Chartered Accountants, ML Aggarwal are separate from the search proceedings carried out at the premises of the assessee. There is no concept of

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group of assessee in Income-tax assessments. Each assessee is treated separately. If any material is found during the course of search from the premises of one assessee, it can be used against another assessee either under section 153C or under section 148 of the Act depending on material belonging to or pertaining to that another assessee but it cannot be termed as material found during the course of the search of another assessee for making addition under section 153A of the Act. If any material impounded during the course the survey at the premises of one assessee and found to be belonging to or related to another assessee, then action may be taken in terms of section 148 of the Act depending on the material found but that material cannot be treated as part of the search carried out at the premises of the another assessee. Further, the Assessing Officer in the impugned order has not brought on record what was incriminating in the said material impounded from the premises of Sh. M.L. Agrawal. In view of our discussion, we reject the above contentions of the Ld. CIT(DR) that any incriminating material qua the addition was found during the course of the search action under section 132 of the Act.

4.10 Another argument, made by the Ld. CIT(DR) in support of her claim of incriminating material was that the Item No.(i) mentioned on page 6 of the assessment order, was incriminating in nature as it contained detail of accommodation entry. For having clarity on the issue raised by the Ld. CIT(DR), we may like to reproduce the relevant part of the assessment order as under:

"Apart from, during the course of search operation in Brahmaputra Group of cases, carried out at premises A-7, Mahipalpur, New Delhi, the following incriminating documents were inter alia seized by party BA-5

i. Page No. 23 of Annexure A-6 (a diary relating to F.Y. 2009- 10)- on the back side\ of this page recording is made in the name of "Shri Shyam Trexim & Fincom P. Ltd." against which 50 lakhs is written.

ii. Page No. 1 of Annexure A-7 - on this page a recording of funds mentioning debit as well as credit of 25 lakhs in the name of Murari Lai Aggarwal dated 31.05.2008 and further comments of the payment of same amount by cash to Murari Lal Aggarwal (MLA) is made

iii. The back side of the above page 1 of Annexure A-7 mentions that Sarat Aggarwal was paid with cash of 30 lakhs bring back equal amount in other form. The date of noting is 04.06.2008.

iv. Page 1 of Annexure A-10 - it contains a hand written extract of cash book containing entry of 5 lakhs in the main of M.L. Aggarwal. It also shows as debit of 3 lakhs in the name of Sarat Aggarwal. The entries are for the date 28.05.2008, the date of writing of this page.

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v. Page No. 4 of above Annexure A-10 contains record of 30 lakhs in the name Mr. A Singhal and M.L. Aggarwala dividing into 25 lakhs and 5 lakhs respectively. On this page the name of Sudarshan Casting P. Ltd. is also written.

During the course of search and post search investigation, the assessees of this group have not been able to explain the above entries satisfactorily. Though these entries are to be dealt with in relevant cases but this also proves the fact that this group is engaged in bring back their unaccounted/undisclosed income in the guise of share capital/share application money."

4.11 We find that the Item No. (i) contains recording in the name of "Shri Shyam Trexim & Fincom Pvt. Ltd". The Assessing Officer has nowhere brought on record how the said recording on the page relates to the addition in question of share capital. The Ld. CIT(DR) also could not explain as how the said recording was related to the addition in question made in respect of alleged unexplained share capital. She only stated that said recording on the page reflected accommodation entry obtained by the 'Brahmaputra Group' and but no documentary evidence regarding the claim that the document was incriminating qua the addition, are filed. In respect of the Items No. (ii) to (v), the Ld. counsel has submitted that additions in respect of the amounts mentioned in the document has been made in the case of another company namely "M/s Brahmaputra Infrastructure Ltd" in assessment year 2009-10. This fact was not controverted by Ld. CIT(DR). Thus, we find that no incriminating material qua the addition made is found during the course of search from the premises of the assessee. Accordingly, above contention of Ld. CIT(DR) are rejected. She also submitted that during the course of search, hard disks of computers and others material were also seized which contained incriminating material. The Ld. CIT(A) failed to substantiate the claim either by the impugned assessment order or through any other documentary evidence. In the assessment order, there is no mention that any incriminating material is found in hard disk etc. Thus, this contention of Ld. CIT(A) is also rejected.

4.12 The next argument of the Ld. CIT(DR) is that the statement recorded under section 132(4) of the Act of Sri Sampat Shrama is incriminating material found during the course of search. We have observed that said statement of Sh. Sampat Sharma was recorded at his residential premises during search proceeding carried out separately. In our opinion, the statement of Sh. Sampat Sharma was not recorded in search proceeding of the assessee and thus, it cannot be considered as incriminating material found during the course of the search of the assessee.

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4.13 Without prejudice to our observation, we do not find any mention of any incriminating material in the statement of Sh. Sampat Shrama recorded under section 132(4) of the Act. The Ld. counsel drawn our attention to copy of the statement available on page 427 to 450 of the paper book and english translation of the same available on pages 420 to 426 of the paper book. In response to question No. 6, regarding details of the bank accounts, Sh. Sharma stated that he did not remember the bank account numbers and all the pass books of the accounts were kept in the office of Brahmaputra Infra Projects Ltd. In response to question No. 8, he explained where the books were kept. The documents referred in question No. 20 to 25 are admittedly not belonging to the assessee. The question No. 26 relates to investment by Sh. Sharma. On perusal of the entire statement of Sh. Sampat Shrama, we do not find any mention of any incriminating material qua the addition made.

4.14 Further, in the case of Best Infrastructure (India) Private Limited (supra) the question of law framed is as under:'

"Did the ITAT fall into error in holding that the additions made under Section 68 of the Income Tax Act, 1961, on account of the statements made by the assessee's Directors in the course of search under Section 132 of the Act were not justified ?"

4.15 In the said case, a search was conducted in case of Mr. Tarun Goyal and Best Group Companies. During the course of search, Sh Tarun Goel admitted of having provided accommodation entry to the best group companies. The Director of the Best group of companies, Sh Anu Aggarwal also surrendered 8 crore during the course of search against share capital and share premium. Another Director, Sh. Harjit Singh in his statement also concurred with the statement of Sh. Anu Aggarwal. In the case, the learned CIT-(A) held that evidence does not mean only documentary evidence and the statement under section 132(4) of the Act is an important evidence collected as a result of search and seizure operation and thus, the addition of share capital was based on evidence gathered during the search. However, the Tribunal held that no incriminating material for each of the assessment year other than the year of search, to justify the assumption of jurisdiction under section 153A of the Act. The Hon'ble High Court, after considering the arguments of both parties on the issue whether statement under section 132(4) of the Act constitute incriminating material, held as under:

"38. Fifthly, statements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax Vs. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti

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Gupta Vs. CIT (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintained accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law."

4.16 In the case of Harjeev Aggarwal (supra), the Hon'ble High Court observed as under:

"19 In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV – B of the Act.

20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The works evidence found as a result of search" would not taken within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the Assessing Officer to make a block assessment merely because any admission was made by the Assessee during search operation.

4.17 The Hon'ble High Court in the above case further noted that the statement recorded under section 132(4) of the Act may be used for making the assessment but only to the extent it is relatable to the incriminating evidence/material unearthed or found during the course of search. The Hon'ble High Court also cited the decision of CIT Vs. Sh. Ramdas Motor Transport, (1999) 238 ITR 177 of Hon'ble Andhra Pradesh High Court, where it is explained that in case no unaccounted documents or incriminating material is found, the powers under section 132(4) of the Act cannot be invoked.

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4.18 Further, as far as the decision of the Hon'ble Supreme Court in the case of Video Master (supra), is concerned, we agree with the argument of the Ld. counsel that in said case certain other materials like loose papers and vouchers were found which corroborated the statement and in those circumstances it was held that it could not be said that addition was based on no evidence. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

"3. In the second round, the assessment order dated March 29, 2000, gave detailed reasons for arriving at the conclusion that the figures stated in the statement recorded were corroborated, in particular, by various loose sheets found at the premises of the assessee as well as vouchers, some of which related to the two films in question. In an appeal filed to the Tribunal, the Tribunal framed three issues, two of which were unnecessary for the reason that the statement recorded on August 25, 1995, was said to be relevant but not conclusive. Therefore, whether the statement was made under duress and whether it was retracted lawfully would have no relevance at this stage. However, the Tribunal went into these issues as well and ultimately, found that the statement could be used as evidence. Further, it examined other corroborative evidence referred to in the assessment order and arrived at a finding that the added income would be income which can be added under section 158BC for the block assessment period in question. In an appeal filed under section 260A to the Bombay High Court, the High Court found, after narrating the facts, that no substantial question of law arises.

4. We are of the view, in accordance with the view of the High Court, that no substantial question of law arises. Further, though it was vehemently argued by Shri Devansh A. Mohta, learned counsel appearing for the assessee, that this was a case both of perversity and of there being no evidence at all. We find that not only are the findings of fact recorded in some detail but that it is not possible to say that this is a case of no evidence at all inasmuch as evidence in the form of the statement made by the assessee himself and other corroborative material are there on record."

4.19 We find that in the case of best infrastructure (India) private limited (supra), despite the admission of accommodation entry in statements under section 132(4) of the Act, the court held that the statement do not constitute as incriminating material. In the instant case, neither is there any statement of any accommodation entry operator claiming that any entry was not provided nor any director has admitted that assessee obtained accommodation entry. Thus, the case of the assessee is on better footing then the case of Best Infrastructure (I) P. Ltd (supra). In such facts and circumstances, respectfully following the decision of the Hon'ble Delhi High Court in the case of best infrastructure (India) private limited (supra), we do

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not have any hesitation to hold that the statement under section 132(4) of Sh. Sampat Sharma cannot be treated as incriminating material found during the course of search.

In the result, we hold that addition of share capital in the year under consideration has been made without relying on any incriminating material found during the course of search."

60. On identical facts in 2018 (3) TMI 1598 - ITAT DELHI M/S BRAHMAPUTRA REALTORS (P) LTD. VERSUS DY. COMMISSIONER OF INCOME-TAX, it was held that all such documents even though they were found to be in original in all those cases it was held to be not incriminating document based on which the concluded assessment can be disturbed.

61. On further identical facts in 2018 (10) TMI 50 - ITAT DELHI M/S M.L. SINGHI & ASSOCIATES (P) LTD. VERSUS DEPUTY COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE-7, NEW DELHI it was held that all such documents even though they were found to be in original in all those cases it was held to be not incriminating document based on which the concluded assessment can be disturbed.

62. In another decision of the coordinate bench in ITA number 1451, 1452, 1453 dated 1/3/2008 for assessment year 2007 – 08 – 09 – 10 wherein on identical facts and circumstances, where 1 of us is a co-author of the judgment, following documents were found:-

5.1 The perusal of the above details reveals that the assessee has received share premium from above companies. Certain documents were found and seized from the residence of the assessee company ,Sh. Vinod Goel which are as under;

1. Annexure No 1. Memorandum and Articles of Association Annexure A-3, A-6, A-7, A-97 A10, A-11, A-12, A-13 a A-14

2. Bank statements –DO

3. Blank share transfer forms –

Do4. Blank special power of attorneys in original signed by the authorized signatory –

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Do5. affidavits by Director of the concerned companies stating therein that their company has applied for equity shares of M/s Goel International Pvt. Ltd –

Do6 Blank receipts against the shares held by the company in M/s Goel International Pvt. Ltd, signed by the Director of company.

Photocopies of AnnexureA-3 showing details of Incriminating documents as mentioned above in the case of one company who had invested in the shares of the assessee company is enclosed alongwith this order. Exactly similar evidence is found in case of other companies also who had made investment in the shares of the assessee company ,which are marked as Annexures mentioned above.

Dealing with all these documents in para number 9.4 of the decision the coordinate bench dealt with the issue as under:-

> "9.4 Furthermore, three blank documents were found with respect to these companies. These are blank share transfer forms, special power of attorney signed by the authorized signatories and blank receipts against the shares. All these three documents are admittedly non-executed and do not show any transactions. Had there been any transaction recorded on blank share transfer forms, receipts regarding any money or transfer in favour of any person, it would have made them suspicious. The entries in those forms are not at all made, but are merely blank. The assessee has given detailed explanation why they were found at the place of assessee. The Assessing Officer has not examined the signatories of these documents to arrive at the true nature of the transactions. The Assessing Officer is just making an assumption that these are the documents which would have been used by the assessee for transferring those shares in the name of the promoters or their group concerns at a price which is far less than the price of shares issued. It is not the case of the Assessing

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Officer that either such shares are subsequently transferred at lower price, or such shares stood disposed of by the investor companies. In view of this, the case of the Revenue is merely based on assumption and surmises ."

63. Therefore apparently compared to all those decisions cited above which are referred by the learned authorised representative where such forms and documents were found in original, the case of the assessee is on far better footing that only in case of few shareholders these documents were found which were also not in original but only photocopies. It is also confirmed repeatedly by the learned assessing officer present in the hearing as well as in his letter to the bench that original of these documents were not found during the course of search.

64. Even otherwise, provisions of section 61 of the evidence act prescribe that the contention of a document may be proved either by primary evidence or by secondary evidence. According to section 67, thereof primary evidence means the document itself reduced for the inspection of the court. Explanation to of section 60 provides that copy of a common original are not primary evidence. Thus, even otherwise the photocopy cannot be primary evidence. As such, it cannot also be classified as a document. In absence of any other material, even such photocopy cannot be treated to be secondary evidence also. Such documents are only overly being claim to be a photocopy without claiming that what was photographed was the original order that it was compared with the original. Therefore, the photocopy to be admissible as evidence has to be a certified 1. Thus for the income tax proceedings the learned assessing officer should have summoned all those investors to verify whether these documents are really executed or not.

65. In view of this, whether such documents can be said to be incriminating documents or not has been answered by all these decisions of the coordinate benches in favour of the assessee. Therefore, we are of the view that for assessment year 2012 – 13 to assessment year 2014-15 , there were no incriminating evidences with respect to the share capital based on which

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the addition can be made. Accordingly, Ground no 1, 2 for AY 2012-13, 2013-14 and 2014-15 is allowed.

66. Even otherwise, on merits of the addition we deal with issue for all these impugned years together. In assessment year 2012-13 the assessee challenged the addition of Rs.14,92,00,000/- on account of unexplained cash credit on Ground No.4 and on Ground Nos.5(a) and (b) challenged the commission paid for arranging share capital @ 2%. A.O. noted that assessee has furnished details of Rs.14.92 crores received during the year under consideration from M/s.Mahalakshmi Traders, the proprietorship concern of Shri Manoj Gupta. The financials of the proprietorship were obtained which shows in proceeding assessment year 2011-12 it's return of income was at Rs.3,90,540/- and assessment year 2014-15 return of income was at Rs.10,28,742/- In assessment year 2016-17 return of income was at Rs.15,85,400/-. The A.O. was of the view that M/s. Mahalaxmi Traders has no financial worth to make investment in assessee company. During the course of search, proprietor of M/s. Mahalakshmi Traders in his statement recorded on 22nd March, 2017 under section 132(4) denied to have made any investment in assessee company. The A.O. accordingly made the addition of the impugned amount. The A.O. also made addition of Rs.34,47,334/- on account of assessee company paid commission @ 2% for obtaining the entry on account of share capital. The Ld. CIT(A) confirmed the addition.

67. In assessment year 2013-14, assessee has raised Ground No.3, challenging similar addition of Rs. 49,99,50,000/- on account of unexplained cash credit under section 68 of the Income Tax Act and sum of Rs. 99,99,000/- as commission paid for arranging the share capital. The A.O. noted that assessee company has received share capital from M/s. Balaji Enterprises of Rs. 15,20,00,000/- and Rs. 34,79,50,000/- from M/s. Vishal Traders. The A.O. as regards M/s. Vishal Traders noted that it has not filed return of income. Further, Mr. Arpesh Garg was confronted on issue of share capital/premium received by the assessee company and in reply to Question No.22 of his own statement recorded on oath under section 132(4) of the Act

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on 22.03.2017 has stated that the amount so received in form of share capital/premium represents the amounts given to various parties/entities in the form of loans/bogus sales/purchases and it had nothing but assessee company's own money which was routed back to the assessee's own money routed back to assessee company in the form of share capital/premium. The A.O. therefore, noted that the amount that assessee has resorted to circuitous and sham transaction with these entities, therefore, addition of the above amount was made as unexplained credit under section 68 of the I.T. Act. Further, the addition on account of commission was also added. The Ld. CIT(A) confirmed the addition.

68. In A.Y. 2014-2015, the assessee raised Ground No.3 challenging the addition of Rs.81,35,44,000/- on account of unexplained credit under section 68 of the I.T. Act and commission paid of Rs.1,62,70,880/-. The A.O. noted that assessee has received share capital from M/s. Rustagi Exim Pvt. Ltd., of Rs.9,55,55,000/- Rs.6,48,90,000/- from M/s. Vikas International and Rs.65,30,99,000/- from M/s. Vishal Traders. Similar statement of Mr. Arpesh Garg was referred to. The A.O. accordingly made the addition under section 68 of the I.T. Act and unexplained commission as well. The Ld. CIT(A) confirmed the addition.

69. In A.Y. 2015-2016, the assessee has raised Ground No.1 challenging the addition of Rs.36,41,49,900/- under section 68 of the I.T. Act and Rs.72,82,998/- on account of unexplained commission paid. The A.O. similarly noted that in assessment year under appeal the assessee has received Rs.11,60,00,100/- from M/s. Rustagi Exim Pvt. Ltd., and Rs.24,81,49,800/- from M/s. Vishal Traders and addition was made under section 68 of the I.T. Act. The A.O. also made addition on account of commission paid @ 2% of Rs.72,82,998/- on account of arranging the share capital. The A.O. similarly referred to the statement of Mr. Arpesh Garg. The Ld. CIT(A) confirmed the addition.

70. In A.Y. 2016-2017, the assessee has raised Ground No.1 challenging the addition of Rs.55,47,74,700/- on account of unexplained credit under section 68 of the I.T. Act and addition of unexplained commission of

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Rs.1,10,95,448/-. The A.O. similarly noted that in assessment year under appeal the assessee received Rs.37,60,99,650/- from M/s. Rustagi Exim Pvt. Ltd., and Rs.17,86,74,750/- from M/s. Vishal Traders on account of share capital. Addition under section 68 of the I.T. Act was made. Further addition was made of Rs.1,10,95,448/- on account of commission paid @ 2% for arranging the share capital/premium. Similarly the statement of Mr. Arpesh Garg was reproduced in the assessment order. The Ld. CIT(A) confirmed the addition.

71. In A.Y. 2017-2018, the assessee has raised Ground Nos.1 and 2 challenging the addition of Rs.52,23,87,900/- on account of unexplained share capital received from M/s. Rustagi Exim Pvt. Ltd., amounting to Rs.52,23,87,900/- which was added under section 68 of the I.T. Act. Further addition was made with respect to commission paid @ 2% for arranging the above share capital/ premium. Addition was made of Rs.1,04,47,758/-. The A.O. similarly referred to the statement of Mr. Arpesh Garg. The Ld. CIT(A) confirmed the addition.

72. Learned Counsel for the Assessee has submitted that share application monies received by the assessee company (AGPL) from these parties are as under :

"Share application monies received by the Assessee Company (AGPL) from the alleged related parties:

Particulars	A.Y.	A.Y.	A.Y.	A.Y.	A.Y.	A.Y.
	2012-13	2013-14	2014-15	2015-16	2016-17	2017 18
(i) Mahalaxmi Traders	14,92,00,000					

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(ii) Sri Balaji Enterprise	-	15,20,00,000	-	-	-	
(iii) Vishal Traders		34,79,50,000	65,30,99,000	24,81,49,800	17,86,74,750	
(iv) Rustagi Exim P. Ltd	-	-	9,55,55,000	11,60,00,100	37,60,99,650	52,23,89,700
(v) Vikas International			6,48,90,000	“	~	

73. He has submitted that with reference to share capital/premium received in A.Y. 2012-2013 from M/s. Mahalakshmi Traders in a sum of Rs.14.92 crores that assessee filed the details during the assessment proceedings to show that this amount was initially paid by assessee company itself to M/s. Mahalakshmi Traders as advance which were returned back by M/s. Mahalakshmi Traders as share capital to the assessee company. In view of the above fact, the source of fund for share capital made by M/s. Mahalakshmi Traders was the assessee itself. As such, it cannot be stated that the said share capital was unexplained/undisclosed income of the assessee to be added under section 68 of the I.T. Act. These transactions were duly reflected both in the Bank Account of the assessee and M/s. Mahalakshmi Traders.

74. Similarly for A.Y. 2013-2014 assessee company received share capital from M/s. Vishal Traders of Rs.34,79,50,000/- and M/s. Balaji Enterprises of Rs.15,20,00,000/-. As per the details filed by the assessee along with books of account the entire amount of Rs.49,49,50,000/- was received by these concerns either directly or indirectly from the assessee company itself as advance or payment for purchase. He submitted that as per documents and bank accounts relevant to A.Y. 2017-2018 during the year M/s. Rustagi Exim Pvt. Ltd., has introduced Rs.52.23 crores. On examination of the

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transaction the assessee company has transferred Rs.54.56 crores to M/s. Rustagi Exim Pvt. Ltd., which has been routed back to the assessee company in the form of share capital/premium which also suggest that source of the funds introduced in the shares is assessees itself. Similarly, in A.Ys. 2014-15, 2015-16, 2016-17, the details filed by the assessee would show that ultimate source of the share application money received by the assessee was from the disclosed source of the assessee itself. The transactions are verifiable from the bank account of both the parties. The assessee also filed confirmation of both the parties supported by their bank statements. In some cases, assessee company has routed its own fund directly from the share application money transactions. In those cases sources are apparently proved. As the source of the share capital/premium can be traced directly to bank accounts of the assessee company and there is no cash movement, therefore, addition of entire share capital/premium of Rs.365.28 crores is not justified and may lead to highpitched assessments. He has further submitted that A.O. in the deviation report has expressed that no addition could be made under section 68 of the I.T. Act on account of share capital/premium and commission @ 2%. After filing of the deviation report, no independent evidences have been given against the assessee. The conclusion drawn by the A.O. that these are unexplained share capital and premium is wholly unjustified and based on no evidence. He has relied upon Judgment of Hon'ble Gujarat High Court in the case of DCIT vs. Rohini Builders 256 ITR 360, Judgment of Hon'ble Delhi High Court in the case of CIT vs. Victor Electronics 329 ITR 271 and Judgment of Hon'ble Bombay High court in the case of CIT vs. U.K. Shah 90 ITR 396. Learned Counsel for the Assessee further submitted that since the entire amount is routed through the funds of the assessee through different intermediary parties, therefore, there is no question of payment of any commission @ 2%. Further findings of the A.O. are based on no evidence or material on record and as such, entire additions are liable to be deleted.

75. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that assessee failed to explain the source of the share

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capital/premium in all the assessment years under appeals. Therefore, addition have been correctly made by the authorities below.

76. We have considered the rival submissions and perused the material on record. The assessee has filed several paper books on this issue which contain the confirmations from the Investor Companies along with bank statements of assessee and all the Investor Companies etc., in all the assessment years. In all the confirmations, the Investor Companies have confirmed that the impugned amount transmitted in their bank accounts from the bank account of the assessee company and as per the enclosed details the trail and transfer back to the account of the assessee company in the form of their share application money in their company. Complete trail of funds with the copies of the relevant bank accounts evidencing the movement of the funds have been enclosed along with confirmations. All the investors are assessed to tax. The confirmations bears the stamp of the Revenue Department which would show that all the confirmations are part of the assessment record supported by all the bank statements of the assessee along with all the Investors and other related parties. The assessee has filed summary of the trails of funds and source of investment because the details are voluminous in nature as filed in the Paper Books No.7A to 7E. The summary of the transfer of funds with documentary evidences filed in the paper book is reproduced as under :

A. "Details of Share Application received from alleged related parties for A.Y. 2012-13:

Share Application received from Mahalaxmi Traders (MT):Rs.14,92,00,000/-

Particulars	Amt. paid by AGPL to MT either directly or indirectly via intermediaries		Amt. received by AGPL as Share Application from MT Rs.	Paper Book Ref.
	(Payment by AGPL to Intermediaries) Rs.	(Payment to MT) Rs.		
Between 19.04.2011 to 04.05.2011: (i) AGPL paid to Mahalaxmi Traders		3,79,95,063		Following docs enclosed in Paper Book No.-7A: (i) Confirmation of Mahalaxmi Traders:
(ii) Mahalaxmi Traders paid to			3,75,25,400	

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AGPL in the form of share application				Annexure A (ii) Complete Trail of Funds: Pgs. 1-2 (iii) Relevant bank statements of concerned parties evidencing movement of funds: Pgs. 3-46
Between 04.05.2011 to 13.05.2011: (i) AGPL paid to Shri Balaji Enterprises	6,53,01,570			
(ii) Sri Balaji Enterprises paid to Mahalaxmi Traders	-	6,52,97,700		
(iii) Mahalaxmi Traders paid to AGPL in the form of share application			6,38,24,600	
Between 30.05.2011 to 26.08.2011 (i) AGPL paid to Mahalaxmi Traders		8,57,87,900	-	
(ii) Mahalaxmi Traders paid to AGPL in the form of share application.		-	4,85,00,600	
TOTAL		18,90,80,663	14,98,50,600	
Less: Amount adjusted against goods			6,50,600	
Amount received towards share application form MT			14,92,00,000	

B. Details of Share Application received from alleged related parties for A.Y. 2013-14:

(1) Share Application received from Sri Balaji Enterprises (SBE): Rs. 15,20,00,000/-

Particulars	Amount paid by AGPL to SBE either directly or indirectly via intermediaries		Amt. received by AGPL as Share Application from SBE Rs.	Paper Book Ref.
	(Payment by AGPL to Intermediaries) Rs.	(Payment to SBE) Rs.		
On 18.03.2013 : (i) AGPL paid to Rustagi Exim Pvt. Ltd.	1,50,00,000	-	-	Following docs enclosed in Paper Book No.-7B: (i) Confirmation of Sri Balaji Enterprises : Annexure-A. (ii) Complete Trail of Funds : Pgs. 1-2. (iii) Relevant bank statements of concerned parties
(ii) Rustagi Exim Pvt. Ltd. paid to Sri Balaji Enterprises		30,00,000	-	
(iii) Sri Balaji Ent. paid to AGPL in the form of share application			30,00,000	
Between 26.03.2013 to 28.03.2013 : (i) AGPL paid to Sri Balaji Enterprises	-	5,89,40,280	-	
(ii) Sri Balaji Enterprises paid to AGPL in the form of share application.	-	-	1,05,50,000	
(iii) AGPL paid to Vishal Trader	4,83,91,200	-	-	
(iv) Vishal Traders paid to Sri	-	3,34,00,000	-	

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Balaji Enterprises	4,94,91,000	-	-	evidencing movement of funds: Pgs.3-19.
(v) AGPL paid to Vikas International .	-	4,94,95,000	-	
(vi) Vikas International paid to Sri Balaji Enterprises.	2,00,00,000	-	-	
(vii) AGPL paid to Rustagi Exim Pvt. Ltd.	-	81,20,000	-	
(viii) Rustagi Exim Pvt. Ltd. paid to Sri Balaji Enterprises	-	-	13,85,00,000	
(ix) Sri Balaji Enterprises paid to AGPL in the form of share application.				
Total		15,29,64,280	15,20,50,000	

(2) Share Application received from Vishal Traders (VT) : Rs.34,79,50,000/-

Particulars:	Amt. paid by AGPL to VT either directly or indirectly via intermediaries (intm)				Amt. received by AGPL as Share Application from Vishal Traders Rs.	Paper Book Ref.
	(Payment by AGPL to intm) Rs.	(Payment by Intm. to another Intm) Rs.	Payment by Intm. to another Intm) Rs.	(Payment to Vishal Traders) Rs.		Following docs enclosed in Paper Book No 7D:
Between 03.04.2012 to 24.04.2012:		-	-		-	(i) Confirmation of Vishal
(i) AGPL paid to Vishal Traders			-	4,16,25,000		
(ii) Vishal Traders paid to AGPL in the form of share application			-	-	1,60,00,000	
			-	-	-	(ii) Complete Trail of Fund
Between 18.10.2012 to 06.11.2012				-	-	
(i) AGPL paid to Vishal Traders	2,24,00,000			-		
(ii) Vishal Traders paid to Rustagi Exim Pvt. Ltd.		2,24,10,000				
(iii) Rustagi paid to ASM Traxim Pvt. Ltd.			2,11,75,000			
(iv) ASM Traxim paid to Vishal Traders	-			1,50,25,000		(iii) Relevant bank statements of concerned parties evidenci
(iv) Vishal Traders paid to AGPL in the form of share application	-	-		-	1,44,50,000	
	-	-			-	
(v) AGPL paid to Vishal Traders	-	-	-	2,15,00,000		
(vi) Vishal Traders paid to AGPL in the form of share application		-	-	-	2,15,00,000	
					-	
Between 22.11.2012 to 14.12.2012:			-		-	
(i) AGPL paid to Rustagi Exim Pvt. Ltd.	2,65,50,000		-		-	
(ii) Rustagi Exim Pvt. Ltd. paid to ASM Traxim Pvt. Ltd.		2,65,20,000	-		-	
		-				
(iii) ASM Traxim paid to Vishal Traders	-	-	-	2,65,15,000		
(iv) Vishal Traders paid to AGPL in the form of share application	-		-		2,65,17,000	
	-			-		
Between 07.01.2013 to 07.02.201				6,74,68,900		

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(i) AGPL paid to Vishal Traders						
(ii) Vishal Traders paid to AGPL towards share application					6,60,83,900	

Between 18.02.2013 to 19.02.2013 (i) AGPL paid to Rustagi Exim Pvt. Ltd. (ii) Rustagi Exim paid to RJ Cold Storage Pvt. Ltd. (iii) RJ Cold Storage Pvt Ltd. paid to Vishal Traders (iv) Vishal Traders paid to AGPL in the form of share application	1,50,00,000	1,50,60,000	-	1,48,34,500	1,48,34,500
Between 25.02.2013 to 26.02.2013 (i) AGPL paid to Vishal Traders (ii) Vishal Traders paid to AGPL in the form of share application				2,90,00,000	4,06,00,000
Between 25.02.2013 to 27.02.2013 (i) AGPL paid to Rustagi Exim Pvt. Ltd. (ii) Rustagi Exim paid to RJ Cold Storage Pvt. Ltd. (iii) RJ Cold Storage paid to Vishal Traders (iv) Vishal Traders paid to AGPL in the form of share application.	3,10,00,000	2,99,70,000	-	2,87,50,400	3,10,21,000
Between 27.02.2013 to 13.03.2013 (i) AGPL paid to Vishal Traders (ii) Vishal Traders paid to AGPL in the form of share application				6,06,24,000	4,03,70,000
Between 18.03.2013 to 22.03.2013 (i) AGPL paid to Rustagi Exim Pvt. Ltd. (ii) Rustagi Exim paid to RJ Cold Storage (iii) RJ Cold Storage paid to Vishal Traders (iv) Vishal Traders paid to AGPL in the form of share application	4,00,00,000	2,47,20,000	-	2,51,00,000	2,37,73,600
On 25.03.2013 (i) AGPL paid to Vishal Traders				2,00,00,000	-

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Between 26.03.2013 to 28.03.2013 (i) AGPL paid to Rustagi Exim Pvt. Ltd. (ii) Rustagi Exim paid to RJ Cold Storage (iii) RJ Cold Storage paid to Vishal Traders (iv) Vishal Traders paid to AGPL in the form of share application	6,72,91,400	5,25,90,000	-	5,45,00,000	5,28,00,000
TOTAL				40,49,42,800	34,79,50,000

C. Details of Share Application received from alleged related parties for A.Y. 2014-15:

1. Share Application received from Vishal Traders (VT): Rs. 65,30,99,000/-

Particulars	Amt. paid by AGPL to VT either directly or indirectly via intermediaries (intm)				Amt. received by AGPL as Share Application from Vishal Traders Rs.	Paper Book Ref. Following docs enclosed in Paper Book No.-7D :
	(Payment by AGPL to Intm) Rs.	(Payment by Intm. to another Intm) Rs.	(Payment by Intm. to another Intm) Rs.	(Payment to Vishal Traders) Rs.		
Between 05.04.2013 to 27.03.2014 : (i) AGPL paid to Vishal Traders. (ii) Vishal Traders paid to AGPL in the form of share application.				50,45,75,253	5,01,79,000	(i) Confirmation of Vishal Traders : Annexure A (ii) Complete Trail of Funds: Pgs. 110-112
Between 18.11.2013 to 10.12.2013 (i) AGPL paid to Rustagi Exim Pvt. Ltd (ii) Rustagi paid to Vishal Traders (iii) Vishal Traders paid to AGPL in the form of share application	7,90,00,000 - -	- - -	- - -	- 7,86,50,000 -	- - 7,56,66,000	(iii) Relevant bank statements of concerned parties evidencing
On 11.12.2013						

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(i) AGPL paid to Rustagi Exim Pvt. Ltd. (ii) Rustagi Exim paid to ASM Traxim Pvt. Ltd. (iii) ASM Traxim Pvt. Ltd. paid to Vishal Traders. (iv) Vishal Traders paid to AGPL in the form of share application	1,75,00,000	1,75,25,000	-	1,75,00,000	1,74,95,000	movement of funds : Pgs. 113-212.
Between 13.12.2013 to 30.03.2014 (i) AGPL paid to Rustagi Exim Pvt. Ltd., (ii) Rustagi Exim paid to Vishal Traders. (iii) Vishal Traders paid to AGPL in the form of share application.	5,85,00,000			5,84,95,000	5,84,70,000	
TOTAL				65,92,20,253	65,30,99,000	

2. Share Application received from Rustagi Exim Pvt. Ltd. (REPL) – Rs.9,55,55,000/-.

Particulars:	Amt. paid by AGPL to REPL Rs.	Amt. received by AGPL as Share Application from REPL Rs.	Paper Book Ref.
Between 06.09.2013 to 30.09.2013 (i) AGPL paid to Rustagi Exim Pvt. Ltd., (ii) Rustagi Exim Pvt. Ltd. Paid to AGPL in the form of share application.	9,78,46,415	9,55,55,000	Following docs enclosed in Paper Book No.-7E: (i) Confirmation of Rustagi Exim Pvt. Ltd.: Annexure A (ii) Complete Trail of Funds: Pg. 1 Relevant bank statements of concerned parties evidencing movement of funds: Pgs.2-18
TOTAL	9,78,46,415	9,55,55,000	

3. Share Application received from Vikas International (VI) – Rs.6,48,90,000/-

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Particulars:	Amt. paid by AGPL to VI Rs.	Amt. received by AGPL as Share Application from VI Rs.	Paper Book Ref.
Between 04.04.2013 to 1.10.2013 (iii) AGPL paid to Vikas International (iv) Vikas International paid to AGPL in the form of share application.	6,82,39,975	6,48,90,000	Following docs enclosed in Paper Book No.-7C: (i) Confirmation of Vikas International : Annexure A (ii) Complete Trail of Funds: Pg. 1 (iii) Relevant bank statements of concerned parties evidencing movement of funds: Pgs.2-18
TOTAL	6,82,39,975	6,48,90,000	

D. Details of Share Application received from alleged related parties for A.Y. 2015=2016 :

1. Share application received from Vishal Traders (VT) – Rs.24,81,49,800/-

Particulars:	Amt. paid by AGPL to VT Rs.	Amt. received by AGPL as Share Application from VT Rs.	Paper Book Ref.
Between 18.12.2014 to 28.03.2015 (i) AGPL paid to Vishal Traders (ii)Vishal Traders paid to AGPL in the form of share application.	26,54,83,540	24,81,49,800	Following docs enclosed in Paper Book No.-7D: (i) Confirmation of Vishal Traders Annexure A (ii) Complete Trail of Funds: Pg. 213. (iii) Relevant bank statements of concerned parties evidencing movement of funds: Pgs.2-18

2. Share application received from Rustagi Exim Pvt. Ltd. (REPL) – Rs.11,60,00,100/-.

Particulars:	Amt. paid by AGPL to REPL Rs.	Amt. received by AGPL as Share Application from REPL Rs.	Paper Book Ref.
Between 02.04.2014			Following docs enclosed in Paper

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to 02.06.2014 (v) AGPL paid to Rustagi Exim Pvt. Ltd. (vi) Rustagi Exim Pvt. Ltd. paid to AGPL in the form of share application.	12,73,68,123	11,60,00,100	Book No.-7E: (i) Confirmation of Rustagi Exim Pvt. Ltd. Annexure A (ii) Complete Trail of Funds: Pg.19. (iii) Relevant bank statements of concerned parties evidencing movement of funds: Pgs.20-44.
TOTAL	12,73,68,123	11,60,00,100	

E. Details of Share Application received from alleged related parties for A.Y. 2016-17 :

1. Share Application received from Vishal Traders (VT) : Rs.17,86,74,750/-

Particulars.	Amt. paid by AGPL to VT either directly or indirectly via intermediaries.		Amt. received by AGPL as Share Application from VT Rs.	Paper Book Ref.
	(Payment by AGPL to Intermediaries) Rs.	(Payment to VT) Rs.		Following docs enclosed in Paper Book No.-7D:
Between 16.01.2016 to 03.03.2016 : (i) AGPL paid to Vishal Traders. (ii) Vishal Traders paid to AGPL in the form of share application	- -	16,66,00,000 -	12,16,64,750	(i) Confirmation of Vishal Traders Enterprises : Annexure A. (ii) Complete Trail of Funds: Pg.243 (iii) Relevant bank statements of concerned parties evidencing movement of funds: Pgs.244-264.
Òn 10.02.2016 : (i) AGPL paid to Vishal Traders. (ii) AGPL paid to Rustagi Exim Pvt. Ltd. (iii) Rustagi Exim Pvt. Ltd. paid to Vishal Traders. (iv) Vishal Traders paid to AGPL in the form of share application.	- 4,80,00,000 - - -	90,00,000 - 4,79,50,000 -	- - - 5,70,10,000	
Total		22,35,50,000	17,86,74,750	

2. Share Application received from Rustagi Exim Pvt. Ltd., (REPL) – Rs.37,60,99,650/-.

Particulars:	Amt. paid by AGPL to REPL either directly	Amt.	Paper Book Ref.

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	or indirect	y via intermediaries (Intm)		received by AGPL as Share Application from REPL Rs.	Following docs enclosed in Paper Book No.-7E: (i) Confirmation of Rustagi Exim Pvt Ltd.: Annexure A. (ii) Complete Trail of Funds: Pg. 45. (iii) Relevant bank statements of concerned parties evidencing movement of funds: Pgs.46-97
	(Payment by AGPL to Intm)	(Payment by Intm to another Intm.)	(Payment to REPL) Rs.		
Between 13.04.2015 to 20.06.2015:					
(i) AGPL paid to Rustagi Exim Pvt. Ltd..	-	-	38,27,20,000	-	
(ii) Rustagi Exim Pvt. Ltd. paid to AGPL in the form of share application	-	-	-	33,22,99,650	
On 17.04.2015:					
(i) AGPL paid to Vishal Traders	4,70,00,000	-		-	
(ii) Vishal Traders paid to RJ Cold Storage		4,45,00,000	-	-	
(iii) RJ Cold Storage paid to Rustagi Exim Pvt. Ltd.			-	-	
(iv) Rustagi Exim Pvt. Ltd. paid to AGPLin the form of share application			4,44,50,000	4,38,00,000	
Total			42,71,70,000	37,60,99,650	

F. Details of Share Application received from alleged related parties for A.Y. 2017-18 :

1. Share Application received from Rustagi Exim Pvt. Ltd. (REPL) – Rs.52,23,89,700/-.

Particulars:	Amt. paid by AGPL to REPL Rs.	Amt. received by AGPL as Share Application from REPL Rs.	Paper Book Ref.
Between 23.11.2016 to 20.03.2017			Following docs enclosed in Paper Book No.-7E:
(i) AGPL paid to Rustagi Exim Pvt. Ltd.	54,56,02,154	52,23,89,700	(i) Confirmation of Rustagi Exim Pvt. Ltd. Annexure A (ii) Complete Trail of Funds: Pg. 98 (iii) Relevant bank statements of concerned parties
TOTAL	54,56,02,154	52,23,89,700	

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77. On verification of facts as stated in the above summary details, which are supported by the confirmation letters and bank statements of all these parties. The details contained in respect of all the assessment years under appeals. The details noted above clearly support the explanation of assessee that initially the amounts have been paid by the assessee company itself to various Investor Companies and others and ultimately the amounts in question have come back to the assessee in the shape of share capital/premium. The details reproduced above are supported by the confirmations and bank statements of the parties. Thus, the trail of the money which travelled back to the account of the assessee company in the form of share application money is clearly explained which, therefore, explained the source of the funds invested in Assessee Company. All the transactions are routed through banking channel and all the parties are assessed to tax. The authorities below have not doubted the above confirmations and bank statements filed by the assessee company. It may also be noted here that initially the A.O. expressed doubts in the deviation report that no addition under section 68 could be made on account of share capital/premium and/or alleged commission @ 2% for any of the year under consideration. However, later on the A.O. without any justification on the basis of the view expressed by the Investigation Wing made these additions against the assessee company. The findings of the A.O. are not based on any evidence or material on record and were clearly in violation of the deviation report earlier filed by the A.O. Since all the parties are related to assessee and it was the amount of assessee itself, which was ultimately introduced in the share of share capital/premium, therefore, there was no justification to hold that assessee would have paid any commission @ 2% for arranging the above share capital/premium The A.O. in A.Y. 2012-2013 has referred to statement of Shri Manoj Gupta, Proprietor of M/s. Mahalaxmi Traders whose statement was recorded during the course of search in which he has stated that he has not made any investment in assessee company. However, it is not clear from the Orders of the

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authorities below whether copy of such statement was supplied to assessee for rebuttal or whether he was produced before A.O. for cross-examination on behalf of the assessee. Since nothing is clear from the assessment order, therefore, any statement recorded at the back of the assessee, cannot be read in evidence against the assessee unless it is confronted to assessee and right of cross-examination have been provided by the A.O. to assessee to cross-examine that statement. We rely upon the Judgments of Hon'ble Supreme Court in the cases of Kishanchand Chellaram 125 ITR 713 (SC) and Andaman Timber Industries 281 CTR 214 (SC).

78. It is interesting to note that in the remaining years, the A.O. referred to statement of Mr. Arpesh Garg who was confronted on the issue of share capital/premium received by the assessee company. The A.O. noted the reply given by him of his own statement recorded under section 132(4) on oath in which he has stated that the amount so received in the form of share capital/premium represents the amounts given to various parties/entities in the form of loan for bogus sales/purchase and it is nothing but the assessee company's own money which were routed back to the assessee company in the form of share capital/ premium. Though there is nothing clear from the assessment order whether such statement was also provided to the assessee company for cross-examination on behalf of assessee company or for rebuttal and it may not be admissible against assessee company, but, this statement itself support the explanation of assessee company that it was the amount of the assessee itself which were routed through various entities. This statement would support explanation of assessee that the source of funds for share capital made by the Investor Companies was the assessee itself. Therefore, in such a situation, it could not be stated that the share capital was unexplained/undisclosed income of the assessee so as to make the addition under section 68 of the I.T. Act. Since all the transactions are recorded in the books of account of assessee and other related parties referred to above which are supported by confirmations, bank statements, therefore, there is no reason to believe that assessee has earned any unaccounted/undisclosed income in the issue of

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share capital/premium. The Hon'ble Gujarat High Court in the case of CIT vs. Rohini Builders 256 ITR 360 (Gujarat) held as under :

> "The assessee was a firm engaged in the business of dealings in land. During the assessment year under consideration the assessee had taken loans from various parties and during the course of assessment proceedings, the assessee had furnished the loan confirmations giving full addresses, GIR numbers/permanent account numbers, etc., of all the depositors. The assessee however issued summons to some of the creditors and also conducted inquiries into the genuineness or otherwise of the loans taken by the assessee. After considering the evidence, the Assessing Officer made an addition of Rs.12,85,000 to the returned income of the assessee. This was confirmed by the Commissioner of Income-tax (Appeals). On further appeal to Tribunal the Tribunal held that the phraseology of section 68 of the Income tax Act, 1961, was clear, that 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, that 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", that the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as income of the assessee. The Tribunal found that the assessee had discharged the initial onus which lay on it in terms of section 68 by proving the identity of the creditors by giving their complete addresses, GIR numbers/ permanent account numbers and the copies of assessment orders wherever readily available, that it had also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee was not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source. Thus taking into consideration the totality of the facts and circumstances of the case, and, in particular the fact that the Assessing Officer had not disallowed the interest claimed/paid in relation to these credits in the assessment year under consideration or even in the subsequent years, and tax had been deducted at source out of the interest paid/credited to the creditors, the Tribunal held that the Departmental authorities were not justified in making the addition of Rs.12,85,000. On appeal to the High Court :

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> Held, that considering the facts and circumstances of the case narrated by the Tribunal and the law explained by it, the appeal was liable to be dismissed."

79. This Judgment has been confirmed by the Hon'ble Supreme Court by dismissing the SLP of the Revenue Department reported in 254 (Statute) 275 (SC).

80. The Hon'ble Bombay High Court in the case of CIT vs. V.M. Shah 90 ITR 396 (Bom.) held as under :

> "The accounts of the assessee disclosed an amount of Rs.2,77,500, described as loans. The assessee gave details of the names and addresses of the bankers who had advanced the loans. The Income-tax Officer summoned the banker instead of appearing, each of them sent a letter confirming the loan advanced by him. The Income-tax Officer was not satisfied with this and added the sum to the total income of the assessee as income from undisclosed source. On appeal the Tribunal reversed the order of the Income-tax Officer on the grounds that all the hundi loans taken by the assessee were through crossed cheques which had passed through recognised banks, the assessee had given complete names and addresses of all bankers who had advanced moneys to him and all the bankers were themselves income-tax assessees, the bankers had submitted letters before the Income-tax Officer confirming the advances made to the assessee, and that the Income-tax Officer had not brought on record any evidence to show that the assessee's explanation was untrue. On an application for reference against the order of the Tribunal:
>
> Held, that the finding arrived at by the Tribunal was based purely upon appreciation of the evidence and no question of law arose out of that finding."

81. The Hon'ble Delhi High Court in the case of CIT vs. Victor Electrodes Ltd., [2010] 329 ITR 271 (Del.) held as under :

> "Held, dismissing the appeal, that it had not been disputed that the share application money was received by the assessee by way of account payee cheques, through normal banking channels. Admittedly, copies of applications for allotment of shares were also provided to the Assessing Officer. It was not the case of the Revenue that the share applications were not signed on behalf of the applicant-companies and were forged documents. It was also not the case of the Revenue that the shares were not actually allotted to the companies. If the

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> Assessing Officer had any doubt about the identity of the share applicants, he could have summoned the directors of the applicant-companies. No such attempt was, however, made by him. Therefore, the Commissioner (Appeals) and the Tribunal were justified in holding that the identity of the share applicants and the genuineness of the transactions had been established by the assessee. The amount was not assessable under section 68."

82. The Hon'ble Delhi High Court in the case of CIT vs. Kamdhenu Steel and Alloys Ltd., & Ors. 361 ITR 220 (Del.) held as under :

> "Once adequate evidence/material is given, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has "created" evidence, the Revenue is supposed to make thorough probe before it could nail the assessee and fasten the assessee with such a liability under s.68; AO failed to carry his suspicion to logical conclusion by further investigation and therefore addition under s.68 was not sustainable."

83. The Hon'ble Delhi High Court in the case of CIT vs. Laxman Industrial Resources Pvt. Ltd., ITA.No.169 of 2017 dated 14th March, 2017, held as under :

> "The CIT(A) took note of the material filed by the assessee and provided opportunity to the AO in Remand proceedings. The AO merely objected to the material furnished but did not undertake any verification. The CIT(A) deleted the addition by relying upon the decision of the Hon'ble Apex Court in the case of Lovely Exports Pvt.Ltd. (supra) and judgment of Delhi High Court in the case of CIT vs Divine Leasing & Finance Ltd. [2008] 299 ITR 268. The ITAT confirmed the opinion of the Ld.CIT(A). Hon'ble High Court in view of the above findings noted that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. The assessee provided details of share applicants i.e. copy of the PAN, Assessment particulars, mode of amount invested through banking channel, copy of resolution and copies of the balance sheet. The AO failed to conduct any scrutiny of the document, the departmental appeal was accordingly dismissed.

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84. The Hon'ble Delhi High Court in the case of CIT vs. (i) Dwarakadhish Investment P. Ltd., (ITA.No. 911 of 2010) and (ii) Dwarkadhish Capital P. Ltd., (ITA.No.913 of 2010) (2011) 330 ITR 298 (Del.) (HC), in which it was held as under :

> "In any matter, the onus of proof is not a static one. Though in section 68 of the Income Tax Act, 1961, the initial burden of proof lies on the assesses yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income-tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "source of source". The assessee-company was engaged in the business of financing and trading of shares. For the assessment year 2001-02 on scrutiny of accounts, the Assessing Officer found an addition of Rs.71,75,000 in the share capital of the assessee. The Assessing Officer sought an explanation of the assessee about this addition in the share capital. The assessee offered a detailed explanation. However, according to the Assessing Officer, the assessee failed to explain the addition of share application money from five of its subscribers. Accordingly, the Assessing Officer made an addition of Rs.35,50,000/- with the aid of section 68 of the Act, 1961 on account of unexplained cash credits appearing in the books of the assessee. However, in appeal, the Commissioner of Income-tax (Appeals) deleted the addition on the ground that the assessee had proved the existence of the shareholders and the genuineness of the transaction. The Income-tax Appellate Tribunal confirmed the order of the Commissioner of Income-tax (Appeals) as it was also of the opinion that the assessee had been able to prove the identity of the share applicants and the share application money had been received by way of account payee cheques. On appeal to the High Court: Held, dismissing the appeals, that the deletion of addition was justified."

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85. The Hon'ble Delhi High Court in the case of CIT vs. Winstral Petrochemicals P. Ltd., 330 ITR 603, in which it was held as under :

> "Dismissing the appeal, that it had not been disputed that the share application money was received by the assessee-company by way of account payee cheques, through normal banking channels. Admittedly, copies of application for allotment of shares were also provided to the Assessing Officer. Since the applicant companies were duly incorporated, were issued PAN cards and had bank accounts from which money was transferred to the assessee by way of account payee cheques, they could not be said to be non-existent, even if they, after submitting the share applications had changed their addresses or had stopped functioning. Therefore, the Commissioner (Appeals) and the Tribunal were justified in holding that the genuineness of the transactions had been duly established by the assessee."

86. Considering the facts of the case in the light of material on record in voluminous paper books and confirmations of the parties and the summary of transfer of funds reproduced above, it is clear that assessee produced sufficient documentary evidences before the A.O. to prove that money routed from the assessee itself which came back to the assessee in the form of share capital/premium, therefore, assessee proved identity of the Investors, their creditworthiness and genuineness of the transaction in the matter and as such have been able to prove ingredients of Section 68 of the I.T. Act. The A.O. however did not make any further enquiry on the documentary evidences filed by the assessee. The A.O. did not verify the trail of the source of funds received by assessee through various entities as explained above. We may also note that during the course of hearing of these appeals, A.O. was present in the Court, but, did not make any adverse comment upon the documentary evidences filed in the paper book filed by the assessee. The A.O. thus, failed to conduct scrutiny of the documents at assessment stage and merely suspected the transaction between the Investor Companies and the assessee company despite the fact that in the deviation report the A.O. expressed doubts in making addition into the matter. It may also be noted here that no cash have been reported to have

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been deposited in the accounts of the assessee, the Investor Companies and other related parties. Considering the totality of the facts and circumstances of the case and material on record, we are of the view that assessee has been able to prove that it has received genuine amounts which is routed through various companies. Therefore, there was no justification to make any addition under section 68 of the I.T. Act. Further, there is no evidence on record that assessee paid any amount on account of commission for arranging any transaction because it was a genuine transaction between the parties. Therefore, there is no justification to make the addition under section 69C of the I.T. Act as well. In view of the above, we set aside the Orders of the authorities below and delete the entire additions in all the assessment years under appeals. In the result, all the grounds of appeals above in all the six assessment years are allowed. Thus Ground no 3,4 and 5 of A Y 2012-13, Ground no 3 for AY 2013-14, Ground no 3 of AY 2014-15, Ground no 1 for Ay 2015-16 , Ground No 1 of AY 2016-17 and Ground no 1 of AY 2017-18 are allowed.

87. Consequently, all the consequential ground of commission related to grounds mentioned in above para also becomes infructous and therefore they are allowed.

88. Now we come to the 2nd issue of addition on account of the bogus purchases out of books sales and suppressed profit. The learned assessing officer has dealt with this issue in para number 4-office assessment order for assessment year 2012 – 13. It is noted that during search the managing director of the assessee company in a statement u/s 132 (4) recorded on 22/3/2017 has admitted that assessee has resorted to bogus sale/purchase transactions with entities like Rustagi impacts private limited, we shall traders, Mahalaxmi traders, Shri Balaji trader et cetera. Thereafter the AO noted amount of sales made to these parties by the assessee and amount of purchases from these parties in answer to question number 6 the managing director of the company stated that all these entities books of accounts are maintained at the premises of the assessee company under the instruction of the accountant of the assessee. Thus, the assessing officer reached at the

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conclusion that the assessee has undertaken bogus sale and purchase transaction with these entities to inflate its expenses, suppressed taxable profits and bring his unaccounted money in the books in the form of share capital. The learned AO noted that analysis of telemetry data shows that during FY 2014 – 15 the assessee has purchased Inshell Almonds From M/s Rustagi Impex at an average price of INR 4 41/– per KG while the average sale price to the same entity is 440/– per KG hence booking a loss of Rs. one per KG. Thus he noted that the above transaction is suggesting that the assessee company is involved in bogus sales and purchases, which is also been observed by the investigation wing. He further noted that similar trend has also taken place in other years also but with similar or different parties. He further noted that the above facts have clearly been strengthened from the stock position as noticed to be short by nearly INR 4 50 crore is against the stock recorded in its books of accounts. Therefore he reached at a conclusion that the assessee has booked bogus purchases in its books of accounts to inflate its expenses and to reduce it taxable profit therefore, taking a reasonable view of the bogus purchases of INR 3 532493127/– from the above said parties were disallowed to the extent of 25%. Therefore the addition of Rs. 883123282/– was made. This addition was made as suggested in the appraisal report. Similar additions were also made for assessment year 13 – 14 to 2017 – 18.

89. In the deviation report submitted by the assessing officer with the approval of the additional Commissioner of income tax as per letter dated 20/12/2018 in para number 4 placed at paper book page number 368 onwards, the learned AO stated as under:-

"4. Bogus Purchases

a) with regard to the addition proposed of INR 9,418,600,000 in respect of bogus purchases, during the course of assessment, the assessee filed extensive details in respect of its entire purchases as well as its sales to various parties. On examination of the details filed by the assessee wherein the details of the total purchase along with the total sales made to all of these parties which have been alleged to be bogus

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in the appraisal report, as it was found that not all purchases were bogus.

b) About 50% of the purchases made by the assessee from different persons have been verified by issuing notice u/s 133 (6) of the income tax act and on account of confirmatory letters as well as copies of ledger accounts presented by the assessee and no any variation has been found so far.

c) Another important issue that needs to be taken care on this account is that when all the transactions with the alleged bogus parties as stated in the appraisal report are cumulatively taken into account, then it is noticed in most of the case is that the sales booked in their name is higher than the purchases reflected against them in each financial year, i.e. implying that the assessee in fact shown profits on the transactions made with the said parties instead of loss as has been alleged in the appraisal report.

   For instances against the purchase of INR 7,537,500,000 from the said parties during financial year 2013 – 14, the sales has been booked at INR 7,976,800,000 resulting to profit of Rs. 43,93,00,000 from the transactions with the alleged bogus parties.

d) Similarly, in the financial year 2014 – 15, the profit booked was INR 350,000,000 on the transactions with the said parties instead of the loss as has been alleged in the appraisal report.

   In view of the same, if the transactions with the said parties are treated as bogus, then the said profit reflected by the assessee in its profit and loss account shall have to be reduced since it cannot be a case where purchases were disallowed as being bogus, but the sales from the same parties are treated genuine and brought to tax.

e) In the appraisal report only transactions of purchases have been examined and treated as bogus whereas no such examination of sales to the same parties have been made leading to a suggestion that purchases be disallowed but the sales against the said purchases to same parties leading to a profit have been completely ignored.

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In view of the above situation, it becomes difficult to make an ad hoc addition of 25% of the purchases being bogus as suggested in the appraisal report. Under the circumstances, if both the purchases and the sales in such a situation are to be treated as bogus then it will lead to a reduction in the returned income of the assessee instead of an addition which will be detrimental to the interest of revenue.

f) Further keeping in mind the bogus transactions in the case of the assessee, the transactions relating to financial year 2016 – 17 with various parties have been examined in notice the transactions of sales and purchases have been made in the following manner:-
   i. with M/s Agarwal Enterprises - purchases and sales have been shown at INR 1 34.06 and 134.23 respectively
   ii. with M/s Kajuwala - purchases and sales have been shown at INR 347,700,000 and INR 162,800,000
   iii. with M/s ASM Traxim purchases and sales have been shown at INR 827.33 crores and INR 7 72.01 crores

g) the above transactions are suggesting that the assessee company is involved in bogus sales and purchases, which has also been observed by you. The similar trends have also taken place in earlier years also but with similar or different parties. The above facts have also been standard from the stock position is noticed to be short by nearly INR 4 50 crores against the stock recorded in its books of account.

In view of the above facts, it is clear that the books of accounts are not genuine and liable to be rejected u/s 145 (3) of the income tax act and the profit rate needs to be estimated on a reasonable basis keeping prevailing market rates in mind."

90. Thereafter the learned assessing officer in para number 5 suggested that the addition as proposed in the appraisal report in case of the assessee may not be tenable in the eyes of law. Thereafter, the learned deputy director of income tax (investigation) New Delhi sent a letter dated 24/12/2018 wherein AO was advised to make the addition on account of bogus purchases as recommended in the appraisal report. The minutes of the

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meeting of the deviation committee dated 28/12/2018 was also placed on record at page number 381 of the paper book. In the above meeting, the assessing officer along with additional Commissioner of income tax reiterated the same facts as suggested in the deviation report. Thus, in the end the learned assessing officer passed an order making addition as suggested in the April report. This information became known after the assessee made an application as per the right to information act where assessee asked for the copy of the deviation later and communication exchanged as mentioned in the order sheet.

91. The learned assessing officer during the course of hearing before the learned Commissioner of income tax (appeals) submitted a remand report dated 22/3/2019 through the additional Commissioner of income tax CR – 7, New Delhi which is placed at page number 387 of the paper book. At page number 390, the learned assessing officer has dealt with the bogus purchases for which the addition has been made. The learned AO mentioned that during the assessment proceedings it was found about 50% of the purchases were made by the assessee from different parties other than related parties and the same were verified by issuing notices u/s 133 (6) of the income tax act. Further confirm material letters were filed by the assessee from these parties and no variation found between the reply received from this parties in response to notice u/s 133 (6) and confirmatory ledgers filed by the assessee. Therefore, as per the remand report it is clear that according to the assessing officer the addition made on account of the bogus purchases is not sustainable as no deviation was found in the purchases recorded by the assessee and confirmatory letter is as well as enquiry letters responded u/s 133 (6) of the act. This fact is also confirmed as per the report of the assessing officer in the deviation meeting. It is also interesting to note that in the remand report the assessing officer has dropped the point of stock shortage of 450 crores.

92. Further, due to above divergent views expressed by the assessing officer in the assessment order, deviation report and remand report, the bench requested the assessing officer to show the relevant paragraph of the

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appraisal report from which the above addition has been made. Appraisal report was produced before the bench and it was found that in para number 4.3.7 the investigation wing has mentioned that the above addition is required to be made in order to protect the interest of revenue. No evidences of bogus purchases were found during the course of search except the statement of the managing director. We have already discussed that the statement of the managing director did not deal with any of the issues and further it was retracted immediately after the search to the extent of correcting the disclosure with respect to deposit in PMGKY scheme.

93. As already stated, that assessee company is a trader and dry fruits and other grocery items used to purchase and sale these items from and to the impugned parties on a regular basis. The entire purchase and sale transactions are duly recorded in the regular books of accounts of all the parties concerned. The entire transactions were routed through regular banking channels. The purchases and sales are also duly supported by the quantitative details. Copies of the bank accounts of all the parties showing the receipts and payments against the sales and purchases from the impugned parties were filed before the learned assessing officer no incriminating documents with respect to the purchases and sales recorded by the assessee in its books of accounts was found in the course of search. In the original assessments for the concluded assessment is all these details were verified and assessments were framed under section 143 (3) of the income tax act. The books of accounts were duly audited as per the companies act and as per the income tax act. No defects in such books were found either by the learned assessing officer or by the learned CIT – A. Based on the information furnished by the assessee the learned assessing officer proceeded to make an addition at the rate of 25% of such purchases without conducting any enquiry. In the deviation proceedings, the learned assessing officer after scrutiny of the books of accounts, appraisal report and statement of the managing director of the company, which was retracted, held that no such addition should have been made. In the

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remand proceedings, also the AO held that on enquiry also made on test check basis of the 50% of the items got confirmed.

94. In view of above categorical facts coming out of the assessment proceedings, on perusal of the deviation report and appraisal report that 4 the concluded assessment is no incriminating evidences were found. In view of this, additions made by the learned assessing officer for assessment year 2012 – 13 to 2014 – 15, respectfully following the decision of the honourable jurisdictional High Court, the additions deserves to be deleted. So, for these years same are deleted. Accordingly ground no 6 for AY 2012-13, Ground no 4 for Ay 2013-14 and Ground no 4 of Ay 2014-15 are allowed.

95. With respect to abated assessment years 9 i.e. AY 2015-16 , 2016-17 and 2017-18 it is also apparent that that assessee has purchased less a sum of goods then sold to those parties. In the deviation report the assessing officer has categorically held that if, the purchases are to be removed from the books of accounts from those parties, then necessarily on the same allegation the sales is also required to be removed from the regular books of accounts, which would lead to assessing the assessee at less than the income returned by it. This fact has also evident from noting the fact that total sales made by the assessee to these parties for assessment year 2012 – 13 to 2017 – 18 is INR 3 6206089783/– and purchases made from this parties is INR 3 6021417848/–, therefore the assessee has shown the profit from these transactions for all these years of INR 1 84671935/–. It is highly unusual that if the purchases are allegedly bogus then how assessee will show higher profit from these purchases in its books of accounts. Thus the allegation of the learned assessing officer as well as the learned CIT – A. That by booking the bogus purchases assessee is reducing its profit by inflating the expenses contrary to this, from these alleged parties transactions of purchases and sales, assessee has shown high profit.

96. The learned assessing officer has categorically held that in the appraisal report, only the purchases from alleged bogus parties were considered and sales made to these parties were altogether ignored. This action of the revenue runs contradictory to its own stand of booking of the bogus

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purchases. Thus, it cannot be said that purchases made from these parties are bogus however; sales made to these parties are genuine. The revenue cannot blow hot and cold in same breathe.

97. Further while disallowing 25% of the purchases the learned assessing officer has not brought on record any material to justify the disallowances with carrying out any enquiry or investigation or bringing forth any evidence.

98. The shortage of stock by nearly INR 4 50 crores mentioned in the assessment order by the learned assessing officer which was purely based on the appraisal report, vanished in the remand report for the reason that during the course of search it was the stock lying at warehouse at Sonipat. This was completely ignored. This premise was also not covered during the search. When the above stock was taken into account, there was no excess or shortage of the stock compared to the book stock of the assessee. This is also evident as no addition with respect to any excess or shortage of stock made in the assessment order for any of the years.

99. When the matter reached before the learned CIT – A, he rejected the action of the learned assessing officer so far as addition with respect to the alleged bogus purchases are concerned. He applied the provisions of section 145 (3) of the income tax act. He segregated the transactions of purchase and sales from the alleged bogus parties and applied the gross profit ratio, which is earned by the assessee from transactions with other parties. He applied such ratio for making an addition for assessment year 2012-13, 2013 – 14 2015 – 16 and 2016 – 17. For assessment year 2014 – 15, the gross profit ratio of the assessee from other parties (other than the alleged parties) was only 4.13 percentages. However, the learned CIT – A did not apply this percentage but took average gross profit ratio for assessment year 2012 – 13 and 2013 – 14 of 16.20 percentage and 9.41 percentage. He applied the average, which is 12.80 percentages to the sales for that year for making an addition. For assessment year 2017 – 18 the gross profit on transactions other than alleged related parties were found to be 6.02 percentage however the learned CIT – A did not apply that ratio but made an addition of INR 4 87053/– as there was loss. Therefore, wherever it was beneficial to the

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revenue, the learned CIT – A applied higher percentages and made the addition. Wherever it was against the revenue, he applied average gross profit of last 2 years or made on ad hoc addition. Thus, it is apparent that the learned CIT – A was not at all consistent in his approach.

100. The next question that has been raised before us by the additional grounds that the learned CIT – A has invoked the provisions of section 145 (3) of the act. The contention raised was that AO did not find any defects in the books of accounts or method of accounting employed by the assessee. Thus, the AO did not reject the books of accounts of the assessee but accepted them as showing the correct profit. Specifically provisions of section 145 (3) was red before us again and again by the learned authorised representative stating that it is the exclusive domain of the learned assessing officer about his satisfaction about the correctness or completeness of the accounts of the assessee and the method of accounting followed by the assessee. It was further stated that in the definition of the assessing officer as per section 2 (7A) there is no mention of the learned CIT – A, therefore, he exceeded his jurisdiction. It was also alternatively argued that, it is not the case of the revenue that AO did not apply his mind to the provisions of section 145 (3) of the act. It was submitted that AO did applied his mind to the applicability of the provisions of section 145 (3) of the income tax act in the deviation report but it was not done by the assessing officer. It was further stated that it was at the behest of the deviation committee meeting. Extensive reference was made to the deviation committing meeting and deliberations made there under. It was also alternatively argued that the learned CIT – A did not examine the books of account at all, then how can he reject the same. It was also submitted that the method adopted by the learned CIT – A of applying the gross profit ratio on transactions with alleged bogus parties of the profit rate on by the assessee from transactions with other parties, resulted in partial rejection of the books of accounts, which is not permitted in the law. Even otherwise, it was submitted that during the course of remand proceedings the assessee as per letter dated 25/3/2019 on the specific requisition of the learned CIT – A filed the details

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of the gross profit ratio in case of 2 of the other companies engaged in similar line of business having similar size along with their balance sheet and profit and loss account. There year -wise sales and gross profit reflected by the 2 companies was also shown to the learned CIT – A. It was contended that the gross profit ratio on by these 2 entities is much lower than gross profit shown by the assessee. It was also submitted that, before applying the different method of making an addition, the learned CIT – A did not issue any notice u/s 251 of the income tax act. It was further argued that the learned CIT – A has found a new source of income of gross profit, which is not permitted as per the law. Therefore, the action of the learned CIT – A was under challenge on all these grounds. We deal with them point vice hereinafter.

101. Coming to the 1st issue whether the learned CIT – A is empowered to reject the books of accounts, which has not been done so by the learned assessing officer. The above question is squarely covered against the assessee by the decision of the honourable Supreme Court in CIT vs Macmillan (1958) 33 ITR 182 (SC). Therefore, according to us, the CIT appeal is empowered to reject the books of accounts where the AO has failed in performing his duty. According to section 145 (3) of the income tax act it is the duty of the assessing officer in each and every case to satisfy himself about the correctness or completeness of the accounts of the assessee and adoption of the method of accounting regularly. If AO has failed to do that, there can be no fetters on the right of the 1st appellate authority to do so. However the same criteria applies to the 1st appellate authority also which applies to the assessing officer while rejecting the books of accounts under section 145 (3) of the act.

102. However, it is required to be noted that in the deviation proceedings the learned assessing officer has given an alternative option to apply the provisions of section 145 (3) of the income tax act, before making an assessment. However, it was rejected in the deviation proceedings and the learned assessing officer was directed to make the addition to the extent of 25% of the purchases from the allegedly bogus parties. Therefore it cannot

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be said that the assessing officer did not applied his mind during the course of assessment proceedings to the provisions of section 145 (3) of the income tax act.

103. With respect to the argument of the learned authorised representative that the learned CIT – A did not grant any opportunity of hearing to the assessee with respect to the application of the provisions of section 145 (3) of the income tax act, we reject the same for the simple reason that provisions of section 251 (2) of the income tax act applies only where there is an enhancement of addition or there is a reduction in the refund due to the assessee. In the present case the learned CIT – A has reduced the addition and therefore, no fault can be found with the action of the learned CIT – A. The learned assessing officer has also filed an appeal against the reduction of addition by the learned CIT – A.

104. However, if the learned CIT – A finds that the assessing officer has failed to apply his mind to the provisions of section 145 (3) of the income tax act then, he can do so, but he has to examine the books of accounts and reach at a conclusive finding that the books of accounts of the assessee are either not correct or are incomplete. He is also required to look in to the method of accounting regularly employed by the assessee. In the present case, on careful reading of the order of the learned CIT – A, we did not find that the learned CIT – A has even called for the books of accounts. In the remand report also there is no whisper from the side of the assessing officer that books of accounts are incorrect or incomplete. The learned CIT DR as well as the learned assessing officer present during the course of hearing also could not show us even a single piece of evidence where it was found that the books of accounts were not correct or incomplete. In the present case, the purchases and sales with alleged bogus parties are supported by the bills and vouchers as well as the stock register maintained by the assessee. Such stock register was maintained in Tally accounting software. The books of accounts of the assessee are duly audited. Payment of purchase consideration to the alleged parties and receipt of sale consideration from the alleged parties are through account payee cheques. There is no

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allegation from the side of the learned assessing officer or the learned CIT – A that books of accounts of the assessee are either incorrect or incomplete. The allegation that booking the purchases has resulted into the reduction of the profits of the assessee has also been negated by the learned assessing officer himself during the deviation proceedings as well as in remand proceedings. Before rejecting the book results, the revenue authorities are duty-bound to find patent, latent and glaring defects in the books of accounts. In the present case, no such exercise or attempt has been made by the revenue authorities but the simply relied on the statement of the managing director, which was later on retracted and was also not on the point of booking the bogus expenditure. Thus, we are of the view that the rejection of the books of accounts by the learned CIT – A is not in accordance with the law.

105. Even otherwise, once the books of accounts of the assessee are rejected, then profit, has to be estimated on the basis of the proper material available. The revenue authorities are not factored by technical rules of evidence and pleadings and they are entitled to act on material, which may not be accepted, as evidence in court of law. Nevertheless, they are not entitled to make a pure guess in making assessment with reference to any evidence or material at all. There must be more than a mere suspicion to support an assessment u/s 143 (3) of the act. Against this, the assessee has supported his books of accounts with adequate evidences of his own business as well as also supported it with the balance sheet and profit and loss account of comparable 3rd parties. The assessee has demonstrated that gross profits earned by those parties in the similar line of business are less than the gross profit declared by the assessee.

106. Further, the quantification of the profit by the learned CIT – A, has been made on in comprehensible assumptions. He applied the gross profit rate of other parties to the sales of allegedly bogus parties. He has application of the gross profit rate also changed from the year to year. In 1 of the years, he adopted the gross profit rate being average of gross profit of 2 preceding years on by the assessee from other parties and applied the same rate to the

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sales from allegedly bogus parties. We fail to understand that how the gross profit ratio of one year can be applied to another year for determining the profit of some of the transactions of another year.

107. In view of the above discussion, we are of the opinion that the learned assessing officer has incorrectly disallowed 25% of the purchases from the alleged bogus parties without finding any evidence and ignoring the sales paid by them to the assessee. Further, the learned CIT – A applied the provisions of section 145 (3) of the income tax act by rejecting the books of accounts of the assessee partially, without even looking at the books of accounts is also incorrect. In view of this the addition made by the learned assessing officer for all those years on account of bogus purchases deserves to be deleted for concluded assessment as well as pending assessments. Accordingly Ground no 2 for Ay 2015-16, ground no 2 for Ay 2016-17 and ground no 3 for Ay 2017-18 are allowed. The two additional Grounds raised by the assessee for Ay 2-15-16 to 2017-18 are partly allowed. These additional grounds for AY 2012-13, 13-14 and 14-15 are infructous as we have deleted the addition relying on decision of Hon. Delhi High court in those years, hence dismissed. Consequently Ground no 1 for Ay 2012-13, Ground no 1 for Ay 2013-14, Ground no 1 for Ay 2014-15 , Ground no 1 for Ay 2016-17 are dismissed.

108. Now we come to the 3rd issue pertaining to the assessment year 2017 – 18 of addition u/s 68 on account of cash deposited in banks post demonetization. The brief facts of the issue is that post demonetization, between 9/11/2016 to 30/12/2016, assessee deposited cash in the following bank accounts.

Name of the bank	amount in crores
Bank of India	79.99
Canara Bank	4
Central bank of India	4
Central bank of India	0.08
IDBI Bank	2.99

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Indian overseas Bank	14.75
Indian overseas Bank	1.65
Punjab national bank	63.56

109. The explanation of the promoter director of the assessee company with respect to the cash deposit was taken understatement u/s 132 (4) on 22/3/2017. With response to question number 29 of his statement he was asked to state the source of the case of deposited. The assessee replied that the source of most of the case of deposited is sales proceeds. He submitted that he had experienced high sales in this year during Diwali, on account of increase in demand of dry fruits. The sale proceeds, which were in cash, were accumulated during this period. The same are being gradually deposited in the bank accounts of the company, as the branches did not accept very high amounts of cash in one go. Further, after 8/11/2016, there were very huge rush at the bank branches. Thus, this cash was deposited in installments in company's bank accounts. The above 1 was reiterated in response to question number 39 wherein the managing director stated that there is an increase in cassettes the Senior due to increase in the demand of dry fruits. That is why, the cash receipts in the cash in hand are on the higher side this year. Further explanation over this would be submitted after reconciliation. However, he submitted that INR 5 0 crores which were shown in the cash book of the company actually represents his unaccounted and undisclosed income, for which he has no explanation however by 31/03/2017, the appellant had deposited the due taxes and deposits under PMGKY an amount of INR 30 crores only. The revenue authorities found that pattern of cash deposits in the bank accounts is highly erratic and not in line with the normal trend. It was noted that monthly cash deposit is generally of 90.26 crores in these 2 months viz a viz INR 4 2.35 crore for the period prior to demonetization and INR 354,000,000 in the last financial year. The explanation of the assessee regarding the increased sales on account of increased demand for dry fruit was also found

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baseless and it was noted that the company has manipulated the books of accounts to reflect higher gross profit margin in the current year to adjust its own unaccounted cash in the process. The gross profit of the assessee was also found to have gone up to 7.9% for the period 1/1/2017 to 20/3/2017 compared to 40.8 percent for the period 9/11/2016 to 31/12/2016. The gross profit ratio of the assessee for 1/4/2016 to 8/11/2016 was also found that 25.2 percentage. The earlier year gross profit for financial year 2016 – 17 was found to be 6.10%, 2015 – 16 was 4.19%, 2014 – 15 was 6.42% et cetera. The stock position of the assessee was also verified and found that on the date of such there is an over reporting of the stock compared to the actual stock found at the premises. Thus, it was found that average monthly cash deposit pre demonetization is INR 4 2.35 crores whereas the actual cash deposited is Rs. 180.53 Crores.

110. During the course of assessment proceedings, the assessee was asked to explain the source of the cash deposit of INR 175.57 crores and invite should not be considered as unexplained money as income of the assessee. The assessee submitted a detailed letter dated 20/11/2018 wherein it was submitted that total cache of INR 1 75.28 crore was deposited in the bank accounts post demonetization between 9/11/2016 to 31st/12/2016 is only INR 1 75.57 crores. The source of cash deposit was explained to be the proceeds arising from the cash sales made by the assessee, which is duly accounted for in the books of the assessee on the credit side of the profit and loss account. The statement of the assessee was further supported by the audited books of account of the assessee, bank wise summary of cash deposits, copies of the bank statement and details of monthly cash sales and cash deposits for the earlier years. The learned assessing officer treated a sum of INR 1 50.53 crores after giving credit of INR 3 0 crores as disclosed under PMGKY. The ld AO noted that pattern of cash deposits was allegedly erratic and not in line with the normal trend. The monthly trend of cash sales and cash deposit transactions for F.Y 2014-15 to F.Y. 2016-17 was noted as under:

Month	FY- 2014-15		FY- 2015-16		FY-2016-17	
	Cash sales	Deposit	Cash sales	Deposit	Cash sales	Deposit
April	27.15 Cr.	25.82 Cr.	42.70 Cr.	42.05 Cr.	58.48 Cr	45.66 Cr

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May	08.51Cr.	10.71 Cr.	23.55 Cr.	21.72 Cr.	61.92 Cr.	57.49 Cr.
June	12.95 Cr.	04.77 Cr.	12.20 Cr.	14.89 Cr.	73.35 Cr.	37.64 Cr.
July	03.13 Cr.	02.90 Cr.	19.70 Cr.	22.36 Cr.	20.46 Cr.	04.97 Cr.
August	02.01 Cr.	03.46 Cr.	-	02.50 Cr.	21.58 Cr.	07.07 Cr.
September	15.21 Cr.	08.20 Cr.	11.71 Cr.	15.63 Cr.	20.10 Cr.	43.76 Cr.
October	**14.60 Cr.**	**25.16 Cr.**	**29.95 Cr.**	**32.64 Cr.**	**99.68 Cr.**	**77.09 Cr.**
November	**16.49 Cr.**	**14.46 Cr.**	**45.18 Cr.**	**47.12 Cr.**	**47.73 Cr.**	**113.52 Cr.**
December	**22.26 Cr.**	**28.08 Cr.**	**97.35 Cr.**	**94.36 Cr.**	**69.83 Cr.**	**89.75 Cr.**
January	54.51 Cr.	57.04 Cr.	80.86 Cr.	76.32 Cr.	64.60 Cr.	63.50 Cr.
February	37.27 Cr.	36.43 Cr.	44.39 Cr.	50.24 Cr.	36.20 Cr.	35.75 Cr.
March	23.35 Cr.	25.62 Cr.	04.93 Cr.	08.36 Cr.	59.33 Cr.	57.54 Cr.

He further alleged that the average cash deposits for two months i.e. Oct to Nov 2016 was Rs. 90.26 crores vis-à-vis from April to October 2016 of Rs. 42.35 crores and Rs. 35.40 crores respectively in the past financial year. He also compared the GP margin of the Appellant was alleged to be as under:

Period	G P Margin
FY 2012-13(As per audit report)	4.85
FY 2013-14(As per audit report)	4.88
FY 2014-15(As per audit report)	6.42
FY 2015-16(As per audit report)	4.19
FY 2016-17(As per audit report)	6.10
01.04.16 to 08.11.2016(As per tally data)	**25.2**
09.11.16 to 31.12.2016(As per tally data)	**40.8**
01.01.17 to 20.03.2017(As per tally data)	7.9

Thus, he held that Assessee Company had manipulated the books of account to reflect higher GP margin in the F.Y. 2016-17 to adjust its own unaccounted cash in the process. It was further alleged that during the course of search the stock position was found to be short vis-à-vis the stock as per books of account. As on 08.11.2018, the Assessee had a cash balance of Rs. 113.03 crores whereas on the date of demonetization, the Assessee had deposited cash in bank of Rs. 13.99 crores only. The AO opined that as on the date of demonetization the Assessee had legitimate cash balance of Rs. 13.99 crores only. It was further alleged that the average monthly cash deposits pre-demonetization was Rs. 42,35,05,714/- whereas the actual cash deposits for two months post demonetization was Rs. 1,80,53,24,000/-. The AO thus opined that cash of Rs. 180.53 Crore deposited in the bank accounts during demonetization period allegedly represented unexplained cash not commensurate with the regular pattern of

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cash pre-demonetization. Accordingly, after giving credit of Rs. 30 crores declared under PMGKY, the balance cash of Rs. 1,50,53,24,000/- was treated as unexplained cash credit u/s 68 of the Act.

111. The assessee agitated this issue in the appeal before the learned CIT – A. The learned CIT – A observed that out of total cash deposits during 09.11.2016 to 30.12.2016 (i.e. the demonetization period) of Rs. 1,80,53,24,000/- (actual cash deposits during the said period was Rs. 1,75,28,24,000/-), deposits of Rs. 63,41,26,000/- were in the form of new currency notes and currencies which had not been demonetized (i.e. Rs. 10/ 20/ 50/100). Copies of relevant deposits slips were called for and analyzed. Verification of cash deposit vouchers were also made from respective banks by deputing ITI and each of the documents/vouchers of cash deposits submitted by the Assessee was verified from the original records maintained by the respective banks and found to be in order. Bank & Currency wise summary of new currency notes and non-demonetized old currency notes aggregating to Rs. 63.41 crores deposited in the demonetization period (i.e. 09.11.2016 to 30.12.2016) are placed at pages 149-150 of Paper book -2. Further copies of all the cash deposit slips for deposit of new and valid currency for 09.11.2016 to 30.12.2016 aggregating to Rs. 63.41 crores are enclosed at pages 151 to 183 of Paper book -2. The Ld. C.I.T (A) further observed that out of Rs. 113.03 crores held by the Assessee on 08.11.2016, only Rs. 13.99 crores was deposited into the bank account on 08.11.2016 (actually deposited on 10.11.2016 immediately after demonetization) and the balance Rs. 99.04 crores was not deposited on the said date. This in the opinion of the Ld. C.I.T (A) implied that on the date of demonetization, the Assessee had actual legitimate cash of Rs. 13.99 crores only. He alleged that the Appellant had not explained the necessity for keeping such huge amount of cash in hand and that the Appellant had created an artificial picture in its books of account by which unaccounted income was routed through showing cash sales and the same was shown to have been deposited into the bank account as per the convenience of the Assessee on future dates. He opined that Rs. 99.04 crores represented unaccounted

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income of the appellant, which did not represent cash sales. Further, cash representing new currency and non-demonetized currency aggregating to Rs. 63.41 crore in the opinion of the Ld. CIT (A) represented cash sales. He thus directed the AO to restrict the addition to Rs. 73.13 crores [i.e. (180.53 – 30) i.e. 150.53 crores – 13.99 crores – 63.41 crores]. Thus, assessee is in appeal for as

112. In regard to the above, it is firstly pointed out that both the AO and Ld. CIT (A) have erred in deeming the total cash deposits between 09.11.2016 to 30.12.2016 (i.e. during the demonetization period) as Rs. 180.53 crores instead of the actual deposits of Rs. 175.28 crores during the said period. While arriving at the said figure of Rs. 180.53 crores, the Revenue Authorities have erroneously considered the total cash deposits between 09.11.2016 to 31.12.2016(i.e. including the cash deposits of Rs. 5.25 crores on 31.12.2017 in new currency notes) instead of the actual cash deposited during the demonetization period of Rs. 175.28 crores.

113. It is submitted that since the impugned addition u/s 68 was made by the AO on account of cash deposited in the bank accounts in the wake of demonetization, only the demonetized old currency notes deposited into the bank accounts during the demonetization period were required to be taken into account even if, for the sake of argument, the allegations of the AO were deemed relevant. Pursuant to demonetization announced by the Government of India on 08.11.2016, the RBI stipulated that the demonetized old currency notes of Rs. 1000 & Rs. 500 could be deposited into the banks only between 10th November 2016 until the closing of banking hours on 30th December 2016. The AO has however erroneously also included the cash deposited in new currency notes of Rs. 5.25 crores on 31st December 2016 (i.e. beyond the demonetization period when demonetized notes could no longer be deposited) in the aggregate cash deposits during 09.11.2016 to 30.12.2016. The error committed by the AO is clearly verifiable from the following evidences on record :

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(i) Complete bank wise details of cash deposited in banks for the period 09.11.2016 to 30.12.2016 showing total deposits of Rs. 175.28 crores during the said period– at pgs 112-113 of PB-2

(ii) Copies of bank statements evidencing cash deposited during 09.11.2016 to 30.12.2016 – at pgs 114-148 of PB-2

(iii) Cash ledger for F.Y. 2016-17 showing deposit of Rs. 5.25 crores on 31.12.2016 i.e. post demonetization period – at pgs 184-191 of PB-2.

114. Further, even out of Rs. 175.28 crores deposited during 09.11.2016 to 30.12.2016, deposits of Rs. 63.41 crores were in new currency notes and non-demonetized old currency notes (Rs. 10/20/50/100). Thus, the said amount of Rs. 63.41 crores could not be construed as cash deposited into the banks as a result of demonetization. The actual deposit of demonetized currency notes (i.e. old 500 & 1000 currency notes) during the demonetization period i.e. 09.11.2016 to 30.12.2016 was thus Rs. 111.87 crores(i.e. 175.28 – 63.41). Further, as per the A.O's own observation at page 5 of the Assessment Order for A.Y. 2017-18, Rs. 13.99 crores deposited on the first day subsequent to the demonetization represented actual legitimate cash held by the Assessee and Rs. 30 crores was declared by the Assessee under PMGKY. Therefore, even going by the A.O's allegations, the maximum addition as per the A.O's own logic works out to Rs. 67.88 crores[i.e. (175.28 – 63.41) i.e. 111.87 - 13.99 – 30] instead of Rs. 150.53 crores erroneously made by him contrary to his own observations.

115. The Ld. C.I.T(A) while allowing reduction of Rs. 30 crores, Rs 63.41 crores& Rs. 13.99 crores on account of the disclosure made under PMGKY, the cash deposited in new & valid currency notes and the cash deposited on the first day subsequent to demonetization respectively, has erroneously considered the cash deposited during the demonetization period as Rs. 180.83 crores instead of the actual deposits during the said period of Rs. 175.28 crores.

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i. That the Assessee is engaged in the trading of dry fruits and kirana items. The customers usually pay in cash and as such, the Assessee normally has sufficient cash balance throughout the year. The cash received against such cash sales is subsequently deposited into the banks from time to time as per the convenience of the Assessee.

ii. Cash sales & corresponding cash deposits into the bank accounts of the Assessee have been a regular feature of the Assessee's business since the past several years. The same is clearly borne out from the details of cash sales and cash deposits made by the Assessee in the past Financial Years viz. F.Ys 2014-15 & 2015-16 filed before the A.O. The same trend has also continued after the demonetization period i.e. in January to March 2017. This implies that the business of the Assessee was normal even after demonetization and there was no unusual trend in the cash sales or cash deposited in the banks. The fact that cash sales and cash deposits in banks are regular features of the Assessee's business (in the pre-demonetization, demonetization and post demonetization period) has not been controverted by the Revenue Authorities and is clearly explicit from the data on record.

iii. The Assessee maintains regular books of account, which are audited by independent Auditor. The cash sales and the corresponding cash deposits in banks are duly reflected in books of the Assessee in the respective years. The books of account and the entries pertaining to cash sales and cash deposits have been accepted by the Department in the assessments framed in the past years. The audited financial statements form part of the regular returns filed by the Assessee for the respective years.

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iv. A search & seizure operation u/s 132 of the Act was conducted at the premises of the Assessee-Company on 21.03.2017. Nothing incriminating with respect to the cash sales or the corresponding cash deposits was found pursuant to the said search action. In course of the search assessment, the Assessee was asked to explain the nature and source of cash deposited into bank accounts during the demonetization period (i.e. between 09.11.2016 to 30.12.2016). The Assessee explained that the source of cash deposits in banks was cash sales. The same trend of cash sales and cash deposits existed in the past years as well as in the months subsequent to the demonetization period. The entries pertaining to cash sales and corresponding cash deposits in banks were duly reflected in the books of account of the Assessee. The audited books of account and the tax audit report for the impugned F.Y. 2016-17 were also filed before the AO in course of the search assessment proceedings.

v. On the query as to why the cash deposited during the demonetization period (i.e. 09.11.2016 to 30.12.2016) was relatively higher than the cash deposited in the pre-demonetization period, the Assessee explained that the demonetization on 08.11.2016 was immediately preceded by Diwali sales on 30th October 2016, which is the main season of sales in the dry-fruits business. The same trend existed in the past years as well. The Assessee submitted the following figures in corroboration:

Table 18:

Financial Year	Diwali Month	Cash Sales in	Cash Deposit in	Total Cash Sales in	Total Cash Deposits in

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		Diwali Month	Diwali Month	the F.Y	the F.Y
2014-15	October	14.60 Cr.	25.16 Cr.	237.44 Cr.	242.65 Cr.
2015-16	November	45.18 Cr.	47.12 Cr.	412.52 Cr.	428.19 Cr.
2016-17	October	99.68 Cr.	77.09 Cr.	633.26 Cr.	633.74 Cr.

vi. With regard to the aforesaid contention of the Assessee, the AO at page 5 of his Deviation Report noted as follows: *"f) During the course of assessment proceedings, the assessee has submitted that the cash deposited during demonetization also included the sales made during Diwali which was on 30th October, 2016 when the sale of dry fruits increases every year as compared to other months. The version of the assessee on the above appears to be an acceptable contention since distribution of dry fruits during Diwali is a normal and acceptable phenomenon."*

vii. It was further explained that pursuant to demonetization announced by the Hon'ble Prime Minister on 08.11.2016, persons holding old five hundred rupee currency notes and thousand rupee currency notes were required to deposit the same into their bank accounts or post office accounts from 10th November 2016 until the close of banking hours on 30th December 2016.

viii. That accordingly, the Assessee was mandatorily required to deposit its entire cash in hand to the extent it comprised of old demonetized 500 & 1000 currency notes into the banks between 10.11.2016 to 30.12.2016.

ix. Apart from the above, the cash deposited during the demonetization period (i.e. 09.11.2016 to 30.12.2016) also comprised of proceeds arising from cash sales made subsequent to the demonetization on 08.11.2016. Admittedly,

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out of total cash deposits of Rs. 175.28 crores during the period from 09.11.2016 to 30.12.2016, Rs. 63.41 crores was deposited in new 2000 rupee currency notes and valid currency notes of Rs. 100/50/20/10 on account of cash sales made subsequent to the demonetization. Therefore, clearly deposits of Rs. 111.87 crores (i.e. 175.28 cr. -63.41 cr.)During the demonetization period were in the form of old demonetized 1000 & 500-rupee currency notes, which were required to be deposited in its entirety before 30.12.2016. This also explains the reason why the cash deposited into the banks between 09.11.2016 to 30.12.2016 was more than the cash deposited in the earlier months.

x. As regards the A.O's allegation that cash deposited during the demonetization period was unusual, it was submitted that in the immediately preceding month pre-demonetization i.e. in October 2016, the Assessee deposited a sum of Rs. 77.09 crores in banks. Further, in the immediately preceding year i.e. in the month of December 2015, the Assessee deposited a sum of Rs. 94.36 crores in banks. Thus, there was no unusual trend in depositing cash in banks during the demonetization period. Further, the total cash deposited in banks during F.Y. 2016-17 (i.e. Rs. 633.74 crores) was higher than the cash deposited in the past years for the simple reason that the cash sales in the said F.Y. 2016-17 (i.e. Rs. 633.26 crores) was way higher than the cash sales in the preceding years. Thus, the cash deposited in the banks was directly proportional to the cash sales in the respective years.

xi. Apropos the A.O's allegation that average monthly cash deposits during October to November 2016 was seen at Rs. 90.26 crores vis-à-vis the average monthly deposits of Rs.

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42.35 crores during the pre-demonetization period i.e. April to October 2016, it was submitted that Diwali in the year 2016 was on 30th October and the proceeds arising out of Diwali Sales were deposited in banks subsequently in the months of November and December leading to higher deposits during the said months. It is also a widely accepted fact that in Dry Fruits business, a surge in sales is normally noted during the winter months when the consumption of dry fruits is relatively higher than the summer months. Thus, the cash deposits arising out of cash sales of summer months are not comparable with the cash deposits during the winter months. Similar trend is also noted in the past F.Ys 2014-15 & 2015-16 as evident from above table.

xii. With regard to the alleged unusual GP ratio as per tally data of 25.2% for 01.04.2016 to 08.11.2016, 40.8% for 09.11.2016 to 31.12.2016& 7.9% for 01.01.2017 to 20.03.2017, it was explained that the tally data was incomplete and not finalized until the time of search on 21.03.2017. The accounts were incomplete and various entries pertaining to expenses etc. were pending as on the date of search, which were made subsequently at the time of finalization of accounts. The GP Margin as per Audited Financial Statements for F.Y. 2016-17 is 6.01%, which is at par with the GP% of the past years.

xiii. Further, with respect to deposits of Rs. 13.99 crores on 10.11.2016 as against total cash in hand of Rs. 113.99 crores on the date of demonetization, it was explained that banks do not accept such huge amount of cash on the same day. The Assessee was advised by the banks to deposit the said amount in tranches. In consonance with the advice received from the banks, the Assessee deposited the said amount over the period of demonetization (i.e. between 10.11.2016 to 30.12.2016) as permitted by the RBI. Merely because the entire cash of Rs.

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113.99 crores held by the Assessee as on the date of demonetization was not deposited on the very first day after demonetization (which was not permitted by the Banks) but in tranches does not automatically imply that the balance cash deposited subsequently did not represent legitimate cash as alleged by the Revenue Authorities. The source of the entire cash held as on the date of demonetization and deposited subsequently into various bank accounts is clearly evident from the entries in the books of account.

xiv. The Revenue Authorities while making the impugned addition u/s 68 and rejecting the explanation offered by the Assessee with respect to the nature and source of the cash deposited in various bank accounts during the demonetization period (i.e. 09.11.2016 to 30.12.2016) have acted merely on surmises, conjectures, suspicion, presumptions and assumptions. The humble submissions of the Assessee highlighting the glaring internal inconsistencies in the orders of the Revenue Authorities the repeated violations of the provisions of law by them are as under:

xv. The AO has treated the cash deposited in the banks during the demonetization period as unexplained cash credits u/s 68 of the Act although the nature and source of the cash deposits being proceeds arising out of cash sales is patently evident from the entries in the audited books of account of the Assessee.

xvi. It is not the case of the Department that the cash deposited in the banks during the demonetization period was in excess of what was available in the cashbooks. The fact that the cash deposits in banks were sourced out of cash sales is evident from the entries in the cashbooks. Nothing incriminating against or contrary to the entries recorded in the cashbooks was found in course search in the case of the Assessee on

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21.03.2017. The cash ledger for F.Y. 2016-17 is enclosed at pages 184-191 of PB-2.The entries in the cash book for the demonetization period may be summarized as under:

CASH IN HAND AS ON 09/11/2016 AS PER CASH BOOK		1130303192
ADD:		
CASH SALES FROM 09/11/2016 TO 30/12/2016	680812731	
CASH WITHDRAWL FROM BANK FOR THE SAID PERIOD	310000	681122731
TOTAL AMT. RS		1811425923
LESS :-		
CASH DEPOSITED IN BANKS FROM 09/11/2016 TO 30/12/2016 *(see pgs 112-113 of PB-2):*		
IN OLD DEMONETIZED CURRENCY NOTES (500 & 1000 NOTES)	1118698000	
IN NEW CURRENCY NOTES AND NON-DEMONETIZED CURRENCY NOTES (*see pgs. 149-150 of PB-2)*	634126000	1752824000
		58601923
LESS :- CASH EXPENSES FROM 09/11/16 TO 30/12/16		1072227
CLOSING CASH BALANCE AS ON 30/12/2016		57529696

xvii. The books of account of the Assessee have been audited by an independent Auditor and have not been rejected by the AO u/s 145(3) of the Act. The stock position depicted in the books of account has thus been accepted by the Department. The cash sales were made out of the accounted stock accepted as such by the Department. It is not the case of the Department that the physical stock found in the course of search was in excess of the book stock, which could have probably indicated/hinted at the possibility of recording of bogus cash sales. In fact, the

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allegation of the Department is that the physical stock recorded in course of search was short of the book stock by around Rs. 450 crores (the reason for the alleged discrepancy has already been explained in the earlier paras). Thus, the recording of any bogus cash sales is not borne out from the facts on record or from the findings of the search action in the case of the Assessee.

xviii. The cash sales are duly supported by relevant vouchers, which were produced before the AO in course of the assessment proceedings, and nothing adverse in connection therewith was noted by the A.O. The figure of cash sales offered by the Assessee in its Return of Income for F.Y. 2016-17 was accepted as such by the Department and considered in arriving at the assessed income of the Assessee for F.Y. 2016-17. Therefore, the cash sales recorded in the books of the Assessee having been accepted as such by the Department, the corresponding cash deposits made out of such cash sales cannot be rejected and deemed to have arisen on account of income from unexplained sources on mere surmises and conjecture of the AO.

xix. The fact that cash sales and corresponding cash deposits in banks have been regular feature of the Assessee's business over the past several years has not been denied by the A.O. In fact, in the past, the AO after conducting a detailed scrutiny of books of account of the Assessee and after arriving at complete satisfaction with respect to the correctness of the entries recorded therein1accepted the cash sales and corresponding cash deposits in banks in the assessments framed u/s 143(3) of the Act for A.Ys 2012-13 to 2014-15. Copies of original

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assessment orders passed u/s 143(3) for the said years are enclosed at pages 81 to 124 of PB-1. Thus, there is no reason why similar modus operandi, which continued in the current F.Y. 2016-17 (A.Y. 2017-18), should not be accepted by the AO and rejected on mere surmises and conjecture of the A.O.

xx. The entries in the cash books for the years under appeal may be summarized as under:

Table 21:

PARTICULARS	A.Y. 2012-13	A.Y. 2013-14	A.Y. 2014-15	A.Y. 2015-16	A.Y. 2016-17	A.Y. 2017-18
OPENING CASH IN HAND AS ON IST APRIL	6,85,08,416	5,35,36,527	5,40,24,002	3,88,25,827	3,34,11,689	3,88,77,076
ADD:						
CASH SALES FOR THE YEAR	1,83,46,54,328	2,55,94,26,635	1,52,29,15,423	2,37,49,83,211	4,12,57,04,347	6,33,33,21,552
CASH WITHDRAWAL FROM BANK FOR THE YEAR	1,57,00,000	5,45,00,000	9,28,45,000	9,08,00,000	20,96,35,000	3,55,85,770
	1,91,88,62,744	2,66,74,63,162	1,66,97,84,425	2,50,46,09,038	4,36,87,51,036	6,40,77,84,398
LESS :-						
TOTAL CASH DEPOSITED IN BANKS DURING THE YEAR	1,84,18,16,318	2,60,71,58,700	1,58,68,73,600	2,42,70,47,200	4,28,25,20,400	6,33,80,14,000
CASH EXPENSES FOR THE YEAR	2,35,09,899	62,80,460	4,40,84,998	4,41,50,149	4,73,53,560	1,57,46,613
CLOSING CASH BALANCE AS ON 31ST MARCH	5,35,36,527	5,40,24,002	3,88,25,827	3,34,11,689	3,88,77,076	5,40,23,785

xxi. It is pertinent to note that while the A.O. has accepted the cash deposited in the bank accounts in the following periods to be sourced out of cash sales recorded in the books of the Assessee viz:

- Cash deposited in the banks in the past Financial Years 2011-12 to 2015-16,
- Cash deposited in banks during the impugned F.Y. 2016-17 in the pre-demonetization period viz. April 2016 to 8th November 2016
- Cash deposited in banks during the F.Y. 2016-17 in the post-demonetization period viz. January to March 2017

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He has refused to accept the same modus operandi with respect to the cash deposited during the period 09.11.2016 to 30.12.2016 merely on the pretext that the same was deposited during the demonetization period and hence was suspicious in nature.

xxii. The Ld. C.I.T(A), in addition to the above, further accepted that out of the total cash deposited during the demonetization period of Rs. 180.53 crores (actually Rs. 175.28 crores), the following deposits were also sourced out of cash sales recorded in the books:

- Cash deposited in new currency notes and non-demonetized currency notes to the extent of Rs. 63.41 crores.
- Cash of Rs. 13.99 crores deposited on 10th November immediately after demonetization.

xxiii. Thus, while the Ld. C.I.T(A) has accepted the cash deposited in banks in (i) the past F.Ys 2011-12 to 2015-16, (ii) in the pre-demonetization period i.e. April 2016 to 8th Nov 2016, (iii)in the post demonetization period i.e. January 2017 to March 2017, (iv) on the first day after demonetization i.e. 10th November 2016[2]and (vi) during the demonetization period to the extent of Rs. 63.41 crores being deposits in new and valid currency notes - to have arisen out of cash sales, he has refused to accept the same modus operandi with respect to the balance cash deposited in old currency notes during the demonetization period without citing any explicable reason.

xxiv. Thus, the Revenue Authorities have blown hot and cold in the same breath accepting and rejecting the explanations offered by the Assessee with respect to the transactions of identical nature at their sheer convenience merely on the basis of

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surmises and conjecture without any evidence or material on record.

xxv. It is submitted that since the entire cash sales recorded in the books have been accepted by the Revenue Authorities and the corresponding sales proceeds in cash were not found physically lying with the Assessee in the course of search operation, as a natural corollary, the same was deposited into the bank accounts as claimed in the books of account of the Assessee.

xxvi. No incriminating material was found in course of search to even remotely suggest that the Assessee had indulged in any other unaccounted business activity leading to any unaccounted income as alleged by the Revenue Authorities. Further, such allegation was not even established by the Revenue Authorities in the course of the search assessment proceedings by conducting any inquiry/investigation by following the procedure laid down u/s 142(2) & 142(3) of the Act. Thus, bald allegation of the Departmental Authorities that the cash deposited during the demonetization period had arisen from some undisclosed source not reflected in the books of account as against the accounted cash sales claimed in the audited books of account dehors any credible evidence/material on record is unsustainable both in law and on facts. Addition so made by the AO deeming the impugned cash deposits arising out of accounted cash sales as unexplained cash credits merely on the basis surmises & conjectures is fallacious and deserves to be deleted.

xxvii. Reference in this connection is craved to the case of Lalchand Bhagat Ambica Ram Vs. CIT (1959) 37 ITR 288 (SC) which is set in somewhat similar back drop in connection with treatment of the encashment of high denomination notes by

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the assessee therein on the promulgation of *High Denomination Bank Notes (Demonetization) Ordinance, 1946as unexplained money on mere conjecture and surmise of the Revenue Authorities. The relevant facts of the said case are that the* ITO in the course of the assessment noticed that the appellant therein had encashed high denomination notes of the value of Rs. 2,91,000. The ITO asked for an explanation, which the appellant gave stating that these notes formed part of its cash balances including cash balance in the Almirah account. The appellant sought to prove the fact that the high denomination notes encashed by it formed part of its cash balances from certain entries in its accounts wherein the fact that moneys were received in high denomination notes had been noted. Portions of these entries to the effect that moneys had been received in high denomination notes were found by the ITO to be subsequent interpolations made by the appellant with a view to advance its case that the cash balances contained the high denomination notes encashed by it. The ITO rejected the appellant's explanation that the high denomination notes formed part of its cash balances and treated the sum of Rs. 2,91,000 as the appellant's secreted profits from business and included it in its total income and assessed the appellant. Before the Tribunal, the appellant stated that the said entries were made in sheer nervousness after the coming into force of the High Denomination Bank Notes (Demonetization) Ordinance, 1946, on 12th Jan., 1946, as the appellant did not know that it had specific proof in its possession of having the high denomination notes as part of its cash balances. The Tribunal held that there was no other reason to suspect the genuineness of the account books in which these interpolations were made. If the entire account books were fabricated to serve its purpose, there would be no need for the

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appellant to make interpolations between the lines already written in a different ink and in such an obvious manner as to catch one's eye on the most cursory perusal. The Tribunal, however, examined the cash book and taking into consideration all the circumstances which had been adverted to by the ITO held that the appellant might be expected to have possessed as part of its business cash balance of at least Rs. 1,50,000 in the shape of high denomination notes on 12th Jan., 1946, when the Ordinance above-mentioned was promulgated. The Tribunal came to the conclusion that the nature of the source from which the appellant derived the remaining 141 high denomination notes of Rs. 1,000 each remained unexplained to its satisfaction. It accordingly ordered that the addition be reduced from Rs. 2,91,000 to Rs. 1,41,000. On the said facts, the Hon'ble Supreme Court held that–the Tribunal *having held that books of assessee were genuine which showed a cash balance of Rs. 3,10,681 on the relevant date; the Tribunal could not have accepted the cash balance of Rs. 1,50,000 out of the value of high denomination notes of the value of Rs. 2,91,000 and treated the balance Rs. 1,41,000 as income from undisclosed sources. It was held that in doing so, The Tribunal had indulged in conjectures and surmises and acted without any evidence or upon a view of facts which could not reasonably be entertained. The relevant excerpts from the order of the Hon'ble Apex Court are reproduced hereunder:*

> *If the entries in the books of account in regard to the balance in Rokar and the balance in Almirah were held to be genuine, logically enough there was no escape from the conclusion that the appellant had offered reasonable explanation as to the source of the 291 high denomination notes of Rs. 1,000 each which it encashed on 19th Jan., 1946. <u>It was not open to the Tribunal to accept the genuineness of these books of account and accept the</u>*

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explanation of the appellant in part as to Rs. 1,50,000 and reject the same in regard to the sum of Rs. 1,41,000.Consistently enough, the Tribunal ought to have accepted the explanation of the appellant in regard to the whole of the sum of Rs. 2,91,000 and held that the appellant had satisfactorily explained the encashment of the 291 high denomination notes of Rs. 1,000 each on 19th Jan., 1946. [para 14]

The Tribunal, however, appears to have been influenced by the suspicions, conjectures and surmises which were freely indulged in by the ITO and the AAC and arrived at its own conclusion, as it were, by a rule of thumb holding without any proper materials before it that the appellant might be expected to have possessed as part of its business, cash balance of at least Rs. 1,50,000 in the shape of high denomination notes on 12th Jan., 1946,—a mere conjecture or surmise for which there was no basis in the materials on record before it. [para 15]

Unless the Tribunal had at the back of its mind the various probabilities which had been referred to by the ITO it could not have come to the conclusion it did that the balance of Rs. 1,41,000 comprising of the remaining 141 high denomination notes of Rs. 1,000 each was not satisfactorily explained by the appellant. [para 18]

If the entries in the books of account were genuine and the balance in Rokar and the balance in Almirah on 12th Jan., 1946, aggregated to Rs. 3,10,681-13-9 and if it was not improbable that a fairly good portion of the very large sums received by the appellant from time to time, say in excess of Rs. 10,000 at a time, consisted of high denomination notes, there was no basis for the conclusion that the appellant had satisfactorily explained the possession of Rs. 1,50,000 in the high denomination notes of Rs. 1,000 each leaving the possession of the balance of 141 high denomination notes of Rs. 1,000 each unexplained. Either the Tribunal did not apply its mind to the situation or it arrived at the conclusion it did merely by applying the rule of thumb in which event the finding of fact reached by it was such as could not reasonably be entertained or the facts found were such as no person acting judicially and properly instructed as to the relevant law could have found, or the Tribunal in arriving at its findings was influenced by irrelevant considerations or indulged in conjectures, surmises or suspicions in which event also its finding could not be sustained. [para 19]

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> *As the conclusion of the ITO was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each.[para 20]*
>
> *Therefore, the Tribunal in arriving at the conclusion in the present case indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was, in other words, perverse and the Court is entitled to interfere. [para 23]*

xxviii. On similar facts, the Hon'ble Supreme Court in the case of Mehta Parikh & Co. Vs. CIT (1956) 30 ITR 181 held as under:

> *"The finding of the Tribunal that high denomination notes of the value of Rs. 30,000 represented the concealed profits of the appellant is not supported by any evidence, and is, in consequence, erroneous in point of law and liable to be set aside. The accounts of the appellant have been accepted by the Tribunal as genuine, and it is impossible to say, having regard to the case balance shown therein, that notes in question could not have been included therein.The Tribunal observes that it is unlikely that so many high denomination notes would have been held as part of the cash on hand for a such a large number of days. That, no doubt, is highly suspicious; but the decision of the Tribunal must rest not on suspicion but on legal testimony."*

xxix. Further the Hon'ble Allahabad High Court in the case of Sri Ram Tandon Vs. CIT (1961) 42 ITR 689 ordained as under:

> *"It appears extremely difficult to appreciate how the Tribunal thought it necessary or proper to make an estimate of 35 notes at Rs. 1,000 each to have been contained in the cash balance. The Tribunal has given no reason whatever for its finding that the assessee possessed 35 notes of Rs. 1,000 each on the day the Ordinance was promulgated.* This evidently is an arbitrary

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expression of its own guess, which cannot be accorded the status of a finding. Equally arbitrary is the other finding that the balance of 10 notes was from an undisclosed source. *After having heard counsel for the Department and after giving best consideration to the matter one is quite unable to see any reason or basis for the so called finding recorded by the Tribunal that the assessee was in possession of 35 notes on the day the Ordinance was promulgated or that 10 notes were from some undisclosed source.* These cannot be recognised as finding at all. *The assessee's business was not one in which large amount of petty notes might have been necessary for the purpose of business, and keeping money in large notes is evidently more convenient for counting, for making payments and for other purposes and no material has been placed to show that the explanation offered by the assessee was one which was inherently improbable or one which could not be accepted. The so-called estimate made by the Tribunal was based on no reason and was a mere guess. In fact there was no justification in the circumstances of the case for making an estimate at all. The assessee had a large cash balance which could very conveniently include the 45 high denomination notes encashed by him. The explanation offered by the assessee was not unreasonable and nothing has been said which could justify its being rejected as unreasonable. On the other hand the so-called estimate by the Tribunal is based on no reason and is purely arbitrary and cannot be upheld as legal."*

xxx. Further, the Hon'ble Allahabad High Court in the case of Kanpur Steel Co. Ltd. Vs. CIT (1957) 32 ITR 56 (All)opined as under:

*"**w**hen the assessee-company had given an explanation which was reasonable, the IT authorities could have been entitled to treat the sum of Rs. 32,000 as income from undisclosed sources only if there was some other material from which such inference could have been drawn. No other material has been mentioned by the Tribunal in their appellate judgment or in the statement of the case. It further appears that the Tribunal, in holding that seven high denomination currency notes of the value of Rs. 7,000 only could form part of the cash balance and the remaining currency notes could not do so, were acting on their surmises for which there was no basis and which had no support from any material on the record. In these*

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circumstances, it must be held that there was no material for holding that the sum of Rs. 25,000 being the value of high denomination currency notes exchanged in pursuance of the High Denomination Bank Notes (Demonetisation) Ordinance, 1946, represented income of the assessee-company from some undisclosed sources."

xxxi. Similar view was expressed in the following cases:

- Madhuri Das Narain Das Vs. CIT (1968) 67 ITR 368 (All)
- K.S. KannanKunhi Vs. CIT (1969) 72 ITR 757

xxxii. Drawing inference from the above cited cases, in the instant case, the Assessee furnished a reasonable explanation with regard to the nature and source of the cash deposited in banks during the demonetization period which was not found to be false by the Department. The explanation offered by the Assessee was in line with the trend of cash deposits in the past years which was accepted by the Department in the assessments framed u/s 143(3) of the Act in the past. No material was brought on record by the Revenue Authorities to draw an inference that the explanation offered by the Assessee was incorrect or unreasonableorthat the impugned sum represented income of the Assessee from undisclosed sources as against the entries recorded in the audited books of the Assessee.Once the books of account of F.Y. 2016-17 were accepted by the Department and the cash sales recorded therein were considered in arriving at the assessed income of the Assessee for the impugned financial year, the cash deposited in banks against such cash sales could not be treated as undisclosed income of the Assessee u/s 68 without bringing on record any credible evidence/materialin support of such allegation merely on the basis of surmises and conjecture of the Revenue Authorities.

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xxxiii. The whole purpose of the Departmental Authorities in singling out the cash deposited during the demonetization period as arising out of unexplained sources(as against the accepted position in the past andthe subsequent periods) is to somehow trigger the provisions of section 115BBE read with section 68 of the Act to the income already offered for tax by the Assessee (as cash sales) at a higher rate of tax of 77.25% (i.e. flat rate of 60% plus surcharge @ 25% on such tax and cess as applicable) on gross basis (without any deduction/allowance). In fact the treatment of the cash deposits as unexplained cash credits u/s 68 by the A.O has resulted in double taxation of the same amount, once in the form of cash sales already offered to tax by the Assessee at the rate of tax applicable to companies and again by way unexplained cash credit on deposits arising from such sales u/s 68 at higher rates specified u/s 115BBE. Section 115BBE of the Act is a machinery provision to levy tax on income and it should not enlarge the ambit of section 68 of the Act to create a deeming fiction to tax any sum already credited/offered to tax as income. Section 68 of the Act traditionally applies to unexplained 'cash credit' like loans, deposits, advances, share capital, etc. and not to sums already offered to tax as income by the assessee in its return of income at the highest slab rate. Such recourse is unwarranted keeping in mind the objective to introduce section 115BBE of the Act was only to curb the practice of laundering of unaccounted money by taking advantage of the basic exemption limit. The reason and purpose of the provision was explained by the explanatory memorandum to the Finance Bill 2012 as under:-

> *1) "Under the existing provisions of the Income-tax Act, certain unexplained amounts are deemed as income under section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and are subject to tax as per the tax rate applicable to the assessee. In case of individuals, HUF, etc., no tax is levied up to the basic*

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exemption limit. Therefore, in these cases, no tax can be levied on these deemed income if the amount of such deemed income is less than the amount of basic exemption limit and even if it is higher, it is levied at the lower slab rate.

2) In order to curb the practice of laundering of unaccounted money by taking advantage of basic exemption limit, it is proposed to tax the unexplained credits, money, investment, expenditure, etc.,which has been deemed as income under section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of 30% (plus surcharge and cess as applicable). It is also proposed to provide that no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of the Act in computing deemed income under the said sections. This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."

xxxiv. Thus, the intention of the Legislature behind introduction of section 115BBE was not to bring to tax genuine cash credits already offered to tax as income by the Assessee at higher tax rates. Such an interpretation wouldlead to recurring attempts on the part of the Revenue Authorities to reject genuine explanations offered by the Assessee with respect to sums credited/offered as income in its books as unsatisfactory solely to extort higher rates of taxes thereon u/s 115BBE of the Act. The A.O in exercising his powers u/s 68 of the Act is not vested with unfettered powers to reject any explanation as being not to his satisfaction merely on the basis of surmises and conjecture. The AO is bound under law to act reasonable and just while framing any satisfactory opinion surrounding the explanation offered by the taxpayer. From the facts of the case at hand, it is clear that the A.O has acted unreasonably and capriciously in rejecting the genuine explanations offered by the Assessee in respect of the impugned cash deposits as

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unsatisfactory solely with the aim of fastening exorbitant tax liability on the Assessee-Company under the garb of unexplained cash credit u/s 68 of the Act. Such recourse primarily hedged on surmises, conjecture, assumptions, presumptions and whims of the Revenue Authorities is clearly unwarranted and the additions so made is unsustainable in the eyes of law and thus deserves to be quashed.

116. In view of the above, it is prayed that the addition made by the A.O (and partly sustained by the CIT (A)) u/s 68 on account of cash deposited in banks during the demonetization period may kindly be deleted.

117. The learned CIT DR briefly referred to the announcement of the scheme of demonetization on 8/11/2016 and stated that the assessee has deposited huge amount of cash in its bank accounts. He further referred to the paragraph number 3 of the assessment order and also page number 3 – 5 of the order of the learned CIT – A. He further submitted that the learned assessing officer has tried to analyze the figure of month wise cash sales and cash deposited into the bank account during the financial year 2014 – 15 to 2016 – 17. He further stated that the learned assessing officer has observed that as compared to the average total cash deposits from April to October 2016 which was only INR 4 2.35 crores and INR 3 5.4 crores in past 2 financial years, the average monthly cash deposit on mud 2 months of the October 2016 and November, 2016 was abnormally high at INR 90.26 crores. He further referred to page number 2 of the assessment order and stated that in post demonetization period, between 09/11/2016 and 30/12/2016, appellant has deposited total cash amounting to INR 1 80.53 crores in various bank accounts maintained during this period. He further submitted that the AO has analyzed and observed that there was a substantial jump in the gross profit margin during the post-demonetization period as compared to pre-demonetization period. In addition, he noted that there are substantial jump in the gross profit of the assessee during this period. AO further noted that during the course of search the stock as per

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the books of accounts was also found short and the explanation regarding increase in sales in this year on account of increased demand for dry fruit was also found baseless. He further submitted that when assessee was holding cash in hand of INR 1 13.03 crores on that date via assessee deposited only INR 1 3.99 crores in the bank account this led the assessing officer to conclude that the legitimate cash on by the assessee company on the date of demonetization was only INR 1 3.99 crores. He also referred to the average monthly cash deposit of the assessee post demonetization period and pre-demonetization. He therefore submitted that deposit of substantially higher amount of INR 1 80.53 crores by the assessee has correctly been added by the learned assessing officer as income of the assessee. He further referred to the order of the learned CIT – A and stated that the addition has correctly been confirmed by analyzing all the facts which are material to the addition.

118. With respect to the appeal of the learned assessing officer wherein the learned CIT – A has upheld the addition to the extent of only INR 7 3.13 crores instead of addition made by the learned assessing officer of INR 1 50.53 crores he submitted that the learned CIT – A has wrongly granted relief to the extent of INR 13.99 crores and INR 63.41 crores. He submitted that whether the amount is deposited in the currency or old currency the addition is required to be made. The learned CIT – A has held that as INR 6 3.41 crores are deposited in the new currency no addition is required to be made in the hands of the assessee. He further submitted that merely because the amount is credited to the profit and loss account as sales the addition thereon couldn't be deleted.

119. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly assessee has deposited INR 1 80.53 crores during the post-demonetization between 9/11/2016 to 30/12/2016. The assessee has disclosed INR 3 0 crores under Pradhan Mantri Garib Kalyan Yojna (PMGKY). Therefore learned AO made an addition of INR 1 50.53 crores as income of the assessee u/s 68 of the income tax act. The main reason for such addition was that during the course of search proceedings

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the stock position of the assessee was verified and it was found that the stock as per books of account was found short. Further it was noted that on 8/11/2018, assessee was holding cash amounting to INR 1 13.03 crores whereas on the date of demonetization the assessee has deposited in bank cash of INR 1 3.99 crore only and therefore the learned assessing officer held that assessee had actual legitimate cash of INR 13.99 crores only. The AO further noted that average monthly cash deposit pre demonetization period is INR 423,500,000 whereas in the month of November and December post demonetization assessee has deposited INR 1 80.53 crores which is disproportionate and not commensurate in with the regular pattern of cash deposits pre-demonetization period. Such addition was challenged before the learned CIT – A. However prior to that during the course of assessment proceedings there was a deviation proceedings based on the appraisal report guidance given by the investigation wing. The learned assessing officer in his deviation report stated as under:

"1. Cash deposit in bank during the period 9/11/2016 to 31st/12/2016

a) During the course of assessment, proceedings the assessee company was asked to explain the sources of cash deposited in its bank account during the period of 9/11/2016 to 31/12/2016. In reply, assessee furnishes various details and documents.

On examination of details and documents and materials available in this office, revealed that bank -wise details of cash deposits between the periods 9/11/2016 to 30/12/2016 works out the total of INR 1 75.57 crores, whereas the addition on account of cash deposits has been proposed of INR 1 80.53 crores on the basis of total cash deposits made during the November and December month.

As per details of evidences filed by the assessee during the course of assessment proceedings, it is found that during the period 9/11/2016 to 30/12/2016 the assessee company had made cash deposits as under:

Note denomination	Number of notes	Total amount in Rs.

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2000 (notes)	284349	568698000/–
1000 (old notes)	738556	738556000/–
500 (old notes)	760248	380124000/–
500 (new notes)	36	18000/–
100	622772	62277200/–
50	52614	2630700/-
20	5105	102100/-
10	41800	418000/–
	Total	1752824000/–

From the above chart, it is seen that out of total cash deposit of 175.28 crores, a sum of INR 634,100,000 was in respect of new notes of INR 2000, 500 and changed old notes of Rs. hundred, 50, 20 and INR 10 and the balance of INR 1,118,700,000 related to old currency. The trend of cash deposit transaction was compared with immediately preceding year i.e. financial year 2015 – 16, the total cash deposits out of the sails for the same period were 17 4,00,00,000 and the real position of earlier years is as under:-

financial year 2014-15		Financial year 2015 – 16		Financial year 2016 – 17	
Cash sales	Deposit	Cash sales	Deposit	Cash sales	Deposit
237.50	242.70	412.57	428.25	633.33	634.00

b) The monthly rent of cash sales and cash deposit transactions for the period of financial year 2014 – 15, 2015 – 16 and 2016 – 17 are as under:-

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month	financial year 2014 – 15		Financial year 2015 – 16		Financial year 2016 – 17	
	Cash sales	Deposit	Cash sales	Deposits	Cash sales	Deposits
April	27.15	25.82	42.70	42.05	58.48	45.66
May	8.51	10.71	23,55	21.72	61.92	57.49
June	12.95	4.77	12.20	14.89	73.35	37.64
July	3.13	2.90	19.70	22.36	20.46	4.97
August	2.01	3.46	-	2.50	21.58	7.07
September	15.21	8.20	11.71	15.63	20.10	43.76
October	14.60	25.16	29.95	32.64	99.68	77.09
November	16.49	14.46	45.18	47.12	47.73	113.52
December	22.26	28.08	97.35	94.36	69.83	89.75
January	54.51	57.04	80.86	76.32	64.60	63.50
February	37.27	36.43	44.39	50.24	36.20	35.75
March	23.35	25.62	4.93	8.36	59.33	57.54

From the above letter, it is revealed that during the period of October/November/December 2016 cash sale and cash deposits are not in consonance to the preceding years. As per analysis, at the end of September 2016 cash in hand was INR 70 .78 crores, whereas in the preceding years such trend of cash holding has not been observed which was less then INR 10 crores. In view of the above analysis, there is element of suspicion that the assessee has made introduction of unaccounted cash in its books of account in the wake of demonetization.

However, at the same time the cash trail to the certain acceptable extent as per the business trend of the assessee company may not be ruled out.

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c) Further in order to estimate the issue of cash holdings in the hands of the assessee company in a particular day corresponding to bank deposits on that day, the cashbook of the assessee for assessment year 2017 – 18 was analyzed.

The data extracted from cashbook of the assessee clearly revealed that huge amount of cash was being retained by the assessee without any purpose. The peak cash holding was on 31/8/2016. The assessee was holding cash exceeding INR 8 0 crores since 16/8/2016 to 6/9/2016.

It is worthwhile to mention here the factors which states on a reasonability of the cash holding which are as under:-

i. huge amount of bank loans as cash credit facility were outstanding, whereas the assessee was holding huge amount of cash

ii. as per books of account, the purchases never been made in cash, therefore, the assessee had no reason for cash holdings for a long duration

iii. as per balance sheet as at 31/03/2013, 2014, 2015 and 2016 the cash holdings are 5.50 crores, 3.88 crores, 3.34 and INR 3.88 crores respectively

iv. further from the analysis of cash holdings from 1/11/2016 revealed the following scenario

date	opening cash balance	cash deposit in bank	closing balance
1/11/2016	88.12 crores	-	95.60 crores
3/11/2016	102.39	4.45	103.90
4/11/2016	103.90	4.15	99.75
5/11/2016	99.75	5.50	108.11
7/11/2016	108.05	5.0	109.24

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8/11/2016	109.24	3.65	113.03
10/11/2016	113.03	13.99	98.52
11/11/2016	98.90	16.88	81.64

From the analysis of the above letter, it can be seen and concluded that

1) 13/11/2016 cash holding was of INR 1 02.39 crores in hand out of which only INR 4.45 crore cash has been deposited in the bank, which suggest that legitimate cash holding was to the extent of INR 4.45 crore
2) similarly, on 4/11/2016 to 7/11/2016 (before demonetization) assessee has deposited small amount of cash (in terms of volume of cash) in bank despite having huge cash in hand and large amount of bank loans
3) on the demonetization day i.e. on 8/11/2016 closing cash holding was INR 1 13.03 crores out of which assessee deposited only INR 1 3.99 crores in bank on 10/11/2016 (9th being a holiday), meaning thereby, the legitimate cash in hand was only to the extent of INR 13 .99 crores and INR 9 9.04 crores was unaccounted cash which has been deposited in the wake of demonetization
4) during the course of assessment proceedings the assessee was to explain the above facts but the assessee at give any plausible explanation

In view of the above facts and factors, it can be concluded that

i. the assessee has made introduction of its unaccounted cash to the extent of INR 9 9.04 crores which is liable to be added to the total income of the assessee for the assessment year 2017 – 18 as against proposed addition of INR 1,80.53 cr by the investigation wing
ii. the introduction of unaccounted cash has taken place in the garb of cash sales, which cannot be verified.

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d) As per cash book study, the opening cash in hand as on 8/11/2016 was of INR 1 13.03 crores in the form of old currency

e) at the same time, as per examination of documents, it is also been observed that during the period of January to March 2017 i.e. post-demonetization period, total Sales was of INR 1 60 crores and cash deposit was of INR 1 5 7 crors.

f) During the course of assessment proceedings, the assessee has submitted that the cash deposited during demonetization also included the sales made during Diwali, which was on 30/10/2016, and the sale of dry fruits increases every year as compared to other months. The version of the assessee on the above appears to be an acceptable contention since distribution of dry fruits during Diwali is a normal and accepted phenomena.

In view of all these facts and circumstances, the addition on account of unaccounted cash, which were introduced in the books of accounts of the assessee under the garb of the cash sales proceeds and deposited in the bank account in the wake of demonetization, of INR 9 9.04 crores may be considered to be reasonable as against the proposal for addition of INR 1 80.53 crores for the assessment year 2017 – 18 which appears to be exaggerated and which may lead to high pitch assessment."

120. The Deputy Director of income tax replied as per letter dated 24/12/2018 wherein it was directed that assessee has not provided any evidence to show that INR 6 3.41 crores was on account of sales accounted for in the books of account, therefore, the contention that INR 6 3.41 crore deposited in respect of new notes of INR 2000 – 500 and old notes of Rs. 100, 50, 20 and 10 represents accounted income of the assessee is not acceptable. Further it was stated that no evidence was provided by the assessee to show that INR 1 3.99 crores represent legitimate cash in hand. Therefore, benefit of INR 1 3.99 crore cannot be given to the assessee. Therefore, the entire amount of cash deposits post-demonetization remains unexplained.

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121. In response to the above in the deviation meeting dated 28/12/2018 the assessing officer stated as under:-

"a) with regard to cash sales of INR 1 75.28 crores (during 8/11/2016 to 31/12/2016) sum of INR 63 .41 crore was the new currency notes of INR 2000/– and INR 500/– denomination. In this respect, the assessee has furnished evidence i.e. bank deposit slips to prove this. As per DDIT (INV), unit – 7 (4), Delhi White this letter dated 24/12/2018 "the contention that INR 6 3.41 crore deposited in respect of new notes of INR 200, 500 and on change old notes of Rs. hundred, 50, 20 and 10 represents accounted income of the assessee is not acceptable." It is to be stated that the case sales even in new currency and on change old notes has been duly recorded in the books of the assessee but is not verifiable since the details of the purchaser is not mentioned in the vouchers.

b) The entire cash deposit of 180.53 crores has been recommended in the appraisal report primarily on of pattern of cash deposits and GP margin over the years. It is mentioned in the appraisal report that average month cash deposit is INR 3 5.4 crores for financial year 2015 – 16, INR 4 2.35 crores for the period prior to 8/11/2016 and INR 90.26 crores during demonetization period. Alternatively as mentioned in the deviation note sent by the ACIT cc – 28, the cash deposit on the immediately after demonetization should be given credit out of closing cash holding on 8/11/2016. This analysis may lead to conclusion that out of 113.03 crores held on close of 8/11/2016, INR 1 3.99 crores deposited on the working day on bank was genuine cash holding of the assessee. Thus INR 9 9.04 crores was unaccounted cash of the assessee deposited during demonetization period.

122. In response to this opinion of additional director of income tax (investigation) unit – 7, Delhi said that she would give her comments in writing. No such comments were received.

123. In the remand report dated 18/3/2019 the learned assessing officer submitted before the learned CIT – A as under:-

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"Cash deposit of INR 1 80.53 crores

During the year under consideration, the assessee has deposited huge cache of INR 1 80.53 crores into its different bank account. During assessment proceedings, the assessee was asked to furnish details of cash deposits, pattern of cash deposits, and source of cash deposits and justification of huge cash in hand. The source of cash deposit was claimed to be cash sales made by the assessee. Further, on perusal of pattern of cash deposits in 3 assessment years i.e. assessment year 2015 – 16, 2016 – 17 and 2017 – 18, it was noticed that the entire cash sales made by the assessee, were not deposited by the assessee on the same day but Cash in hand for its business operations. However, no proper justification was given for keeping huge cash in hand on day-to-day basis.

Further, as per evidence furnished by the assessee regarding deposits of cash during demonetization period, it was found that cash of INR 6 3.41 crore was made by the assessee in new currency notes of INR 2000 and INR 500 and old currency notes of Rs. hundred, INR 5 0, INR 2 0 and INR 10. The assessee has paid INR 3 0 crores under the PMGKY capital scheme during the post-search proceedings is declared during the search proceedings, therefore, the benefit of INR 3 0 crores was allowed out of INR 1 80.53 crores, accordingly INR 1,505,300,000 was added to the total income of the assessee.

Further, there was huge difference in cash deposits of current year and cash deposits in past 2 years."

124. When assessee approached the learned CIT – A, he dealt with the whole issue as per paragraph number 5.4 of his order as under:-

"5.4 I have considered the facts and circumstances of the case, submission of the appellant and perused the AO's order. I find that it is not understood as to why the cash of such a huge amount was kept by the appellant at its premises as on 9/11/2016 as only INR 1 3.99 crore was deposited into the

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bank account on 8/11/2011 but the balance of Rs. 99.04 crore was not deposited into the bank account. The appellant has not explained the necessity for keeping the cash in hand of such a huge amount whereas huge amount of bank loan as cash credit facilities were outstanding. Further, the appellant has not shown purchases in cash. It appears that the appellant has created an artificial picture in its books of account by which the unaccounted income was rooted through showing cash sales and the same were shown cash in hand and shown to have deposited into the bank account as per its convenience on the future dates. Under these circumstances, it would be reasonable and logical that case deposited on 8/11/2011 of INR 1 3.99 crore is treated to be genuine coming out from the case sales. On analysis of the details of case sales vis-a-vis cash deposit into bank account for different years/periods, I am of the considered view that INR 99.04 crores is nothing but represents the unaccounted income of the appellant which does not represent the cash else. As far as the case representing new currency after demonetization is concerned, I am of the view that being new currency the same represents cash sales of INR 634,100,000. Thereby AO is directed to restrict the addition to INR 7 3.13 crores (150.53 crore - 13.99 crores -63,41,00,000) but the balance addition is directed to be deleted."

125. We have carefully gone through the various standard operating procedures laid down by the central board of direct taxes issued from time to time in case of operation clean. The 1st of such instruction was issued on 21/02/2017 by instruction number 03/2017. The 2nd instruction was issued on 03/03/2017 instruction number 4/2017. The 3rd instruction was in the form of a circular dated 15/11/2017 in F.No. 225/363/2017 – ITA.II and the last one dated 09/08/2019 in F.no.225/145/2019 – ITA.II. though some of the instructions/circular are after the passing of the assessment order but it gives a hint that what kind of investigation, enquiry, evidences that the assessing officer is required to take into consideration for the purpose of assessing such cases. In 1 of such instructions dated

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09/08/2019 speaks about the comparative analysis of cash deposits, cash sales, month wise cash sales and cash deposits. It also provides that whether in such cases the books of accounts have been rejected or not where substantial evidences of wide variation be found between these statistical analyses. Therefore, it is very important to note that whether the case of the assessee falls into statistical analysis, which suggests that there is a booking of sales, which is non-existent and thereby unaccounted money of the assessee in old currency notes (SBN) have been pumped into as unaccounted money. The instruction dated 21/02/2017 that the assessing officer basic relevant information e.g. monthly sales summary, relevant stock register entries and bank statement to identify cases with preliminary suspicion of back dating of cash and is or fictitious sales. The instruction is also suggested some indicators for suspicion of back dating of cash else or fictitious sales where there is an abnormal jump in the cases during the period November to December 2016 as compared to earlier year. It also suggested that abnormal jump in percentage of cash trails to on identifiable persons as compared to earlier histories will also give some indication for suspicion. Non-availability of stock or attempts to inflate stock by introducing fictitious purchases is also some indication for suspicion of fictitious sales. Transfer of deposit of cash to another account or entity, which is not in line with the earlier history. Therefore, it is important to examine whether the case of the assessee falls into these parameters are not.

126. We have analyzed the figures of sales and cash deposit for the last two years as under :-

Month	F Y 2014-15		F Y 2015-16				F Y 2016-17			
	Cash sales	Cash Deposit	Cash Sales	Cash Deposit	Jump in sales	% Jump in sales	Cash sales	cash Deposit	Jump In sales	% Jump in sales
April	27.15	25.82	42.70	42.05	15.55	57.27	58.48	45.66	15.78	36.96
May	8.51	10.71	23.55	21.72	15.04	176.73	61.92	57.49	38.37	162.93
June	12.95	4.77	12.20	14.89	-0.75	-5.79	73.35	37.64	61.15	501.23
July	3.13	2.90	19.70	22.36	16.57	529.39	20.46	4.97	0.76	3.86
August	2.01	3.46	0.00	2.50	-2.01	-100.00	21.58	7.07	21.58	0.00
September	15.21	8.20	11.71	15.63	-3.50	-23.01	20.10	43.76	8.39	71.65

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October	14.60	25.16	29.95	32.64	15.35	105.14	99.68	77.09	69.73	232.82
November	16.49	14.46	45.18	47.12	28.69	173.98	47.73	113.52	2.55	5.64
December	22.26	28.08	97.35	94.36	75.09	337.33	69.83	89.75	-27.52	-28.27
January	54.51	57.04	80.86	76.32	26.35	48.34	64.60	63.50	-16.26	-20.11
February	37.27	36.43	44.39	50.24	7.12	19.10	36.20	35.75	-8.19	-18.45
March	23.35	25.62	4.93	8.36	-18.42	-78.89	59.93	57.54	55.00	1115.62
Total	**237.44**	**242.65**	**412.52**	**428.19**	175.08	73.74	**633.86**	**633.74**	221.34	53.66
Increase in sales (%)			173.74				153.66			
Sales in November	16.49		45.18		28.69	173.98	47.73		47.73	105.64
sales in December	22.26		97.35		75.09	337.33	69.83		69.83	71.73

i. On analyses of sales, it is apparent that sales in F Y 2014-15 were Rs 237.44 Crores, which increased to Rs. 412.52 crores in F Y 2015-16. The jump in sales is Rs. 175.08 crores, which is 73 %, compared to earlier years. The sales in F Y 2015-16 of Rs 412.52 Cr Increased to Rs 633.74 cr in F Y 2016-17, which resulted in to jump of Rs. 221.34 Cr resulting in to increase by 53.66 %. The % increase in sales in F Y 2105-16 compared to F Y 2014-15 of 73.74 % and % increase in sales in FY 2016-17 is only 53.66 %. Thus in the year of demonetization % increase in sales in less than earlier year. Growth in sales compared to earlier two years in case of the assessee shows similar trend. Thus, it cannot be said that assessee has booked non-existing sales in its books post demonetization.

ii. Sales in November 2014 was Rs 16.49 Crores where as sales in November 2015 was Rs 45.18 crores, Thus resulting in to jump in sales of Rs. 28.69 Cr. The Jump In sales of November 2015 from Rs 45.18 crores to sales in November 2016 of Rs. 47.73 crores was meager sum of Rs. 2.55 crores. Comparative Jump sales in November 2015 was 173 % where as comparative jump in sales of November 2016 of Rs. 47.73 Crores to sales of November 2015 of Rs 45.18 Crore was meager 5.64 %. Thus compared to earlier years there is no substantial increase in sales of November 2016 (Post demonetization). There is no higher booking of sales by the assessee

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compared to earlier years which can justify the stand of the revenue that assessee has booked non existing sales in November 2016.

iii. Sales in December 2014 was Rs 22.26 Crores where as sales in December 2015 was Rs 97.35 crores, Thus resulting in to jump in sales of Rs. 75.09 Cr. The decrease in sales of December 2015 from Rs 97.35 crores to sales in December 2016 of Rs. 69.83 crores was decrease of Rs 27.52 crores. Comparative Jump in sales in December 2015 was 337 % where as comparative Downfall in sales of December 2016 of Rs. 69.83 Crores to sales of December 2015 of Rs 97.35 Crore was downfall of 28.26 %. Thus compared to earlier years there is substantial down fall in sales of December 2016 (Post demonetization). Thus, it cannot be said that trend of sales in this year post demonetization, assessee has booked higher sales.

iv. On analyses of cash sales to cash deposit ratio it was noted that in financial year 2014 – 15 assessee recorded cash sales of INR 237.44 crores against which the assessee deposited INR 242.65 crores. Therefore the amount of cash deposit in the bank account is equivalent to the cash is recorded by the assessee for the year subject to a minor difference. For financial year 2015 – 16 assessee recorded cash sales of Rs. 412.52 crores against which the cash deposit is INR 4 28.19 crores. Therefore, for financial year 2015 – 16 also the cash deposit is almost equal to the amount of cash sales recorded by the assessee. For financial year 2016 – 17 assessee recorded cash sales of Rs. 633.86 Crores against which assessee deposited cash in bank account of Rs. 633.74 crores. For this year, in addition, amount of cash deposit is less than cash is recorded by the assessee. Thus, it is apparent that whatever cash sales recorded by the assessee for the year is deposited equal amount of cash in its bank account.

v. On analysis of the month wise sales it is apparent that in the month of May, June and October there is a substantial jump in the sales compared to earlier year. However, the revenue has not questioned it.

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It is also not the case of the revenue that by backdating the entries in its accounting software it has increased the sales fictitiously.

vi. Further jump in sales in the month of March 2017 compared to same month in earlier year shows phenomenal jump of more than thousand percent. It has been accepted by the revenue. Therefore, it clearly suggests that there is a growth in the business of the assessee beyond pre demonetization and post demonetization.

vii. It is not the case of the revenue that assessee has not shown the relevant stock register before the assessing officer. The assessee has maintained the complete stock tally in its accounting software. Such books of accounts are audited, quantitative records produced before the tax auditor, such quantitative records are certified by tax audit and no questions have been raised by the assessing officer. Thus, it cannot be said that the figures of sales and purchases are not supported by the quantity details.

viii. Another ground cited by the A.O in support of the impugned addition is that the stock position was short by nearly Rs. 450 crores as against the stock recorded in the books of account. While alleging so, the A.O has completely overlooked the fact that the godown of the Assessee at Agson Global Logistics Park, Sonepat, Haryana wherein a part of the stock of the Assessee was stored was not covered under the search action. The stock lying at the said premises was not taken into consideration while arriving at the physical stock as on the date of search, thus resulting in the alleged difference of Rs. 450 crores. Though originally at the time of recording of the statement of the managing director on the date of such there were certain discrepancies in the stock however later on it is stated by the learned authorised representative that they were reconciled after inclusion of the stock at Sonipat and ultimately there was no discrepancy in the physical stock found during the course of search as well as stock at Gurgaon at Sonipat with the book stock. There was thus actually no difference in the stock physically lying with the Assessee vis-à-vis the

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stock as per books of accounts as on the date of search. This submission of the assessee is not controverted by the learned assessing officer as well as the learned CIT DR. It was not also shown to us that there was any discrepancy in the physical stock found during the course of search and stock as per the books of account if the stock at the Sonipat go down was taken into consideration. There is no whisper about the alleged shortage of stock during the assessment proceedings, deviation proceedings and also in remand proceedings. During assessment proceedings, we also directed AO to show the shortage of stock of Rs 450 Crore, which is also the basis of addition along with the panchanama and response to explanation of assessee about stock lying at godown at Sonipat as stated by the assessee. There is no reference in any of the statements recorded by the investigation wing with respect to such shortage of stock. Even in the appraisal report produced before us there is no such finding about shortage of stock. Even in the submissions made by the learned CIT DR there is no reference made to such shortage of stock during the course of search proceedings. There is no addition in any of the assessment year including the search year with respect to any such shortage of stock. No quantitative details of stock physically verified as well as the book stock found by the search party were shown to us, which suggested that there is a shortage of stock after considering stock lying at Sonipat.

ix. With respect to the variation in the gross profit assessee submitted before the assessing officer wide letter dated 20/11/2018 in reply to point number 7 which is placed at page number 325 of the paper book – 1 wherein it is stated that that at the time of search the tally data was not finalized and therefore various adjustment like depreciation, interest and provisions for expenses were made after the close of the financial year. Therefore, it was submitted that gross

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profit shown by those tally data could not be compared with the data of audited accounts of earlier years. Assessee also submitted that if the GP ratio of all the years including financial year 2016 – 17 (Assessment Year 2017 – 18) is more or less same and there was no variation in the gross profit ratio. Therefore, comparison of the gross profit ratio with unaudited data of the current year with the audited data of the previous year cannot be made. However, there was a categorical statement of the assessee that if the audited accounts of the current year with the audited accounts of the previous year are compared there is no deviation in the gross profit ratio declared by the assessee. Subsequent to this submission, there is no further enquiry by the assessing officer. Assessee submitted that gross profit for assessment year 2015 – 16 is 6.41%, for assessment year, 2016 – 17 is 4.19% and for assessment year, 2017 – 18 it is 5.85%. The assessee also compared the net profit ratio, which is 0.72%, 0.81% and 1.35% comparatively for all these 3 years. Therefore, it was submitted that there is neither substantial downfall of substantial increase in the gross profit and net profit compared to earlier years.

x. Further as per letter dated 17/12/2018, for the impugned assessment year the assessee submitted the details of the closing stock, list of debtors, details of purchases and sales party wise for the year, list of creditors, bank statement copies as well as the books of accounts. Assessee also produced the copy of the sales invoices as well as purchase invoices, however there are no instances stated before us or in the assessment order about unidentified buyers. Therefore, it cannot be said that assessee has purchased goods or sold goods to unidentified parties.

xi. The assessee has also obtained the proceedings it for assessment year 2017 – 18 under the right to information act. This shows that on 17/11/2018 where assessee submitted cashbook along with the statement of bank account before the assessing officer. On 20/11/2018, assessee submitted the details to specific questions

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raised by the AO. On 26/11/2018 assessee submitted complete details on cash else on deposits. On 10/12/2018, assessee submitted books of accounts along with documents and summary of details of sales and purchases, which were examined with the books of accounts of the assessee along with the seized material. On 20/12/2018 the AO prepared the detailed deviation not which has already been discussed herein above. On 24/12/2018, the reply was received from the investigation wing and on 30/12/2018 the assessing officer passed the order u/s 153A read with section 143 (3) of the act. Thus, on reading of these proceedings it, it is amply clear that the AO did not make any enquiry on the material submitted by the assessee. He merely proceeded on statistical analysis, which is also partial as stated by us in earlier paragraph, to make the addition on account of cash deposits. He neither found any back dating of the entries, evidence of bogus sales, evidence of bogus purchases, and non-existing cash in the books of account. In the deviation report the assessing officer has also stated that there is an unreasonable 80 of the cash holding, but it was merely a suspicion expressed by the AO based on which the addition was made. In paragraph number 1 (B) of the deviation report dated 20/12/2018, the learned AO himself stated that there is an element of suspicion that the assessee has made introduction of unaccounted cash in its books of accounts in the wake of Demonetization. However, he hastened to add that at the same time the Cash sales to the certain acceptable extent as per the business trend of the assessee company could not be ruled out. He neither made any attempt by making independent enquiry is to strengthen his suspicion into sound fact, nor he accepted the explanation of the assessee. He simply proceeded to make the addition. As per our analysis of the cash sales, which is as per the business trend of the assessee company only.

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xii. Further, it is not the case of the revenue that sales booked by the assessee in the newly introduced currency are bogus. It is accepted by the AO in deviation report that such addition, which is on account of sale in the new currency, cannot be added.

xiii. With respect to the opening balance of INR 1 3.99 crores the learned assessing officer himself agreed during the deviation proceeding that such addition cannot be made. When such holding of cash as per the books of accounts was found correct, there is no reason to not to consider the resulting cash balance generated from such cash sales.

xiv. With respect to the deposit of the cash on hand with the various bank, the explanation of the assessee that no such bank was accepting such a huge cash at one go and therefore assessee had to deposit the cash in various banks. The assessee also submitted that that in the same bank assessee has deposited cash in its 2 different branches which itself proves that the banks were not accepting such a huge deposit. Even otherwise, it was submitted correctly that merely because the cash holding as on 8/11/2016 was not deposited immediately cannot lead to conclusion that assessee did not have that cash. It can merely lead to a suspicion but based on this addition cannot be made without making further enquiry and conclusively proving that assessee did not have that kind of cash available with it. Even otherwise, if the assessee had to introduce his unaccounted money he would have deposited it at the first instance.

xv. Assessee also filed its VAT returns, which are not found to be in variance with the accounting and tax records. Therefore, it cannot be substantiated that the assessee has backdated the transactions of the sale.

xvi. The another claim of the learned assessing officer is that assessee has huge cash in hand but a large amount of bank loans are outstanding and therefore, the claim of the assessee that it was having a huge cash is unacceptable. On careful analysis of the balance sheet of the assessee company for the year ended on 31st of March 2017 it is

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apparent that assessee has long-term borrowing in the form of secured loans, which are Term loan. These loans are payable at regular installments and have the commitment charges. Therefore, it could not have been paid by the assessee. The assessee further referred to note number 6 where short-term borrowings are explained. It is submitted that the most of the outstanding is bills payable under letter of undertaking and cash credit, which are backed by the closing stock of the assessee. Naturally, these funds are available to the assessee at a lesser rate of interest. Certain funds are also backed by hundred percent margins of fixed deposit receipts, which has very small amount of interest payout. The other advances received from banks in the form of packing credit are with respect to the export of garments. Therefore it was submitted that the funds available to the assessee are either repayable on a predefined term and or are having very small rate of interest. Therefore, it cannot have any relationship with the holding of cash on hand.

xvii. Now the cardinal issue that requires to be discussed is that the assessee is maintaining its books of account in Tally software. It also maintains its stock register in that software. The various pages of the appraisal report and the printouts found during the course of search shows that assessee maintains the books of account of the large number of companies of its group or associates in the tally software. At page number 123 of 198 of part a of appraisal report, at the time of the search the gross profit margin of the assessee was 4 – 6% only. It was also stated that since the figures reported in the audited balance sheet and ITR are not matching with the tally records, the authenticity of the books of accounts of the assessee company is doubtful. It also recorded that the debt or in respect of transaction's voluminous, there are large number of bank accounts, use cases thereby making it complex. Thus the appraisal report suggested the assessing officer to consider getting the books of accounts of the assessee company audited under section 142 (2A) of the act. The

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issue also arose during the course of assessment that whether the sales of dry fruits by the assessee are backdated or not. To identify such backdating of the transaction the AO should have got the accounts of the assessee audited u/s 142 (2A) of the act as well as the forensic audit. In absence of these actions, it is impossible for the assessing officer to note that whether the assessee has backdated the transaction in the tally software or not. The tally software runs on ODBC and rarely one finds the audit Trail of the transactions, which are altered. If the assessee maintains its books of accounts on tally software and back dates the transactions in that particular software, it is impossible to trace them and find out whether they are backdated or not. The only option left with the revenue is to get the accounts of such assessee is subject to forensic audit to know that whether there is a back dating of such accounts or manipulation of the accounts or not. In absence of this, it is impossible to catch hold of an assessee who can manipulate his accounts to suit his requirement. In many of the accounting, software there is an absence of any audit Trail and they can be easily erased, altered, backdated without any evidence or trace. The time has come to also look into usability of such accounting software by the regulator for filing the tax and financial results. Either this software's should be compliant of the audit trail or they may be regulated to provide such audit trails.

xviii. Even otherwise as per retraction letter dated 24/3/2017 of the managing director of the company which was submitted on 31/3/2017 where assessee has revised its disclosure from INR 5 0 crores to INR 3 0 crores under PMGKY. There is no whisper of further recording the statement of the managing director to show how the original disclosure was incorrect. In fact, revenue accepted the revised disclosure made by the managing director.

127. In view of above facts the additions sustained by the learned CIT – A of INR 73 .13 crores are deleted thus ground number 5 of the appeal of the

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assessee for assessment year 2017 – 18 is allowed. Consequently, ground number 1 of the appeal of the learned assessing officer for the same assessment year 2017 – 18 is dismissed.

128. Accordingly, all these appeals are disposed off as 6 appeals of the assessee are partly allowed and 6 appeals of the ld AO are dismissed.

Order pronounced in the open court on 31 /10/2019.

Sd/- Sd/-

(BHAVNESH SAINI) (PRASHANT MAHARISHI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Dated: 31 /10/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
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