IN THE INCOME TAX APPELLATE TRIBUNAL
"A"BENCH : BANGALORE

BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.698 & 699/Bang/2018
Assessment years :2007-08 & 2008-09

M/s Janani Infrastructure Pvt. Ltd., No.24, 1st Main Road, Near Bhashyam Circle, Vyalikaval, Bengaluru-560 003. PAN – AABCJ 7371 H	Vs.	TheAsst. Commissioner of Income-tax, Central Circle-1(1), Bengaluru.
APPELLANT		RESPONDENT

AND

ITA Nos.700 & 701/Bang/2018
Assessment years : 2007-08 & 2008-09

M/s Carmel Asia Holdings Pvt. Ltd., No.56B/34, 1st Main, Vyalikaval, Bengaluru-560 003. PAN – AACCC 7133 R	Vs.	The Asst. Commissioner of Income-tax, Central Circle-1(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Percy Pardiwala, Sr. Advocate & Shri C.P Ramaswamy, Advocate
Respondent by	:	Shri K.V Arvind, Sr. Counsel for Dept.

Date of hearing	:	08.05.2019
Date of Pronouncement	:	02.08.2019

O R D E R

PerB.R Baskaran,Accountant Member

All these appeals preferred by the respective assessees are directed against the orders passed by Ld CIT(A)-11, Bangalore and

they relate to the assessment years mentioned in the cause title against the name of each of the assessees. All these appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. These assessees have filed an Additional Ground in all the years, wherein they have questioned the validity of approval granted u/s 151 of the Act for reopening of assessments. At the time of hearing, the Ld A.R did not press the said additional ground in all the appeals. Accordingly, the additional ground urged in all these appeals is dismissed as not pressed. The remaining grounds relate to the following issues:-

(a) Validity of reopening of assessment.

(b) Merits of addition relating to Share application money/ share capital and share premium receipts.

Other ground relating to charging of interest u/s 234B of the Act is consequential in nature and hence it does not require adjudication.

3. Since the underlying facts of all these cases are identical, the appeal filed by M/s Carmel Asia Holdings P Ltd for assessment year 2007-08 was taken up as lead case. Both parties agreed that the decision taken in the above said case can be conveniently applied to other appeals also. The facts relating to the case, as assimilated from the orders of tax authorities, are discussed in brief. Both the assessees herein belong to Shri Y.S. Jagan Mohan Reddy group. Shri Y.S. Jagan Mohan Reddy is son of Shri Rajasekara Reddy, former Chief Minister of state of Andhra Pradesh. A search was conducted by the Central Bureau of Investigation (CBI) in the hands of Shri Jagan Mohan Reddy and his group of companies on 18.08.2011. The information collected by CBI during the course of search was passed on to the Income tax department. These companies had received share application money and had also allotted shares to certain

companies at a premium during the years under consideration. The allegation of the CBI was that the share applicant companies have been selected by Shri Y.S. Jaganmohan Reddy and they have received benefits from State Government of Andhra Pradesh during the tenure of Shri Rajasekar Reddy in the form of licences/projects, public properties, SEZs, Mining leases, ports, real estate permissions and other benefits. The case of CBI was that these share applicants, in turn, have given bribes to Shri Y.S. Jaganmohan Reddy under the guise of purchasing shares in companies controlled by him at high premium.

4. Based on the information so received, the assessing officer reopened the assessments of these two companies for the years under consideration by issuing notices u/s 148 of the Act on 29-03-2014. It is pertinent to note that the original returns of income filed by these assessees for the years under consideration were accepted u/s 143(1) of the Act. In the reopened the assessment, the AO assessed the share application money and share premium received from these share applicants as income of the assessees herein. In respect of one subscriber of share named Shri Srinivasa Reddy, even the par value of shares was also assessed as income in AY 2008-09 in the case of Carmel Asia Holdigs P Ltd. The assessing officer was of the view that the method of allotment of shares was unusual, i.e., It was seen that the share applicants have voluntarily applied for shares at huge share premium and the share premium so collected was not commensurate with the income earned by the assessees herein and also with their financial strength. Further there was no clarity on the basis of valuation of shares and determination of share premium. The assessee did not substantiate the quantum of share premium. The AO also noticed certain deficiencies in receipt of money, application forms, date of allotment of shares etc. Accordingly, the AO held that

the transactions entered by these assessee on issue of shares are unusual and unreasonable. Accordingly, the AO held that the entire share premium remains unsubstantiated and also the share application money received also remain unsubstantiated. Accordingly, the AO assessed the share application money and share premium received by these companies as income of the assessees in the year of receipt. In the hands of Carmel Asia Holdings P Ltd, the par value of shares received from Shri Srinivasa Reddy was also added. The details of additions made by the AO are given below: -

(A) CARMEL ASIA HOLDINGS: -	
Assessment year 2007-08	6059.79 lakhs
Assessment year 2008-09	1878.58 lakhs**
(B) JANANI INFRASTRUCTURE P LTD: -	
Assessment year 2007-08	1210.17 lakhs
Assessment year 2008-09	769.55 lakhs

(** In this year, entire share capital received from Shri Srinivasa Naidu has been added).

5. Before Ld CIT(A), these assessees challenged the validity of reopening of assessment. It was contended that the observations made by the assessing officer with regard to flaws in allotment of shares are imaginary and divorced from facts, since the assessee had already given appropriate replies to the Registrar of Companies on the queries raised by him in this regard. It was contended that other observations made by the AO relating to collection of share capital and share premium are based on suspicions, surmises and conjectures. Accordingly, it was contended that the reopening of assessments was not valid. It was also submitted that the AO has reopened the assessment on the basis of information received from CBI, but the AO did not confront the same with the assessee, even though it was asked from him. Accordingly, it was contended that there was violation of principles of natural justice and hence the addition was not justified. It was further submitted that the assessee has furnished all the details of share applicants and hence addition is not warranted.

6. In view of the above said submissions, the Ld CIT(A) called for a remand report from the AO. In the remand report, the AO reiterated the observations made by him in the assessment order and also furnished confidential facts relating to proceedings before CBI, wherein it was alleged that the illegal payments by way of bribe have been given to these assessees under the cover of financial transactions, i.e, by way of equity participation in companies belonging to Shri Jagan Mohan Reddy. In reply thereto, the assessee reiterated its contentions that the materials received from CBI were not confronted with the assessee. It was submitted that the AO has refused to furnish the materials by observing that the assessees may get the copies of those documents from the respective agencies. It was submitted that the assessee was not aware of the details of documents furnished to the assessing officer by CBI.

7. The Ld CIT(A), however, upheld the validity of reopening of assessment and his observations made in this regard are extracted below:-

> *"It is clear from the Reasons Recorded, reproduced above, that the AO has not relied upon the information about benefits received by various persons from the State Government of Andhra Pradesh to come to believe that income has escaped assessment. The AO on receipt of information has looked into the Returns filed by the appellant and noticed that it has received huge amounts of Share Premium which is not justifiable in the back ground of its actual activities and financial affairs and came to a belief that the amount received and labelled as Share Premium but income in the hands of the appellant which has escaped taxation. The AO is well justified in assuming jurisdiction u/s 147 and the reopening is in order.*
>
> *Further the fact that the Report from CBI and the copy of FIR not being provided to the Appellant is also not opposed to principles of natural justice as no addition is based on*

these documents. The additions are made only looking into the activities of the appellant, its back ground, its financial standing etc and not based on the reports from CBI. No information is used from the said reports to make the addition and therefore the AO is justified in not giving copies of the same……."

8. On merits, the Ld CIT(A) observed that the assessee has miserably failed to justify the Premium received and also not filed confirmations from the investors on the said issue. Accordingly, the Ld CIT(A) held that the assessee has not discharged the onus cast on it to justify its stand that the amount received is actually Share Premium, not only in form but also in pith and substance. He also held that the decision of Hon'ble Supreme Court rendered in the case of CIT vs. SumatiDayal (82 ITR 540) squarely applies to the facts of this case and observed as under: -

"The Apex Court has held that it is trite Law that an Apparent must be considered as Real until it is shown that there are reasons to believe that Apparent is not real. The taxing authorities are not expected to put on blinkers while looking at what is Apparent but must look into surrounding circumstances to find out reality. In the present case amount received as Share Premium is Apparent, but the same is not Share premium is real. The surrounding circumstances definitely show that the same cannot be Share Premium."

Accordingly, the Ld CIT(A) confirmed the addition made by the AO in all the cases under consideration.

9. The Ld A.R Shri C.P. Ramaswamy, Advocateadvanced his arguments on validity of reopening of assessment. He contended that the re-opening of assessment is bad in law. He submitted that the assessee has sought for the reasons for reopening after complying with the notice issued u/s 148 of the Act and the AO has also supplied the same, which is in the paper book. He submitted that the assessee filed its objections before the AO objecting to reopening of assessment and the same has been rejected by the AO.

10. The Ld A.R submitted that the reasons recorded by the AO would clearly show that it does not lead to the any belief that there was escapement of income. He submitted that the assessee has received share application money, share capital and share premium from reputed companies and the said fact is already available in the return of income filed by the assessee. No other material is available with the AO to form the belief that there was escapement of income except the information received from CBI. However, the Ld CIT(A) has taken the stand that the AO has not relied upon the said information. If that be the case, then the AO should have spelt out the details of other tangible materials, which led him to form the belief that the share application money/share premium constituted income in the hands of the assessee. Without tangible material, the AO could not have entertained belief about escapement of income and hence the reopening of assessment is not valid. In support of this proposition, the Ld A.R placed his reliance on the decision rendered by Hon'ble Delhi High Court in the case of CIT vs. Orient Craft Ltd (354 ITR 536)(Delhi). The Ld A.R submitted that even if any material was available with the AO, it is mandatory to show that there was nexus between the said material and alleged escapement of income. Relying on the decision rendered by Hon'ble Supreme Court in the case of Pr. CIT vs. Nokia India P Ltd (2019)(413 ITR 146), the Ld A.R submitted that the reasons for reopening should satisfy the requirement of sec.148, viz., (a) it should contain the facts constituting "reasons to believe" and (b) it should furnish necessary details for assessing escaped income of the assessee.

11. The Ld A.R further submitted that the share premium and share application money are capital receipts in the hands of the assessee and hence there is no scope to entertain the belief that there was

escapement of income. In this regard, the Ld A.R placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of G.S. Homes & Hotels P Ltd (2016)(387 ITR 126), wherein it was held that the Share capital received by a housing company for allotment of sites cannot be considered as business income of the assessee. He further submitted that the AO did not consider the said receipts as unexplained cash credits in terms of sec.68 of the Act. He has only doubted the motive of the share applicant in making investments in the assessee companies. He was also of the view that the share premium collected by the assessee is high. These reasons cannot be a ground to treat share application money/share premium etc as income of the assessee. Hence the AO was not right in law in forming the belief that there was escapement of income in the hands of the assessee companies.

12. The Ld A.R reiterated his contention that the basis of reopening of assessment was only the information received from CBI. He submitted that the AO, however, did not supply those materials to the assessee, even though it was requested to him to supply copies of the same during the course of assessment proceedings. He submitted that this said action of the AO has violated the Principles of Natural justice. Hence the AO could not have made the impugned additions and accordingly, the additions so made are liable to be deleted on this ground. In this regard, the Ld A.R placed his reliance on the following decisions:-

(a) SurajmallMohta and Co. vs. A.V. Visvanatha Sastri (1954 Law suit(SC) 113)
(b) Smt. Sunita Dhadda vs. The DCIT (ITA No.751/JP/2011)
(c) CIT vs. Smt. Sunita Dhadda (SLP (civil) Diary No. 9432/2018)

The Ld A.R submitted that the Jaipur bench of ITAT had deleted the addition made in the case of Smt. Sunita Dhadda, since there was violation of Principles of Natural Justice in not supplying the sworn statement given by a person, which was relied upon by the AO for making addition and also in not providing opportunity of cross examination to the assessee. The Ld A.R submitted that the decision so rendered by the Tribunal has since been upheld by the Hon'ble Supreme Court.

13. The Ld A.R further submitted that the assessing officer has accepted the genuineness of share capital received by the assessee to the extent of its par value. He has disbelieved the quantum of share premium on the reasoning that the assessee companies are having lesser income and their financial strength does not justify the quantum of share premium. He submitted that the above said observation of the AO would not lead to the belief that there was escapement of income. He further submitted that the AO has also mentioned that the share applicant companies have benefitted from the State Government of Andhra Pradesh. The income, if any, arising out of such benefits would accrue to the share applicant companies only and not to the assessees herein. He submitted that the AO has also mentioned that the share capital received by the assessee is gratuitous in nature. He submitted that any receipt, which may be gratuitous in nature would not give rise to any taxable income as per the provisions of Income tax Act. He submitted that the Hon'ble Supreme Court has held in the case of Parimisetty Seetharamamma (57 ITR 532) that the primary liability and onus is on the department to prove that a certain receipt is liable to be taxed. He submitted that the AO has, nowhere, mentioned in the reasons for reopening that share premium constitutes income of the assessee. He has only questioned the quantum of share premium. Accordingly, he submitted

that there is no connection between the reasons recorded and the alleged escapement of income. Accordingly, he contended that the reopening of assessment is bad in law.

14. The Ld A.R reiterated that the AO has reopened the assessment on the basis of information received from CBI that there was quid pro quo, i.e., the share applicants have subscribed to the shares of assessee companies only because they received benefits from Government of Andhra Pradesh. However, the CBI, vide its Memo filed in RC 19(A)/2011-CBI-HYD before the Hon'ble Court of Principal Special Judge for CBI, has submitted that it could not establish quid pro quo. Accordingly, he submitted that the very basis on which the reopening was done by the AO would fail. The Ld A.R submitted that the Memo submitted before the Hon'ble Principal Special Judge for CBI was collected by the assessee only recently and accordingly, the assessee has moved an application to admit the same as additional evidence. Accordingly, the Ld A.R contended that the reopening of assessment is bad in law and hence liable to be quashed.

15. The Ld Special Counsel Shri K.V. Aravind (Ld. DR), appearing on behalf of the revenue, submitted that the assessing officer has reopened the assessments by recording proper reasons. He submitted that the reasons so recorded should be read in its entirety in order to find out as to whether the AO had reason to believe that there was escapement of income. He submitted that the meaning of the word "reason" mentioned in sec.147 of the Act has been explained by Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P Ltd (291 ITR 500) as under: -

> *"16……. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income has escaped assessment. The*

expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by Delhi High Court in Central Provinces Manganese Ore Co Ltd v ITO (1991)(191 ITR 662), for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. ***At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief.*** *Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing officer is within the realm of subjective satisfaction (see ITO v. Selected Daluband Coal Co. Pvt Ltd (1996)(217 ITR 597)(SC); Raymond Woollen Mills Ltd v ITO (1999)(236 ITR 34)(SC).*

17.....

18. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation u/s 143(1) had been issued."

16. The Ld D.R submitted that the final outcome of the reopening of assessment is not relevant at the time of reopening of assessment. He submitted that the reasons recorded by the AO should be read as a whole and if it is read so, it would show that the assessing officer did not rely upon the information received from CBI for reopening of assessments. It has only triggered the AO to look into the return of income. Accordingly, the AO has looked into the Return of Income and found that the share premium collected by the assessees is very high and does not commensurate with the income and financial

strength of the assessee companies. Accordingly, the assessing officer has formed the belief that there was escapement of income and accordingly he has reopened the assessments. The Ld D.R further submitted that there was no necessity for the AO to furnish copies of information received from CBI, since he has not relied upon them to form the belief. He submitted that the assessing officer has passed orders on 30-03-2015 and the Ld CIT(A) has passed orders on 12-02-2018 in the instant cases. However, the assessee has sought for copies of information received from CBI on 18-07-2018, i.e., after completion of present assessments and passing of orders by Ld CIT(A). Accordingly, he submitted that there was no violation of Principle of Natural Justice, as alleged by the assessee.

17. The Ld D.R submitted that the high Share premium collected by the assessee was not commensurate with the income and financial strength of these assessees. Hence the AO was of the view that the amount so collected by the assessee was not in the nature of share premium. Accordingly, the AO could entertain belief that the that there was escapement of income. He submitted that the Hon'ble Supreme Court has upheld the assessment of amount raised by issuing shares at a premium u/s 68 of the Act in the case of NRA Iron & Steel P Ltd (412 ITR 161). It was held by Hon'ble Apex Court that it is for the assessee to prove by cogent and credible evidence that the investments made in share capital are genuine borrowings, since facts are exclusively within the assessee's knowledge. The Hon'ble Supreme Court has also observed that the practice of conversion of un-accounted money through the cloak of Share capital/premium must be subjected to careful scrutiny and this would be particularly so in the case of private placement of shares, where a higher onus is placed on the assessee since the information is within the personal knowledge of the assessee. It was further held that the assessee is

under legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee. The Ld D.R submitted that the assessees herein have collected hefty share premiums which were not commensurate with the financial strength and income of the assessees. Further the information received from CBI about quid pro quo has triggered the assessing officer to form the belief that there was escapement of income. Accordingly, the ld D.R contended that the reopening of assessments has been done on sound reasons and hence valid.

18. In the rejoinder, the Ld A.R submitted that the assessing officer has reopened the assessment on the basis of information received from CBI only. The assessees have made this submission before the AO in the objections filed by them for reopening of assessment, vide their letter dated 09-02-2015. In the said letter, it was submitted before the AO that the Principles of Natural justice would be satisfied if the required material which was used against the assessee (Report of Investigation wing) is put to assessee and his comments are taken thereon and considered. Accordingly, the Ld A.R submitted that the assessee had sought for copies of information received from the CBI and investigation wing during the course of assessment proceedings itself. He further submitted that the assessing officer should have independently applied his mind on the information received from the CBI, since the reassessment should be based upon his independent reasoning only. However, the assessing officer has reopened the assessments on the basis of information passed on by the CBI to the Income tax Department, without forming opinion independently.

19. The Ld A.R submitted that the assessing officer has disposed of the objections raised by the assessees by his letter dated 10-02-2015, wherein he has observed as under:-

> *"…The assessee company has quoted various case laws in respect of disclosure of reasons recorded. The reasons recorded for reopening the cases have already been communicated to the assessee vide this office letter dated 09-10-2014. As per the said letter it is clearly stated in para 2 that CBI has passed on the information. This office only received the information but not any seized material.*
>
> *The assessee has also quoted various case laws relating to reopening of the assessment. The investigations by the CBI has revealed the nexus between the benefits conferred by the government of AP and premium receipts. After perusing the returns, the assessing office came to know that the company has not carried out any activity during the said years and opined that there is no justification for allotting shares at a huge premium especially when the shareholder have not received any stake commensurate with the amount invested by them. So the assessing officer has the reason to believe that the amount invested by the companies is gratuitous in nature and since the same has not been offered for taxation the assessments were reopened."*

20. The Ld A.R, accordingly, contended that the assessing officer has formed the belief only on the basis of information received from CBI, but the said information was not supplied to the assessee. The Ld A.R invited our attention to the following observations made by Hon'ble Supreme Court in the case of Suraj Mall Mohta and Co. vs. A.V. Viswanadha Sastry (supra): -

> *"19. When an assessment on escaped or evaded income is made under the provisions of S.34 of the Indian Income tax Act, all the provisions for arriving at the assessment provided under S. 23(3) come into operation and the assessment has to be made on all relevant materials and on evidence and the assessee ordinarily has the fullest right to inspect the record and all documents and materials that are to be used against him. Under the provisions of*

section 37 of the Indian Income tax Act the proceedings before the Income tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at.
In other words, the assessee would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal.…"

He submitted that the Principles of Natural justice has been violated by the AO in not providing copies of information received from the CBI, which formed the basis for re-opening of assessment. If the AO had not relied upon the information received from CBI, then there was no tangible material available with the AO to form the belief that there was escapement of income.

21. The Ld A.R further submitted that the reasons recorded should provide link between the evidence and conclusion reached. In this regard, he placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of Hindustan Lever Ltd vs. R.B. Wadkar, ACIT (2004)(268 ITR 332) and submitted that the AO could not have entertained any belief on escapement of income, since the details of share capital and share premium received by the assessee were already available in the return of income filed by the assessee. Hence the information received from the CBI alone could be the basis for reopening of assessment. He further submitted that the AO has only questioned the valuation of shares and accordingly took the view that the amount invested by the applicants is gratuitous in nature. He has not stated in the reasons that the same constitutes income in the hands of the assessees TheLd A.R submitted that there is no quarrel with the principles enunciated by Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P Ltd (supra). However, the revenue cannot take support of the decision rendered by Hon'ble Supreme Court in the case of NRA Iron & Steel P Ltd (supra), since the

said decision has been rendered on the basis of facts prevailing in that case.

22. We heard rival contentions on the legal issue of validity of reopening of assessment and perused the record. Since the dispute revolves around the provisions of sec.147 of the Act, we extract the same below: -

> "**Income escaping assessment**
>
> *147. If the Assessing Officer[3] has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)"*

23. It can be noticed that the assessing officer should have "reason to believe" that any income chargeable to tax has escaped assessment for any assessment year" before he proceeds to invoke the provisions of sec.147 for making assessment of escaped income. The assessing officer shall issue a notice u/s 148 of the Act, when he forms the belief that the income has escaped assessment and decides to reopen the assessment. As per section 148(2) of the Act, the assessing officer shall record his reasons for doing so before issuing any notice u/s 148 of the Act. In the instant cases, the assessing officer has recorded the reasons for reopening. For the sake of convenience, we extract below the reasons recorded by the assessee for reopening of assessment, as communicated to the assessees by the AO in the case of Carmel Asia Holdings P Ltd: -

"A search was conducted by the CBI in the case of Sri Jagan Mohan Reddy and his Group companies on 18.8.2011. During the course of search, certain documents were seized by the CBI and subsequently, the information was passed on to the Income Tax Department.

M/s Carmel Asia Holdings Pvt. Ltd., filed its return of income for A.Y.2007-08 on 06.11.2007 which was processed on 13.10.2008. The company is engaged in investing in long term investments in equity shares and other securities of its group companies and subsidiaries.

As per the information available, the assessee company received capital and allotted shares to the following companies and invested it at a premium during the F.Y.2006-07, the details of which are encapsulated in the Table 1 below:

Table I

SN	*Name of Investor*	*No. of shares allotted*	*Nominal Value*	*Premium collected*	*Year of Investment (FY)*
1	*Silver Oak Technologies Pvt. Ltd.,*	*95,418*	*9,54,180*	*2,40,45,336*	*2006-07*
2	*GR Intra Chem Ltd.*	*95,417*	*9,54,170*	*2,40,45,084*	*2006-07*
3	*Beta Avenues P Ltd.*	*763,358*	*76,33,580*	*19,23,66,216*	*2006-07*
4	*Pioneer Infrastructure Holdings Ltd.*	*8,77,862*	*87,78,620*	*22,12,21,224*	*2006-07*
5	*Jubilee Media Communications P Ltd.*	*3,81,676*	*38,16,760*	*9,61,82,352*	*2006-07*
6	*India Cements Ltd.*	*1,90,839*	*19,08,390*	*4,80,91,428*	*2006-07*

Among the above companies,. M/s. Pioneer Infrastructure Holdings Ltd, M/ s India Cements Ltd., M/ s. Jubilee Media Communications Pvt. Ltd and M/ s. Gilchrist Investments Pvt. Ltd (sister concern of M/s Beta Avenues P Ltd) have also invested in shares of M/s.. Jagati Publications Pvt Ltd. and M/s Bharathi Cement Corporation Ltd (sister concerns of M/ s. Carmel Asia Holdings Pvt Ltd) at premium but none of them received any stake commensurate to their investment. Some of the companies namely, M/s. Pioneer Infrastructure Holdings Ltd. and M/s. India

Cements Ltd; received benefits from the State Government of Andhra Pradesh. The investment made by the above mentionedentities was treated as income in the hands of M/s. Jagati Publications Pvt. Ltd. and M/s Bharathi Cement Corporation Ltd.

From a perusal of the return of income for A.Y.2007-08 in the case of M/s Carmel Asia Holdings Pvt. Ltd, it is seen that the assessee company has reflected income by way of 'Interest received on Fixed deposits' amounting to Rs.4,88,763/- and total income of Rs 2,27,230/-. The company has not shown income under any other head. The premium of Rs.60,59,51,640/collected from the investors mentioned in Table 1 above is not commensurate with the income reflected by M/s Carmel Asia Holdings. Pvt. Ltd, in its return of income. Further, the company has shown income only under the head "Interest Income" for A.Y.2007-08. There is no reason for the companies listed in Table 1 above to pay such a huge premium amounting to Rs.60,59,51,640/- except for the fact that the company belongs to Sri Jagan Mohan Reddy Group of companies.

It is reliably learnt on the basis of the investigations carried out by the CBI that the companies have received benefits from the State Government of Andhra Pradesh.

It is clear that the company has not carried out any activity during the year. Therefore, there is no justification for allotting shares to the companies mentioned in Table--1 above, at a huge premium of Rs.60,59,51,640/- especially when the companies have not received any stake commensurate with the amount invested by them.

I have reason to believe that the amount invested by companies mentioned in Table 1 is gratuitous in nature, M/s Carmel Asia Holdings Pvt. Ltd has not offered the amounts invested by the companies mentioned in the Table 1 above as income for the year.

Thus, income of Rs.60,59,51,640/- has escaped assessment and the same needs to be taxed in the hands of M/s Carmel Asia Holdings Pvt Ltd. for AY 2007-08"

24. It is the case of the assessees that the above said reasons recorded by the assessing officer do not lead to the belief that there was escapement of income. In order to better appreciate the contentions of the parties, we may dissect the reasons recorded by the AO as under:-

(a) A search was conducted by CBI in the case of Sri Jagan Mohan Reddy and his Group companies on 18.089.2011. During the course of search, certain documents were seized by the CBI and subsequently, the information was passed on to the Income tax Department.

(b) As per information available, the assessee company received capital and allotted shares at a premium.

(c) The investor companies did not receive any stake commensurate to their investment.

(d) Some of the companies namely, M/s Pioneer Infrastructure Holdings Ltd and M/s India Cements Ltd received benefits from the State Government of Andhra Pradesh.

(e) The investment made by the above mentioned entities were treated as income in the hands of M/s Jagati Publications P Ltd and M/s Bharathi Cement Corporation Ltd.

(f) The premium of Rs.6059.51 lakhs collected from the investors is not commensurate with the income reflected by M/s Carmel Asia Holdings P Ltd in its return of income. There is no reason for the investor companies to pay such a huge premium amounting to Rs.6059.15 lakhs except for the fact that the company belongs to Sri Jagan Mohan Reddy Group of companies.

(g) It is reliably learnt on the basis of investigations carried out by the CBI that the companies have received benefits from the State Government of Andhra Pradesh.

(h) There is no justification for allotting shares at a huge premium.

(i) The AO has reason to believe that the amount invested by the companies mentioned in Table 1 is gratuitous in nature. M/s Carmel Asia Holdings P Ltd has not offered the amounts invested by the companies mentioned in Table 1 above as income for the year.

(j) Thus, income of 6059.15 lakhs has escaped assessment and the same needs to be taxed in the hands of M/s Carmel Asia Holdings P Ltd for AY 2007-08.

25. Before examining the above said reasons in the context of sec.147 of the Act, we may discuss some of the decisions rendered by Hon'ble Courts on the provisions of sec.147 of the Act. The Hon'ble Supreme Court has held in the case of Rajesh Jhaveri Stock Brokers P Ltd (supra) that, at the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Hence it needs to be examined as to whether a reasonable person could have formed a requisite belief on the basis of material available with the assessing officer.

26. The meaning of the expression "reason to believe" has been explained by Hon'ble Bombay High Court in the case of Hindustan Lever Ltd (supra) as under:-

> *"21. ..... It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year.* ***It is for the Assessing Officer to form his opinion.*** *It is for him to put his opinion on record in black and white.* ***The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind.*** *The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons.* ***Reasons provide the link between conclusion and evidence.*** *The reasons recorded must be based on evidence.* ***The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record.*** *He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment.* ***The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission****, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced."*

Thus, the reasons recorded by the assessing officer should be that of his own and further they should be clear and unambiguous. The reasons should provide link between conclusion and evidence. It is for

the assessing officer to form the opinion and to disclose his mind through the reasons recorded, i.e., the assessing officer should form the opinion independently by duly applying his mind on the material available with him, i.e., the AO cannot borrow reasons from any other authority.

27. In the case of Orient Craft Ltd (supra), the Hon'ble Delhi High Court has also discussed the meaning of expression "reason to believe". It was held that even in the cases, where the return of income was accepted u/s 143(1) of the Act, it can be disturbed only when the ingredients of sec.147 are fulfilled and with reference to section 143(1) vis-à-vis section 147, the only ingredient is that "there should be reason to believe that income chargeable to tax has escaped assessment". In the above said case, the return of income was processed u/s 143(1) of the Act, wherein the assessee had claimed deduction u/s 80HHC and sec.10B of the Act. The assessee had declared duty drawbacks, DEPB, premium on DEPB and on sale of quota etc. in its profit and loss account. The AO reopened the assessment on forming opinion that the assessee was wrong in treating the proceeds of sale of quota as part of export turnover for claiming deduction u/s 80HHC of the Act. Accordingly, he formed the view that the assessee has been allowed deduction in excess and consequently income has escaped assessment. The Hon'ble Delhi High Court, after discussing catena of decisions on "reason to believe", held as under:-

> *"18. In the present case, the reasons disclose that the assessing officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in CIT v. Kelvinator (supra). The reasons recorded by the Assessing Officer in*

the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the Assessing Officer subsequent to the issue of the intimation. It reflects arbitrary exercise of power conferred under section 147."

28. The Hon'ble Delhi High Court, in the above said case, has extracted the law discussed by Hon'ble Supreme Court in the case of LakhmaniMewal Das (1976)(103 ITR 437)(SC), wherein the principles as to what constitute "reason to believe" has been discussed as under:-

"14. The entire law as to what would constitute "reason to believe" was summed up by H.R. Khanna J., speaking for the Supreme Court in ITO v. LakhmaniMewal Das (1976)(103 ITR 437)(SC). The following principles were laid down:-

(a) The powers of the Assessing Officer to reopen an assessment though wide, are not plenary.

(b) The words of the statute are 'reason to believe' and not 'reason to suspect'.

(c) The reopening of an assessment after the lapse of many years is a serious matter. Since the finality of a judicial or quasi-judicial proceedings are sought to be disturbed, it is essential that before taking action to reopen the assessment, the requirements of law should be satisfied.

(d) The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjective satisfaction of the assessing authority; the reason to be held in good faith and cannot merely be a pretence.

(e) The reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the

Assessing Officer and the formation of belief regarding escapement of income.

(f) The fact that the words "definite information" which were there in section 34 of the Act of 1922 before 1948 are not there in section 147 of the 1961 Act would not lead to the conclusion that action can now be taken for reopening an assessment even if the information is wholly vague, indefinite, far-fetched or remote."

29. We shall now examine the facts available in this case on the basis of legal principles explained by the Courts. It is the case of the revenue that the assessing officer has not formed his belief on the basis of information furnished by CBI. However, from the perusal of the reasons recorded by the assessing officer, it can be noticed that the assessing officer has referred to the search conducted by CBI in the initial paragraph and again refers to the investigations conducted by CBI in the last 4th paragraph. The information referred in the last 4th paragraph is extracted below, at the cost of repetition: -

> *"It is reliably learnt on the basis of the investigations carried out by the CBI that the companies have received benefits from the State Government of Andhra Pradesh."*

In the paragraph recorded below the table also, the assessing officer has mentioned that "some of the companies namely, M/s Pioneer Infrastructure Holdings Ltd and M/s India Cements Ltd received benefits from the State Government of Andhra Pradesh.

30. We have noticed earlier that the Ld CIT(A) has called for a remand report from the AO and the assessing officer has furnished certain confidential facts in the remand report. For the sake of convenience, we extract below the relevant portion of the remand report furnished by the AO:-

"**4(iii) Confidential facts**:

The FIR No. RC19(A)/2011 dated 17-8.2011 registered by the CBI alleges that various public properties, Licenses/projects, SEZ's, Mining leases, Ports, real estate permissions and other benefits were allotted to persons picked by Shri V.S. Jaganmohan Reddy violating established norms and procedures in the Government of Andhra Pradesh ***for quid pro quo****.* ***These beneficieries have in turn given bribes to Shri V.S. Jaganmohan Reddy under the guise of purchasing shares in companies controlled by him, at inflated share value*** *which is done by artificially increasing the credit worthiness of M/s Carmel Asia Holdings P Ltd (shich is holding M/s Janani Infrastructure P Ltd) by fixing high premiums to receive these amounts, as illegal gratification at the cost of the public exchequer.*

It is alleged that these payments were made under the cover of financial transactions by way of equity participation in M/s Bharat Cement Corporation P Ltd, M/s Jagati Publication P Ltd and M/s Janani Infrastructures P Ltd (which is holding M/s Jonani Infrastructure P Ltd). The illegal payments made through this route are, to show the payments, as if they are bonafide financial transactions made under equity participation and to project the illegal consideration as genuine and bonafide investment. Part of the illegal payments received by M/s Janani Infrastructures P Ltd was utilized as investment in M/s Janani infrastructure P Ltd. Shri V S Jaganmohan Reddy, has not received any investments in the group companies controlled by him prior to his father Shri V Rajsekhar Reddy becoming the Chief Minister of Andhra Pradesh.

The money so pumped into these companies controlled by Shri Jaganmohan Reddy has been invested in purchase of immovable property by all these companies and investments in other group companies. The Joint Director of Enforcement Directorate has also given a finding that these investments by way of shareholding/huge premiums are proceeds of crime involving money laundering and have been utilized to purchase immovable property."

31. It can be noticed that the AO has referred to the case registered by CBI on 17-08-2011, while the present assessments have been reopened by issuing notice u/s 148 of the Act on 29-03-2014. It was contended by Ld D.R that the information received from CBI has only triggered the assessing officer to form belief that there was escapement of income, but he has not placed his reliance on those information for making impugned additions. However, the Ld A.R contended that the details relating to share capital/share premium collected by the assessee are already available in the return of income filed by the assessees. The details of alleged benefits received by the share applicants from Government of Andhra Pradesh are not available in the return of income. We have noticed that the AO has referred to the search conducted by CBI in the case of Sri Jagan Mohan Reddy and his Group companies in the reasons and further referred to the fact that the share applicant companies have received benefits from the State Government of Andhra Pradesh. In the remand report also, the assessing officer has referred to confidential facts, wherein he has stated that the CBI has alleged that the benefits were given to share subscriber companies for quid-pro-quo. Accordingly, we are of the view that the source of information about the alleged connection between the investments made by the share applicants in these two assessee companies and the benefits received by them from Government of Andhra Pradesh is CBI only. The next question that would naturally arise is that – whether the said information could trigger the AO to form the belief that there was escapement of income? In the reasons recorded by the AO for reopening of assessment, the AO has referred to the information received from CBI on benefits received by the share applicant companies and further questioning the high share premium collected by the assessee company. The AO, in our view, has raised query on the alleged high share premium only on the basis of allegation of the CBI that there was quid-pro-quo. Hence,

on a cumulative consideration of facts, one can easily understand that the AO has also entertained the view, like that of CBI, that the high share premium could be quid-pro-quo for the benefits received. Without so forming the view, the AO could not have come to the conclusion that there was escapement of income. Hence, we are not able to agree with the contentions of Ld D.R that the assessing officer has not relied upon the information received from the CBI for forming belief of escapement of income.

32. If the contention of the revenue that the assessing officer did not rely upon the information received from CBI for forming belief of escapement of income is accepted as correct for a moment, then it is necessary for the assessing officer to show there was some tangible material, which formed the basis to form the belief that there was escapement of income. We shall now examine the reasons recorded by the AO in order to find out as to whether the assessing officer has referred to any tangible material and further, whether the AO has shown that there was direct nexus or live link between the material coming to the notice of the assessing officer and the formation of belief regarding escapement of income.

33. For that purpose, we shall examine various points mentioned by the AO in the reasons recorded by him. As observed by Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P Ltd (supra), the question to be examined is whether there was relevant material on which a reasonable person could have formed a requisite belief. After discussing about the CBI raids on Sri Jagan Mohan Reddy and the details of share capital/share premium collected by the assessee in the reasons, the AO has also made following observations, i.e., if the information received from CBI was not the basis for reopening, then the following observations would constitute the

reasons for reopening. We have to examine as to whether these reasons would give rise to the belief that there was escapement of income.

(a) the investor companies have not received any stake *com*mensurate to their investments.

Though the meaning of this sentence is not clear, yet the said observation shall not lead to the belief that there was escapement of income.

(b) "some of the companies namely M/s Pioneer Infrastructure Holdings Ltd and M/s India Cements Ltd received benefits from the State Government of Andhra Pradesh".

This observation of the AO only gives information that these two investor companies have received benefits from State Government. The details of nature of benefits, how the investments made by them are related to it and how it would result in escapement of income in the hands of the assessee were not spelt out by the AO. This observation, in our view, does not lead to the belief that there was escapement of income.

(c) The abovementioned investment made by the abovementioned entities was treated as income in the hands of M/s Jagati Publications P Ltd and M/s Bharathi Cement Corporation Ltd.

This observation of the AO gives information about the action taken in the hands of other assessees. It is not celar as to whether the AO wished to follow the action taken in the hands of other assessees. If it is to be so, then the reopening is not valid, because it is not the belief of the AO, but borrowed belief which is not permitted u/s 147 of the Act as per the decision rendered by Hon'ble Bombay High Court in the case of Hindustan Lever Ltd (supra).

(d) The premium of Rs.60,59,51,640/- collected from the investors is not commensurate with the income reflected by M/s Carmel Asia Holdings P Ltd in its return of income.....There is no reason for the companies listed in Table 1 above to pay such a huge premium amounting to Rs.60,59,51,640/- except for the fact that the company belongs to Sri Jagan Mohan Reddy Group of companies.

This observation only narrates the query raised by the AO to himself searching for reasons for the high share premium paid by the investor companies. The AO has concluded that high share premium was paid only for the reason that these assessee companies belong to Sri Jagan Mohan Reddy. It reflects thinking of the assessing officer and it does not lead to the belief that there was escapement of income.

(e) It is reliably learnt on the basis of investigations carried out by the CBI that the companies have received benefits from the State Government of Andhra Pradesh.

This observation clearly show that the AO is placing his reliance on the information received from CBI. Though the AO states that the investor companies have received benefits from the State Government of Andhra Pradesh, he has not spelt out as to how it could lead him to believe that there was escapement of income in the hands of the assessee.

(f) It is clear that the company has not carried out any activity during the year. Therefore, there is no justification for allotting shares to the companies mentioned in Table 1 above, at a huge premium of Rs.60,59,51,640/- especially when the companies have not received any stake commensurate with the amount invested by them.

This observation of the AO only reveals the view taken by the AO on the transactions of receipt of share premium. It is well settled principle that the taxman is not entitled to sit in the arm chair of a businessman and regulate the business activities. Hence the question Whether there was justification for collecting huge share premium or not cannot be a ground for forming belief that there was escapement of income leading to reopening of assessment.

(g) I have reason to believe that the amount invested by companies mentioned in Table 1 is gratuitous in nature.

We notice that the meaning of the word "gratuitous" is "given without receiving any return value". When a person makes investment in Shares of any company, he would get share certificate for the same and further the said share certificate is transferrable to other person for consideration. This is the mechanism prescribed under the Companies Act with respect to subscription of shares. Hence, it is not legally correct to categorise the share subscription as "gratuitous" in nature. Even, if it is considered as gratuitous payment, the AO has not shown as to how it can be considered as "income" in the hands of the assessees herein, as per the provisions of Income tax Act.

34. The above said analysis of the observations made by the assessing officer in the reasons recorded for reopening of assessment would show that there was no other material available with the assessing officer to form the belief that there was escapement of income except the information received from CBI on alleged quid pro quo. Accordingly, we are of the view that the assessing officer has reopened the assessments only on the basis of information received from CBI.

35. We have noticed that the Hon'ble Delhi High Court has held in the case of Orient Craft Ltd (supra) that there should be some tangible material to support the re-opening of assessment, even if the return of income had been processed u/s 143(1) of the Act. We have noticed that, except the information received from CBI, there is no other tangible material available with the AO.

36. The Hon'ble Supreme Court has held in the case of LakhmaniMewal Das (supra) that the reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation is belief regarding escapement of income. In our view, except the information received from CBI, the material that could be considered as available with the AO are: -

(a) the information that the assessee has collected share capital and Share premium. (As noticed earlier, it is not clear as to whether the above said information was recognized by the AO from the report of CBI or from the return of income)

(b) the information that the share applicant companies have got benefits from the State Government of Andhra Pradesh. (This information could have been received from CBI only).

The information relating to collection of share capital/share premium is already available on record. Hence there was no other fresh material available with the AO to form the belief that there was escapement of income. The next material is the information about the benefits received by the share applicant companies. However, the AO has not shown that there was a direct nexus or live link between the said information and the formation of belief regarding escapement of income.

37. The information received from the CBI only alleges that there was quid-pro-quo in receiving share capital. There should not be any doubt that it was only allegation at that point of time. Whether the said allegation could be the basis for forming belief that there was escapement of income is the moot question. In our view, the said allegation could trigger the investigation, but it alone cannot be the basis for arriving at the belief that there was escapement of income. The AO should bring some other material to show that the apparent was not real or it does not satisfy the conditions of sec.68 of the Act. Nothing of that sort was brought on record by the AO while recording the reasons for reopening. Hence, we are of the view that the assessing officer was not right in law in reopening the assessment, as he could not have entertained the belief about escapement of income on the basis of reasons recorded by him.

38. We have noticed that the information received from the CBI, as spelt out by the AO in the reasons recorded and in the remand report, would show that the CBI has alleged that the investments have been made by the applicants as quid pro quo to the benefits received by them. This information cannot be the basis for reopening of assessment, since it is the assessing officer who has to apply his mind on the issue and take an independent view. It is not visible from the reasons recorded by the AO that he has taken any independent view on the matter. The question that would arise is Whether this information alone is sufficient to form the belief that there was escapement of income?. In our view, it will not lead to the belief that the income of the assessee has escaped the assessment. What was received by the assessee was Share capital/Share application money/Share premium. They are admittedly capital receipts. The only section available at that point of time to assess them as income of

the assessee was sec.68 of the Act. During the course of hearing, the Ld D.R accepted that the addition has been made u/s 68 of the Act. However, there was no material available with the assessing officer in order to tax them u/s 68 of the Act. He has only observed about high share premium, but it cannot be the basis for forming belief that there was escapement of income. The AO has further observed that the share premium/application money collected by the assessee is gratuitous in nature. First of all, the share capital collected by the assessee against issue of share certificates cannot be termed as gratuitous payments. Secondly, as rightly contended by Ld A.R, the gratuitous payments are not income taxable under the Act for the years under consideration. Further, we have noticed that the information received from the CBI was not confronted with the assessee by the assessing officer. This is in contravention of the law explained by Hon'ble Supreme Court in the case of Suraj Mall Mohta and Co. (supra). Hence there is violation of Principles of Natural Justice, as it was obligatory on the part of the AO to provide all the materials which were used against the assessee. The Jaipur bench of ITAT has deleted the addition made in violation of principles of natural justice in the case of Smt. Sunita Dhadda (supra), which decision has since been upheld by Hon'ble Supreme Court in the very same case, referred supra.

39. The Ld D.R placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of NRA Iron & Steel (P) Ltd. The said decision has been rendered in the context of sec.68 of the Act, whereas, we are dealing herewith with the issue of validity of reopening of assessment u/s 147 of the Act. Further, the said decision has been rendered on the basis of facts prevailing in that case, since the addition u/s 68 is made on factual basis. The other decision relied on by Ld D.R is the decision rendered by Hon'ble

Supreme Court in the case of Rajesh Jhaveri Stock Brokers P Ltd and the said decision lays down legal propositions on which there cannot be any quarrel.

40. In view of the foregoing discussions, we are of the view that the reopening of assessment is bad in law. Accordingly we allow the legal ground urged by the assessees and quash the orders passed by the tax authorities.

41. Since the parties have agreed that the above said decision can be applied on three other appeals under consideration, we hold that the reopening of assessment in the case of three other appeals is also bad in law and accordingly quash the orders passed by the tax authorities.

42. The Ld. Senior Advocate, Shri Percy Pardiwala advanced his arguments on merits of the additions. The case of Carmel Asia Holdings P Ltd for assessment year 2007-08 was taken up first. The Ld AR submitted that the AO has assessed the share application money and share premium only as income of the assessee in this year. He further submitted that the AO has not referred to any of the sections of the Income-tax Act for assessing the 'share application money and share premium amount' as income of the assessee. At this point of time, the Ld D.R was asked to clarify this point, to which the Ld D.R submitted that the assessing officer has stated in page 7 of the assessment order that the sum of Rs.6059.52 lakhs is brought to tax as "unexplained credits". Accordingly he submitted that the AO has invoked the provisions of sec.68 only for making the above said addition. Hence, both the parties agreed to proceed on the basis that the addition was made by the AO u/s 68 of the Act as "unexplained credits". The Ld A.R submitted that the AO has accepted the genuineness of share capital to the extent of its par value and hence it

can be concluded that the AO was satisfied with the three main ingredients required to be proved u/s 68 of the Act viz. identity of the shareholder, credit worthiness of the shareholder and genuineness of the transactions. Accordingly, the Ld A.R submitted that there is no scope for making addition u/s 68 of the Act.

43. The ld AR further submitted that the assessee, vide its letter dated 14/3/2015, has furnished all the details and documents that were called for by the AO. Further details were given to the AO vide letter dated 26/3/2015 furnished before him. He submitted that the assessee has allotted shares by passing proper resolutions in the Board meeting. In support of the same, the ld AR invited our attention to the copies of the minutes of Board meeting placed in the paper book. The details so furnished by the assessee contained name, address and PAN number of the share applicants. He submitted that the AO has not stated that the assessee has not furnished any of the details called for by him. On the contrary, the assessing officer has mentioned in the assessment order that all details called for were furnished by the assessee. He submitted that the AO has not made any further enquiry with any of the share applicants, in which case, it should be construed that the AO was satisfied with the details furnished by the assessee. Accordingly, he submitted that the assessee has discharged the onus placed upon its shoulders u/s 68 of the Act and hence the share application money and share premium cannot be considered as unexplained credits within the meaning of sec. 68 of the Act.

44. The Ld A.R submitted that the AO has referred to the certain deficiencies in the share application forms furnished by the share applicants. The AO has also referred to non-compliance of Articles of Association. The ld AR submitted that these deficiencies, at the most,

may result in violation of provisions of Companies Act, in which case the transactions may be voidable at the instance of shareholders. The same would not lead to the conclusion that the share application and share premium received by the assessee are unexplained credits.

45. The ld AR submitted that the AO was not right in observing that there was no basis for charging such high premium. Inviting our attention to copy of valuation report placed in page 125 to 134 of the paper book, the ld AR submitted that the assessee has obtained a valuation report from a firm of Chartered Accountants, which would support the share premium collected by the assessee. The ld AR submitted that the above said valuation report was furnished to the AO along with the letter dated 26-03-2015. Accordingly he submitted that there was no scope for making any addition u/s 68 of the Act on the ground of high share premium.

46. The ld AR invited our attention to the letter dated 25.2.2015 placed at page No.50-53 of the paper book addressed to the AO during the course of asst. proceedings. The ld AR submitted that the assessee has given detailed explanation as to why share premium cannot be assessed as income of the assessee. It was submitted that share capital and share premium receipts are capital account transactions. In this regard, the assessee took support of the decision rendered by Hon'ble Bombay High Court in the case of Vodafone services Pvt. Ltd. (368 ITR 1), wherein it has been held that share premium received is a capital receipt. The Hon'ble Court has specifically observed that the share premium was made taxable by a legal fiction inserted in u/s 56(2)(vii) w.e.f 1/4/2013. Accordingly the Ld A.R submitted that the share premium received by the assessee for the year under consideration shall constitute capital receipt and it cannot be brought to taxation.

47. The Ld. A.R submitted that the AO has reopened the assessments on the basis of information received from CBI that the share capital subscribed by the share applicants was on account of benefits received by them from the State Government of Andhra Pradesh. The AO had formed the view that the amount collected by the assessee in the form of share premium is in substance represents income of the assessee. Accordingly, he has assessed the share application money and share premium as income of the assessee.He further submitted that the CBI has already submitted a memo before the Hon'ble Court of Principal Special Judge for CBI that they could not establish quid pro quo. Accordingly he submitted that the very basis on which the AO had the impugned addition has failed and hence there is no justification for sustaining this addition.

48. The Ld A.R submitted that the assessee has furnished all the details that were called for by the AO, which fact has also been acknowledged by the assessing officer in the assessment order. Since the assessing officer did not call for confirmation or financial statements of the share subscribers, there was no occasion for the assessee to furnish them to the AO. He submitted that the subscribers to the share capital are leading companies and the assessee has downloaded their financial statements from the Registrar of Companies web site, viz., www.mca.gov.in. Those financial statements are in public domain and they have been furnished before the Tribunal in the paper book. He submitted that all these companies have duly disclosed the investment made by them in the assessee companies.

49. The Ld A.R submitted that the decision rendered by Hon'ble Supreme Court in the case of NRA Iron & Steel (P) Ltd (supra) will not

apply to the facts of the present case. Inviting our attention to the decision rendered by Hon'ble Supreme Court in the above said case, the Ld A.R submitted that the assessee therein was called upon by the AO to furnish details of the amount received and provide evidence to establish identity of the investor companies, credit worthiness of the creditors and genuineness of transactions. The Assessee furnished copies of income tax returns of the investor companies and submitted that the money was received from banking channels. Accordingly the assessee contended that the onus placed upon it u/s 68 of the Act stands discharged. Thereafter, the AO issued summons to investor companies. Nobody appeared before the AO, but replies were received by post. Hence the AO got field enquiries conducted independently and the result of enquiry was summarised by the AO in the assessment order, which showed that many companies did not exist at the given address or they lacked credit worthiness. Accordingly, under these set of facts, the Hon'ble Supreme Court has upheld the addition made u/s 68 of the Act. He submitted that the AO, in the instant case, has not conducted any enquiry independently nor did he point out any other deficiency. Accordingly he submitted that the decision rendered by Hon'ble Supreme Court in the above said case will not apply to the facts of the present case.

50. The Ld A.R invited our attention to the decision rendered by Hon'ble Bombay High Court in the case of Pr. CIT vs. M/s Aditya Birla Telecom Ltd (ITA No.1502 of 2016 dated 26-03-2019). He submitted that the above said assessee had issued preference shares having face value of Rs.10/- each at a premium of Rs.10,890/- per share to a Mauritius based company. The AO took the view that the premium charged to the subscriber is so adverse that no prudent businessman would ever agree to subscribe to it. The assessee furnished all the documents called for by the AO. However the AO made the addition

by holding that the assessee has failed to prove genuineness of transactions. Before Hon'ble Bombay High Court, the revenue contended that the entire transactions are colourable device and not genuine. It also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of NRA Iron & Steel P Ltd (supra). However, the High Court did not agree with the contentions of the revenue. It held that the dividend income alone is not the sole criteria for the investor and that the investor could expect a fair return on the investment, of course, subject to vagaries of any business decision. Accordingly the High Court has observed that the AO had to advert to all such materials on record in proper perspective. The Ld A.R submitted that the above said observation of the High Court shall apply to the facts of the present case also.

51. The Ld A.R further submitted that the Hon'ble Bombay High Court has held that share premium received by an assessee is Capital receipt in the case of Vodafone India Services P Ltd (368 ITR 1) and the same ratio has been reiterated in the case of Apeak Infotech (397 ITR 148) by Hon'ble Bombay High Court. Accordingly, the Ld A.R contended that the addition made by the AO is not justified and is liable to be deleted.

52. The Ld A.R submitted that the AO has made similar additions in the case of Carmel Asia Holdings P Ltd in AY 2008-09 and Janani Infrastructure P Ltd in AY 2007-08 and 2008-09, subject to following modifications:-

(a) In the case of Carmel Asia Holdings P Ltd, the AO has added share capital amount also in AY 2008-09 in respect of amount received from Shri Srinivasa Naidu.

(b) In the case of Janani Infrastructure P Ltd, the said assessee has received share capital in AY 2008-09 from Carmel Asia

Holdings P Ltd to the tune of Rs.273.21 lakhs. The AO has assessed the same on protective basis.

The Ld A.R submitted that the arguments made by him shall apply to the above said appeals also.

53. The Ld D.R, on the contrary, submitted that the assessing officer has called the assessee to substantiate the genuineness of share premium collected by the assessee. However, the assessee has failed to substantiate the same. The Ld D.R submitted that the Hon'ble Supreme Court has held in the case of NRA Iron & Steel P Ltd (supra) that the assessee is required to prove the genuineness of the transactions relating to collection of share premium. He submitted that the Hon'ble Supreme Court has sustained the addition of Share premium in the above said case, since the assessee did not offer any explanation as to why the investor companies had applied for shares of the assessee company at a high premium. He submitted that the assessee, in the instant case also, did not substantiate the share premium received by it.

54. The Ld D.R submitted that the valuation report furnished by the assessee has been rejected by the AO on noticing that it did not provide the basis or the basic data for the valuation of shares of certain companies held by the assessee company. Accordingly, the Ld D.R submitted that the AO has properly analysed the details furnished by the assessee and accordingly held that the share premium amount has not been substantiated by the assessee.

55. The Ld D.R drew our attention to the decision rendered by the co-ordinate bench in the case of M/s Cornerstone Property Investments P Ltd vs. ITO (ITA No.665/Bang/2017 dated 09-2-2018). He submitted that the issue before the Tribunal was related to the addition of share

premium amount of Rs.49.50 crores. He submitted that the addition was confirmed by the co-ordinate bench.

56. The Ld D.R further submitted that deficiencies in the application forms and violation of Companies Act would show that the share transactions are not genuine.

57. With regard to the reliance placed by Ld D.R on the decision rendered by Hon'ble Bombay High Court in the case of M/s Aditya Birla Telecom Ltd (supra), the Ld D.R submitted the assessing officer had accepted the genuineness of transactions and only questioned the rationality of high share premium. However, in the instant case, the assessee has failed to substantiate the share premium.

58. In the rejoinder, the Ld A.R submitted that the Hyderabad bench of Tribunal has considered the issue of assessment of share premium in the case of Bharathi Cement Corporation vs. ACIT (ITA Nos. 696 & 697/Hyd/2014 dated 10-08-2018). He submitted that the Tribunal, has restored the issue to the file of AO for examining it afresh on the basis of facts prevailing in that case and arguments made. He submitted thatthough the said decision cannot be applied in the instant cases, yet thefollowing observations made by the Tribunal in the above said case would support the cases of the assessees herein:-

> *"9..... These shares were issued with huge share premium and share premiums were determined without any basis. But all the issue and allotment of shares are within the four corners of law. The AO/CIT(A) has not brought on record any issues with the issue and allotment of shares since they are issued and allotted as per the Companies Act and rules that existed at the time of issue and allotment of shares.* ***The determination of share premium may not be as per industries norm or investor***

norms but these were fixed and accepted by the investing parties.

9.1 .....The arrangement and circumstances leading to issue and allotment of shares may draw some doubts that certain benefits may have passed on to the directors. But the question is whether the directors/shareholders have really benefitted with this arrangement and the assessee company was used as arrangement to pass on the benefit. ***The revenue has to prove that the investors have passed on the benefit to the shareholders/directors through this arrangement by bringing cogent material.*** *But the AO/CIT(A) has brought on record so many incidences and alleged benefits which were enjoyed by the investors from the Govt. of AP. But, what is important is that the funds were invested in the company and the company has demonstrated that it has treated the investment as part of share capital fund and also the share premium as part of capital reserve within the company as per the provisions of Companies Act. Since the assessee is artificial person created by the Statute, we cannot trespass the legal entity. It cannot be trespassed provided the authority has evidence to prove that this legal person was used to pass on the benefit to interested shareholders by lifting the corporate veil. In this case, no such evidence was brought on record rather circumstantial evidence and test of human probabilities were applied to convert the capital transaction as per Companies Act into revenue transaction under the Income tax Act.....*

9.3 Again, ***we also cannot presume or apply test of human probabilities, we are dealing with the business transaction, it has to be based on cogent material****.*

Accordingly, the Ld A.R submitted that the Ld CIT(A) was not right in applying test of human probabilities to the instant case. The Tribunal has also observed that the share premium was fixed and accepted by the investing parties. He submitted that the above said observations made by the Tribunal support the case of the assessee here.

59. We have heard rival contentions on merits of the additions. We have earlier quashed the orders of tax authorities on the ground that the reopening of assessment is not valid. Hence there is really no necessity to adjudicate the grounds urged on merits. Since the parties have made detailed arguments on merits also, in the interest of justice, we have duly recorded those arguments in the preceding paragraphs.

60. We have held that the sole basis of reopening of the assessment is the information received from the CBI. It is an undisputed fact that AO did not supply those materials to the assessee and also did not confront them with the assessee. Hence, we are of the view that there is clear violation of Principles of Natural Justice. It is well settled proposition of law that the assessing officer is not entitled to rely upon the materials, which were not confronted with the assessee. The decision rendered by Jaipur bench of Tribunal in the case of Smt. Sunita dhadda (supra) supports the case of the assessee on the above said ground. We have already noticed that the above said decision of the Tribunal has since been upheld by the Hon'ble Supreme Court in the very same case. Hence, on this ground alone, the additions made by the assessing officer in the hands of both the assessees in the years under consideration are liable to be deleted.

61. We noticed that the Ld CIT(A) has applied the theory of Human Probabilities. We also noticed that the Hyderabad bench of Tribunal has observed in the case of Bharati Cement Corporation (supra) that

the test of human probabilities cannot be applied to business transactions, as they are based on cogent materials. In any case, the Ld D.R has agreed that the receipt of share premium has to be tested u/s 68 of the Act. Hence the theory of human probabilities cannot be applied in this case.

62. We have noticed that the Ld D.R has clarified that the additions have been made u/s 68 of the Act. From the assessment order as well as from the paper book furnished by the assessee, it can be noticed that the assessee has furnished all the details that were called for by the AO. We notice that the AO has treated the share premium has unexplained cash credit only for the reason that the same was commensurate with the size of the income and financial strength of the assessee. We have noticed that the AO has reached to this conclusion without carrying out any further investigation and without bringing any material on record. The AO has not shown that the Share premium so collected by the assessee represents assessee's own money warranting an addition u/s 68 of the Act.

63. However, the fact remains that the share premium has been collected as per the understanding reached between both the parties. We notice that the AO has not mentioned in the assessment order that the assessee has failed to satisfy the three main ingredients in the context of sec.68 of the Act. His only case was that the assessee did not substantiate the quantum of share premium collected. We have noticed that the assessee has furnished a valuation report in order to justify the share premium, even though the same has been rejected by the AO. However, the important point is that the doubt of the assessing officer on the quantum of share premium cannot be a ground for making addition u/s 68 of the Act. This view is supported

by the decision rendered by Hon'ble Bombay High Court in the case of CIT vs. Green Infra Ltd (392 ITR 7).

64. The Ld D.R submitted that the violation of provisions of Companies Act would show that the share premium was not genuine. We have noticed that the AO has only pointed out procedural lapses and further the information about allotment of shares has already been furnished to Registrar of Companies and the same has been accepted. Hence we are not able to agree with the contentions of Ld D.R on this aspect.

65. The Ld D.R has placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of NRA Iron and Steel P Ltd (supra) in order to contend that the assessee is under obligation to substantiate the share premium. We are of the view that there is no quarrel on the above said proposition. However, we agree with the contentions of Ld A.R that the above said decision was rendered by Hon'ble Supreme Court on the basis of facts prevailing in that case, which were highlighted by Ld A.R during the course of his arguments, which have been recorded by us in the preceding paragraph.

66. The Ld D.R also placed his reliance on the decision rendered by co-ordinate bench in the case of Cornerstone Property Investments P Ltd (supra). We have gone through the said decision and we notice that it was a case of receipt of share capital through layering process through a chain of companies. The Tribunal has noticed that the revenue has given a finding that the there has been routing of money for illegal purposes through a chain of companies in which the assessee is a conduit in the layering process. The AO has carried out investigations and has given several adverse findings. Under those set of facts, the co-ordinate bench has held that the assessee has failed to prove the genuineness of the share premium and accordingly

confirmed the addition. In our view, the facts of the present case are different and hence the revenue cannot take support of the above said decision rendered by the Tribunal.

67. In the instant case, as noticed earlier, it is not the case of the assessing officer that the assessee did not furnish any of the details called for by him. Further, the assessing officer did not find any fault with the documents furnished by the assessee except some deficiencies in the application forms filed by the assessee, which are procedural mistakes. The AO also did not make any independent enquiry with the share applicants in order to find out the veracity of the submissions made by the assessee. Under these set of facts, it has to be presumed that the AO was satisfied with the details furnished by the assessee. Hence, we are of the view that the decision rendered by Hon'ble Supreme Court in the case of NRA Iron and Steel P Ltd shall not apply to the facts of the present case.

68. Accordingly we are of the view that there is no merit in the impugned additions made by the AO in the hands of both the assessees during the years under consideration. We have already held that reopening of assessment is bad in law in paragraphs 40 & 41 and quashed the orders.

69. In the result, both the appeals of both the assessees are allowed.

Order pronounced in the Open Court on **2nd August, 2019.**

Sd/-	**Sd/-**
(Pavan Kumar Gadale)	**(B.R Baskaran)**
Judicial Member	**Accountant Member**

Bangalore
Dated, 2nd August, 2019
/Vms/

Copy to:
1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation ……

2. Date on which the typed draft is placed before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S ……..
4. Date on which the fair order is placed before the dictating Member ……..
5. Date on which the fair order comes back to the Sr. P.S. ……..
6. Date of uploading the order on website……..
7. If not uploaded, furnish the reason for doing so ……..
8. Date on which the file goes to the Bench Clerk ……..
   Dictation note enclosed
9. Date on which order goes for Xerox & endorsement……
10. Date on which the file goes to the Head Clerk …….
11. The date on which the file goes to the Assistant Registrar for signature on the order ……
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order …….
13. Date of Despatch of Order. ……..

14. Dictation note enclosed ……