आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
(समक्ष) Before **श्री ऐ. टी. वर्की,** न्यायीक सदस्य **एवं/and** श्री एम .बालागणेश, लेखा सदस्य)
[Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

I.T.(SS).A. Nos. 24 to 30/Kol/2016
Assessment Years: 2007-08 to 2013-14
&

Rashmi Metaliks Ltd. (PAN: AACCR7183E)	**Vs.**	Deputy Commissioner of Income-tax, Central Circle-2(2), Kolkata.
Appellant		**Respondent**

&
I.T.(SS).A. Nos. 37 to 42/Kol/2016
Assessment Years: 2008-09 to 2013-14

Deputy Commissioner of Income-tax, Central Circle-2(2), Kolkata.	Vs.	Rashmi Metaliks Ltd.
Appellant		Respondent

Date of Hearing	27.03.2019
Date of Pronouncement	01.05.2019
For the Assessee	Shri A. K. Tulsiyan, FCA & Ms. Shikha Agarwal, ACA
For the Revenue	Shri A. K. Singh, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

These appeals of assessee for AYs. 2007-08 to 2013-14 as well as the appeals of Revenue for AYs 2008-09 to 2013-14 have been filed against the separate orders of Ld. CIT(A)-20, Kolkata all dated 31.03.2016.Since issues are common and facts are identical, we dispose of all these appeals by this consolidated order for the sake of convenience.

2. All the Revenue's appeals are time barred by three days and condonation petitions have been filed. After considering the condonation petitions and the no objection given by the Ld. AR, we condone the delay and admit the appeals for hearing.

3. First of all, we will take up the assessee's appeal in ITA No. 24/Kol/2016 for AY 2007-08 wherein the assessee has raised the following relevant grounds of appeal:

> *"1. That the Ld. CIT(A) erred in dismissing the plea of the Appellant Company that the Assessing Officer had no jurisdiction to disturb the original assessment completed on 30.12.2009 under section 143(3) read with section 153A of the Act in absence of any incriminating material found in course of search and when no proceedings were pending before him for the Assessment Year 2007-08*
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> *2. That the Ld. CIT(A) erred in directing the Assessing Officer to re-examine the issue of disallowance of Rs.8,97,950 made under section 40(a)(ia) of the Act when no such disallowance was made in original assessment completed under section 143(3) read with section 153A of the Act and no incriminating document relating to such disallowance was found during search in case of the assessee company.*
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> *3. That the order passed by Ld. CIT(A) is against law and facts of the case and is perverse."*

4. At the outset, we will deal with the legal issue that has been raised by the assessee that consequent to the search u/s. 132 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") on 18.02.2013, in the proceedings u/s. 153A of the Act which were initiated against the assessee, no addition/disallowance could have been made unless there was any live and direct nexus with any incriminating material unearthed during the search. Since the issue raised in Ground No. 1 goes to the root of the matter, we would like to adjudicate this issue first.

5. Brief facts of the case are that the assessee company filed its original return of income on 30.10.2007 declaring total income of Rs.3,81,774/-. Search operations was conducted u/s. 132 of the Act in the assessee's premises on 03.05.2007. Consequent to the search the order u/s 153A/143(3) of the Act was passed for AY 2007-08 on 30.12.2009 assessing total income at Rs.3,81,774/-.

6. Thereafter, second search u/s. 132 of the Act was conducted on 18.02.2013 and the Panchnama was drawn in the name of the assessee company. Subsequent thereto notice u/s 153A was issued asking the assessee to file return of income and in response the assessee filed return declaring total income of Rs.3,81,774/- as earlier assessed. In the order passed u/s 153A/143(3) the AO made addition on account of short deduction of TDS of

Rs.8,97,950/- along with some other disallowances. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to give partial relief to the assessee by deleting all other disallowances/additions except that of Rs.8,97,950/- on account of short payment of TDS. In the impugned order the Ld. CIT(A) however noted that in the assessment order the AO had referred to several seized documents and books of accounts with reference to which the disallowances were made while framing the order for AY 2007-08. The Ld. CIT(A) therefore held that since the disallowances made were with reference to seized material, there was no legal infirmity in the AO's order. Aggrieved, the assessee is before us and the Revenue has not filed any appeal against the action of the Ld. CIT(A) in giving relief to the assessee on merits.

7. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the legal issue raised by the assessee before the Ld. CIT(A) was that since the assessment for AY 2007-08 was not pending on the date of search no addition/disallowance was warranted without the aid of any incriminating materials. Now before us, the assessee has agitated the legal issue. We note that the first assessment for the relevant AY 2007-08 was completed by the AO on 31.12.2009 u/s.143(3) consequent upon search u/s 132 which was conducted against the appellant on 03.05.2007.Copy of the said assessment order is found placed at Pages 59 to 61 of the paper book. We find that the income returned for the AY 2007-08 was accepted by the AO without making any addition or disallowances. Thereafter, the second search which culminated in the impugned assessment order before us happened on 18.02.2013 and thereafter assessment was framed u/s. 153A at Rs.14,80,850/-. On appeal, the Ld. CIT(A) has confirmed disallowance of Rs.8,97,950/- in respect of the short payment of TDS u/s. 40(a)(ia) of the Act, made by the AO. In order to adjudicate the legal issue before us, as stated above, we note that when the second search happened on 18.02.2013, undisputedly no assessment was pending before the AO and therefore this assessment year is an unabated assessment. Settled position of law is that no addition can be made for an unabated assessment unless incriminating materialis unearthed during search qua the assessment year under consideration. Our aforesaid finding

is fortified by the decision of the Hon'ble Delhi High Court in the ***ITA No. 707, 709 & 713 of 2014 CIT Central-III vs. Kabul Chawla,*** wherein their lordships have held as under:

> ***"Summary of legal position***
> *37. On a conspectus of Section 153A(1) of the Act, read with provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*
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> *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
> *ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
> *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*
> *iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
> ***v. <u>In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.</u>***
> *vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
> *vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

8. The Hon'ble Jurisdictional High Court in *CIT vsVeerprabhu Marketing Ltd. reported in (2016) 73 taxmann.com 149 (Cal)* also held as under:

> *"We agree with the view expressed by the Delhi High Court that incriminating material is pre-requisite before power could have been exercised u/s 153(C) r.w Section 153(A). In the case before us, the AO has made a disallowance of the expenditure, which was held disclosed, for one reason or the other, but such disallowances made by the AO were upheld by the LD.CIT(A) but the Ld. Tribunal deleted these disallowance. We find no infirmity in the aforesaid Act of the Ld. Tribunal. The appeal is, therefore, dismissed".*

9. The Hon'ble Jurisdictional High Court in PCIT-2, Kolkata Vs. Salasar Stock Broking Limited (ITAT No. 264 of 2016) dated 24.08.2016 held as under:

In this case, the Honorable Jurisdictional High Court observed that the Ld. ITAT, Kolkata was of the opinion that the assessing officer had no jurisdiction u/s 153A of the I.T. Act to reopen the concluded cases when the search & seizure did not disclose any incriminating material. In taking the aforesaid view, the Ld. ITAT relied upon the judgments of Delhi High Court in the case of ***CIT(A) Vs. Kabul Chawla in ITA No. 707/2014 dated 28.08.2014****. The Court also observed that more or less an identical view has been taken by this Bench in* ***ITA No. 661/2008 in the case of CIT Vs. Veerprabhu Marketing Limited.*** *Considering the above facts, the Honorable High Court did not admit the appeal filed by the Department. It held as follows:-*

"Subject matter of challenge is a judgement and order dated 18th December, 2015 by which the learned Tribunal dismissed an appeal preferred by the Revenue registered as ITA No.1775/Kol/2012 and allowed a cross-objection registered as CO-30/Kol/2013 both pertaining to the assessment year 2005-06. The learned Tribunal was of the opinion that the Assessing Officer had no jurisdiction under Section 153A of the Income Tax Act to reopen the concluded cases when the search and seizure did not disclose any incriminating material. In taking the aforesaid view, the learned Tribunal relied upon a judgement of Delhi High Court in the case of CIT[A] vs. Kabul Chawla in ITA No.707/2014 dated 28th August, 2014. The aggrieved Revenue has come up in appeal."

....In that view of the matter, we are unable to admit the appeal. The appeal is, therefore, dismissed."

10. We also gainfully refer to the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Kurule Paper Mills P. Ltd. [2016] 380 ITR 571 (Delhi) wherein it was held as follows:-

"1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs. 89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.

2. The Court finds that the order of the CIT(Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.

3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination.

4. The appeal is, accordingly, dismissed."

11. It is noted that the Department had filed a Special Leave Petition in S.L.P (C) No-34554 of 2015 before the Hon'ble Apex Court against the above judgment of the Delhi High Court which has since been dismissed. The relevant extracts reported in 380 ITR (st) 64-Ed is as follows:

The Hon'ble Apex court dismissed the special leave petition filed by the department.
The relevant Para as mentioned in the ITR is reproduced as under.

"Their Lordships MadanB.Lokur and S.A.Bobde JJ dismissed the Department's special leave petition against the judgment dated July 06,2015 of the Delhi High Court in I.T.A No 369 of 2015, whereby the High Court held that no substantial question of law arose ***since there was a factual finding that no incriminating evidence related to share capital issued was found during the course of search and that the assessing officer was not justified in invoking section 68 of the Act for the purpose of making additions on account of share capital"***

12. In the light of the aforesaid ratio laid down by the Hon'ble High Courts, wherein, the Hon'ble High Court held that in the absence of any incriminating materials, the completed assessment cannot be disturbed. We note that in respect of the disallowance made u/s 40(a)(ia) the Ld. CIT(A) did not uphold it on merits and against which the Revenue is not in appeal before us. In the circumstances the material issue to be decided is whether AO was permitted to make the disallowance merely because the AO was authorized to frame the assessment for the year under consideration u/s 153A of the Act. We note that for making this disallowance the AO has only taken note of the TAN details available in the ITS data for FY 2006-07 relevant to AY 2007-08 and found that TDS amount of Rs.20,150/- had not been paid by the company. Based on such information the AO issued show cause notice to the assessee and thereafter made the disallowance. We therefore find that the only information on the basis of which the addition was made was ITS data for the FY 2006-07

and nothing else. The said ITS data for the relevant year was available to the AO even at the time of original assessment dated 31.12.2009 and therefore it was not a case that any new and incriminating material was unearthed as a consequence of the second search carried out against the assessee u/s 132 in February 2013. We therefore find merit in the contention of the Ld. AR that no incriminating material was found against the assessee which was unearthed qua this assessment year for making the impugned disallowance. In terms of the law laid by the Hon'ble jurisdictional High Court in Veerprabhu Marketing Ltd. (supra) Pr. CIT Vs. Salasar Stock Broking Ltd. (supra)as also the decisions of theHon'ble Delhi High Court in the cases of Kabul Chawla (supra)and Pr. CIT Vs. Kurele Paper Mills Pvt. Ltd. (supra) which has since been upheld by the Hon'ble Supreme Court; we are of the considered view that no addition or disallowance was permissible while framing the assessment u/s 153A since no incriminating material was found in relation to the disallowance made in the unabated assessment for AY 2007-08. The Ld. CIT, DR fairly conceded that in respect of the disallowance u/s 40(a)(ia) no incriminating material was found in the course of second search. In light of this factual and legal position we therefore allow the Ground No. 1 of the assessee's appeal. Consequently the disallowance of Rs.8,97,950/- made u/s 40(a)(ia) is held to be legally unsustainable. Even otherwise we find that in the impugned order passed by the Ld. CIT(A); the AO was directed to re-verify the relevant facts from the TAN details and thereafter pass a speaking order. It was brought to our attention that in the order passed u/s 251, after examining the relevant facts, the AO did not retain the disallowance. Therefore even on merits we find the disallowance of Rs.8,97,950/- to be factually untenable. Accordingly Ground No. 2 of the assessee's appeal is allowed.

13. We find that the Ground No. 1 involved in AY 2007-08 is also involved in the subsequent AYs 2008-09 to 2011-12. A bird's eye view about this factual position for these years (AY 2008-09 to 20.11.2012) are as follows:

Asstt. Year	Date of filing original return	Date of original	Asst. completed	Whether assessment pending on date of search/

		assessment	u/s.	abated
(1)	(2)	(3)	(4)	(6)
2008-09	29.09.2008	31.12.2009	154/143(3)	No
2009-10	29.09.2009	28.04.2011	143(3)	No
2010-11	14.10.2010	30.12.2011	143(3)	No
2011-12	29.09.2011	No regular assessment (time limit for issue of 143(2) dt. 30.09.2012		No
2012-13	-	-		Yes
2013-14	-	-		Yes

In the aforesaid appeals, the common ground no. 1 raised by the assessee is that the AO had no jurisdiction to disturb the original assessment completed on dates given above u/s. 153A in absence of any incriminating material found in the course of search and when no proceedings were pending before him for the AYs 2008-09 to 2011-12. From the foregoing statement we note that for the AYs 2008-09 to 2010-11, the regular assessments were completed u/s 143(3) much before the search u/s 132 was carried out in 18.02.2013 and as such there is no ambiguity as to the fact that these assessments had not abated. Even with regard to the AY 2011-12 we note that the return of income was filed on 29.09.2011 and the proceedings for regular assessment could have been started by the AO by serving notice u/s 143(2) on or before 30.09.2012. No such notice was admittedly served and thereby the assessment proceedings were not pending on 18.02.2013 being the date of search. In our considered view therefore even the assessment for AY 2011-12 was an unabated one for the purposes of Section 153A of the Act. This proposition finds support in recent decision of the coordinate Bench of this Tribunal at Delhi in the case of AnuragDalmia vs. DCIT in ITA Nos. 5395 & 5396/DEL/2017; Assessment Years: 2006-07 & 2007-08, dt. 15/02/2018, which has elucidated the law on this issue in the following manner:-

> *"12. We have heard the rival submissions, perused the relevant material placed on record and the finding given in the impugned order with respect to legal issue raised vide ground no.5 by the assessee that the additions made in this year are beyond the scope of assessment u/s.153A, as no incriminating material was found during the course of search for the impugned Assessment Year; and the assessment had attained finality and was not abated in terms of 2nd Proviso to Section 153A. As stated above, the original return of income was filed in July, 2006 and said return was duly accepted and processed u/s. 143(1) vide intimation dated 25.05.2007. Since no notice u/s. 143(2) was issued thereafter or any other proceedings have been*

commenced to disturb said return of income, accordingly, it had attained finality much prior to the date of search which was on 20.01.2012. Hence in terms of 2nd Proviso to Section 153A the assessment for the Assessment Year 2006-07 was not pending and accordingly, has to be reckoned as unabated assessment. Under the jurisdiction of Hon'ble Delhi High Court, the law is well settled that in case of unabated assessment, the additions which can be roped-in, in the assessments framed u/s.153A, would only be with regard to any incriminating material or evidence unearthed or found during the course of search. If no incriminating material has been found during the course of search, then no addition can be made in the assessment years where assessments had attained finality. The relevant observations and the ratio laid down would be discussed in the later part of this order.

15. Now coming to the ratios laid down by the Hon'ble Jurisdictional High Court, first of all, in the case of Kabul Chawala (supra), the Hon'ble Court after discussing the issue threadbare and analysing the various judgments of different High Courts laid down the following legal proposition in terms of scope of addition which can be made u/s. 153A(1) which are as under:-

> *"37. On a conspectus of Section 153A (1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*
>
> *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
> *ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
>
> *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*
>
> *iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
>
> *v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.
vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

This judgment of the Hon'ble Delhi High Court has been followed in several judgments not only by the Hon'ble Delhi High Court but also by other Hon'ble High Court like, ***Pr. CIT vs. Somaya Construction Pvt. Ltd. 387 ITR 529 (Guj), CIT vs. IBC Knowledge Park Pvt. Ltd. 385 ITR 346 (Kar)*** *and* ***CIT vs.Gurinder Singh Bawa reported in 386 ITR 483.*** *In the latest judgment the Hon'ble Delhi High Court in* ***Pr. CIT vs. MeetaGutgutia,*** *their Lordships reiterated the same principle after discussing and analyzing catena of decisions including that of Anil Kumar Bhatia (supra) and Dayawanti Gupta. The Hon'bleHighCourt observed and held as under:-*

"62. Subsequently, in Principal Commissioner of Income Tax-1 v. Devangi alias Rupa {supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Principal Commissioner of Income Tax v. Saumya Construction P. Ltd. {supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in CIT v. IBC Knowledge Park P. Ltd. {supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in CIT-2 v. Salasar Stock Broking Ltd. {supra), too, followed the decision of this Court in Kabul Chawla (supra). In CIT v. Gurinder Singh Bawa {supra), the Bombay High Court held that:

"6...once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in CIT v Mahesh Kumar Gupta {supra) and The Pr. Commissioner of Income Tax-9 v. Ram AvtarVerma {supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd. {supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015."

18. Post the judgment of MeetaGutgutia (supra), also the same principle have been reiterated in the case of ***PCIT vs. Best Infrastructure (India) Pvt. Ltd. (supra),*** *wherein the Hon'ble*

High Court held that during the course of search, statement recorded u/s. 132(4) by themselves does not constitute incriminating material and assumption of jurisdiction by the Assessing Officer u/s.153A solely based on statement is unsustainable when there is no incriminating material found during the course of search. Again in the case of ***PCIT vs. DharampalPremchand Ltd., in ITA No.512 to 514/206,*** *the Hon'ble Delhi High Court held that ratio laid down in the case of Kabul Chawla, MeetaGutgutia, still holds ground and the Revenue's contention that the matter should be referred to a larger bench was turned down. Apart from*

these judgments, there are catena of other judgments of other High Courts laying down similar ratio and proposition. The main underlying principle permeating in all the judicial precedents is that, in the case of the unabated assessment which had attained finality on the date of search, which are reckoned as unabated assessments, no addition over and above the originally assessed income can be made sans any incriminating material found or unearthed during the course of search. The principle reiterated time and again is that something should be found as a result of search which is incriminating in nature so as to implicate the assessee and acquire jurisdiction to make the addition, because for the completed assessment, or in other words, assessment which are not abated, the Assessing Officer is required to make reassessment u/s.153A which is only possible when any incriminating material has been found during the course of search."

14. Applying the proposition of law which we have applied while deciding Ground No. 1 of the appeal for AY 2007-08, we hold that even in respect of the appeals filed by the assessee for AYs 2008-09 to 2011-12 being unabated assessments, no addition or disallowance was permissible unless the AO established some tangible and cogent nexus with any incriminating evidence or material found or unearthed qua the assessee, qua the assessment year as a result of search conducted on 18.02.2013. However, the Ld. CIT, DR vehemently contended that the AO has made addition of introduction of share capital in the assessee company based on statements recorded of entry providers against the assessee. Per contra, the Ld. AR pointed out that first of all, the AO did not himself record any statement of entry providers who gave statements against the assessee; secondly, no copies of purported statement of these entry operators were furnished to assessee; thirdly, statements made by these entry providers were general in nature and not specifically against the assessee; fourthly, no opportunity to rebut/cross-examination was given to assessee; fifthly, it has come to the assessee's knowledge that these so called entry providers have retracted the statement given to Investigation Wing which was the foundation on which the addition of share capital introduced into the assessee company was made. After hearing the rival submissions and carefully

going through the records produced before us, we find merit in the submission of the Ld. AR of the assessee and so we hold that based on general statements of third party and without providing the adverse statements recorded against the assessee if any to the assessee and not providing an opportunity to assessee to rebut/cross examine the person/entry operators cannot be the basis for drawing adverse inference against the assessee. And so, on this issue we find no merit in the contention of Ld. CIT, DR. However, we will deal this elaborately and specifically when considering the merits of addition based on any statement recorded [infra] for each assessment year under consideration before us. Since we have found out that the statements recorded of the entry providers cannot be the basis of additions (which we will again deal later (infra) while examining the merits of the addition), we find that no incriminating materials/statements were available before the AO to make any additions for the abated assessment years 2008-09 to 2011-12. We therefore allow Ground No. 1 of assessee's appeal in AYs 2008-09 to 2011-12. However we shall deal with the merits of the additions in the subsequent paragraphs.

15. We now deal with the cross appeals for AY 2008-09 being ITA (SS) Nos. 25/Kol/2016 & 37/Kol/2016. Ground Nos. 2 to 9 of the assessee's appeal and Ground No. 2 of the Revenue's appeal is against the validity of the addition of share application money of Rs.90,00,000/- (reduced to Rs.70,00,000/- after verification by the AO) u/s 68 of the Act and consequent alleged commission paid in relation thereto amounting to Rs.45,000/-. The Ld. AR submitted that in the assessment order the AO did not point out any specific incriminating material which was found or unearthed in the course of search with reference to which the additions of Rs.70,00,000/- & Rs.45,000/- were made. Drawing our attention to the assessment order for the relevant AY 2008-09, the Ld. AR pointed out that the said additions were based solely with reference to statements allegedly given by some persons alleged to be entry operators. The Ld. AR pointed out that in the assessment order the AO had merely referred to

alleged statements recorded from certain persons who had admitted of indulging in providing accommodation entries in the form of share capital to various beneficiaries against receipt of commission. The Ld. AR drew our attention to the fact that the full copies of the statements were never provided to the appellant nor any opportunity of cross-examination was given inspite of repeated requests. He also pointed out that the contents of the alleged statements, which formed the basis of the impugned addition, was neither disclosed to the assessee nor brought out in the assessment order. He drew our attention to the assessment order wherein the AO made observations in general terms that certain statements were recorded from various entry operators by the Investigation wing but neither the exact contents and the statements given accusing the appellant of availing accommodation entries were never disclosed to the assessee before passing the impugned order nor spelled out in the assessment order. In fact the Ld. AR pointed that even the AO himself never examined any of the alleged entry operators personally so as to bring on record the relevant information first hand which would have thrown light to the charge that the said persons had provided accommodation entries and thereby assessee's unaccounted income was introduced in the form of share application monies. The Ld. AR further argued that nowhere in the assessment order the AO had established with any cogent evidence any link or nexus between receipt of share application monies with any incriminating material or evidence gathered during the course of search. The Ld. AR also submitted that since the assessee was never provided with the statements of the alleged entry operators nor granted opportunity of cross-examination but mere allegations were made in the show-cause issued, the appellant attempted to ascertain the correct state of affairs from the Investigation Wing of the Income-tax Department. The assessee was then informed that the alleged entry operators, whose statements formed basis for the allegation, had already furnished their retractions before the Investigating Officer and copies of such retractions were furnished before the AO. In the light of these material events it was contended by the Ld. AR that it was obligatory on the AO's part before drawing any

adverse inference against the assessee to personally examine the alleged entry operators to determine the true & correct state of affairs. Thus, it was brought to our notice that the additions made were based only on the statements obtained by the Investigation Wing in the proceedings conducted against the alleged entry operators, which were later retracted and so the additions made by AO was without reference to any incriminating material or evidence which was found from the assessee's possession during the course of search conducted on 18.02.2013.

16. When confronted with these facts the Ld. CIT DR argued that the additions were justifiably made by the AO because the statements of the entry operators were recorded in the proceedings conducted by the authorized officer of the Investigation Wing. In the statements recorded on oath, these entry operators had admitted of providing accommodation entries in the form of share application monies to various persons inter alia including the assessee. The Ld. DR further argued that mere furnishing of retraction statement without bringing on record cogent material for its withdrawal was not sufficient for the assessee to deny the correctness of the original statements. He therefore submitted that the AO was legally justified in drawing adverse inference against the assessee based on the statements of these entry operators.

17. After giving due consideration to the rival submissions and material available on record, we find merit in the Ld. AR's submission that before the AO made additions with reference to statements recorded from third parties not only the copy of the statement should have been provided to the assessee but also opportunity of cross examination should have been allowed. In the given facts of the case we however find that neither the AO himself examined these persons nor an opportunity to cross-examine any of these persons was given to the appellant, based on whose statements the addition was made. We therefore find merit in the Ld. AR's submissions that the additions were made without complying with principles of natural justice. In this

regard the reliance placed by the Ld. AR on the decision of the Hon'ble Supreme Court in the case of Kishinchand Chellaram vs. CIT, 125 ITR 713 (SC) is relevant. In this judgment the Hon'ble Apex Court had held that the opportunity of cross-examination must be provided to the assessee. This proposition was reiterated by the Hon'ble Supreme Court in the case of Andaman Timbers Ltd. Vs. Commissioner of Central Excise 62 Taxman 3 wherein it held as follows:

> "*5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.*
>
> *6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005[2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*
>
> *7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."*

18. The Hon'ble Jurisdictional High Court in the case of CIT Vs Eastern Commercial Enterprises (1994) 210 ITR 103 (Cal HC)held as follows:-

> *"As a matter of fact, the right to cross-examination a witness adverse to the assessee is an indispensable right and the opportunity of such cross-examination is one of the cornerstones of natural justice."*

19. Applying the legal propositions laid down in above case laws, in order to ascertain as to whether there was any incriminating materials unearthed during the search qua the assessment year, we now deal with the additions/disallowances as made by the AO for AY 2008-09. We note that the AO made the addition invoking section 68 of the Act by summarizing the facts &observed as under:

> "*I) Names of the companies appearing m statements of the entry providers given to investigation wing figure as applicants to shares in the assessee company.*
>
> *II) Perusal of the operating bank a/c shows that the a/c of most of the investing companies are in the same bank as that of the assessee company.*
>
> *III) There is no justification on record whatsoever as to whether the company's credentials commanded a huge share premium, particularly when the same is being paid by strangers.*
>
> *IV) Summons U/S 131 to such persons I company have not been adequately responded and the assessee has failed to produce them in response to the show- cause notice.*
>
> *V) The findings that the investing companies which subscribed to the shares were borne on the file of the ROC and that the monies have come through a/c payee cheques is at best, neutral. Mere payment by cheques is not sacrosanct as would not, make a non-genuine transaction as genuine.*
>
> *VI) Bonafide and genuineness of the transactions is the main issue and in this regard, the assessee company has failed miserably.*
>
> *VII) Scrutiny has revealed the camouflage adopted by the assessee and exposed the true nature of the transactions.*
>
> *VIII) Onus is on the assessee to prove the identity of share applicants, their creditworthiness and genuineness of the transactions appearing in its books of sale which is not proved in this case. In fact, genuineness of the transactions has not been established in spite of repeated opportunities.*
>
> *IX) There is enough material on record to doubt the veracity of the transactions."*

Hence, according to AO, it can be held that in this case, the provisions sec. 68 of the Act are applicable.

20. From a perusal of the aforesaid summary it is noted that the addition in question is not based on any incriminating material found during the course of search. It is worthwhile to note that the assessment for AY 2008-09 was originally completed u/s 143(3) and in the course of the said assessment no addition was made u/s. 68 after making enquiries regarding the receipt of share application monies. In that view of the matter we are of considered view that in the order u/s 153A framed consequent to the second search conducted on 18.02.2013; the AO could have disturbed the assessment only if there is any incriminating material unearthed during search qua the said issue. From the assessment order we note that the AO made general reference to the statements recorded from alleged entry operators who had allegedly admitted that the assessee company had utilised accommodation entries through them. We however note that these statements recorded from third parties behind the back of assessee by themselves cannot be construed as incriminating material found in the course of search against the assessee. It was not the case of the Revenue that the persons whose statements were recorded were acting under the control and superintendence of the assessee and they were present in the premises at the time when the search proceedings were carried out against the assessee. The proceedings conducted by the Revenue authorities were independent and separate and were taken against these persons in their own right and in the statements certain averments were purportedly made. The oral averments so made could not by themselves be construed to be incriminating material found from the assessee in the search conducted against the assessee. It is for the person making the statement or the person using the statement for drawing inference against the assessee to prove the contents of the statement to be correct and truthfulness of the same, and not the other way round. The use of the statement recorded from third party was permissible only if the assessee was furnished the statement of such person and the opportunity of cross examination was also afforded, so that the truthfulness of the statement can be tested on the anvil of cross-

examination. It has to be kept in mind that the AO is empowered to collect materials behind the back of the assessee, however if he intends to use it adversely against the assessee, then it is incumbent upon him to furnish a copy of the materials/statements to the assessee and the assessee should be provided an opportunity to rebut/cross examine the provider/maker of the adverse material. The assessee cannot be kept in the dark and the adverse statements or materials cannot be kept away from his eyes, and if the AO was intending to use it against the assessee to draw adverse inference/finding, then the assessee should be provided the adverse material/statements in order to rebut/cross examine the provider/maker of the adverse material, which is a natural right of the assessee and we find that it has not been done in this case, resulting in violation of natural justice. We are therefore of the considered view that the general statements recorded from the alleged entry operators by themselves with the legal infirmities pointed out, supra, did not constitute incriminating material for the purposes of Section 153A of the Act. In this regard our findings stand fortified by the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Kurule Paper Mills P. Ltd. (supra) [since upheld by the Hon'ble Supreme Court] wherein it was held as follows:

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

21. We may also gainfully refer to the following observations of the Hon'ble Bombay High Court in the case in CIT Vs Reliance Industries Ltd (261 taxman 358) which are as follows:

> *2. Question Nos.1 and 2 are elements of the same issue and relate to the addition of Rs. 3.39 crores (rounded off) made by the Assessing Officer by disallowing expenditure of the said sum incurred by the respondent-assessee in form of payments to one Shri S.K. Gupta. The Assessing Officer on the basis of statement of said Shri Gupta recorded during search operations held that the said person had not rendered any service to the assessee-company so as to receive such payments. CIT (Appeals) however deleted the addition inter-alia on the grounds that Shri S.K.Gupta had retracted the statement recorded during search, that the assessee-company had pointed out range of services provided by Shri Gupta and that the Assessing Officer had no other material to disallow the expenditure. The Tribunal in further appeal by the revenue confirmed the view of the CIT (Appeals) independently coming to the conclusion that the Assessing Officer was not justified in making the addition. It was noted that Shri Gupta retracted his statements within a short time by filing an affidavit. Subsequently, his further statement was recorded in which he also reiterated the stand taken in affidavit. The Tribunal also referred to the decision in case of the Dy. CIT v. Link Engineers (P.) Ltd. [IT Appeal No. 968 & 2248 (Delhi) of 2011] in whose case also a similar issue of genuineness of payment to Shri S.K. Gupta had come up for consideration. The Tribunal noted that in such a case also the Tribunal had held in favour of the assessee.*
>
> *3. Having heard learned counsel for the parties and having perused documents on record, we notice that the entire issue is based on the appreciation of materials on record. CIT (Appeals) and the Tribunal concurrently held that there was sufficient evidence justifying the payment to Shri S.K.Gupta, a Consultant and that the Assessing Officer other than relying upon the retracted statements of Shri Gupta recorded in search, had no independent material to make the additions. No question of law arises."*

22. Coming to the alleged cash trail, we note that none of the materials gathered by the AO by way of bank account copies of various companies supposed to be part of the chain of companies was confronted to the assessee. The statements that were recorded from directors of some of these entities, which inter alia formed part of this alleged chain, were also not brought on record. We note that no evidence was brought on record to prove that the cash deposited in bank accounts of entities forming part of this trail either belonged to the assessee company or originated from the assessee. Moreover, no material whatsoever was

brought on record to demonstrate that the alleged cash deposit made in the bank accounts of third parties actually belonged to the assessee company or was provided by the assessee company. No opportunity to cross-examine any of these entities was provided to the assessee. The bank statements based on which the cash trail was prepared were part of the disclosed documents/accounts and therefore cannot be held as incriminating material. Thus, we note that during the search and seizure operation conducted u/s. 132of the Act, no incriminating documents/papers in respect to additions made were seized or found. We therefore find merit in the Ld. AR's argument that the addition of Rs.90,00,000/- [reduced to Rs.70,00,000/- after verification] made u/s 68 in impugned order was without the aid of any incriminating material and therefore unsustainable in law. Consequently therefore the addition of the alleged commission paid amounting to Rs.45,000/- is also held to be unsustainable. Accordingly both the additions are directed to be deleted.

23. The second material addition which is disputed in the appeals filed both by assessee and Revenue relates to disallowance of Rs.21,81,06,060/- u/s 40(a)(ia) of the Act. At the onset it was brought to our attention that in the impugned order the Ld. CIT(A) did not adjudicate the said issue at his end but restored the issue back to the AO for verification and passing the order afresh. At the time of hearing of the appeal, the Ld. AR brought to our attention that in the order passed by the AO u/s 251 the disallowance of Rs.21,81,06,060/- u/s 40(a)(ia) was not retained by the AO on being satisfied that the addition was uncalled for. Besides the Ld. AR also submitted that in the assessment u/s 143(3), such disallowance was not made and no incriminating document or evidence was found in the course of search on 18.02.2013 to justify the disallowance u/s 40(a)(ia) of the Act. The Ld. CIT, DR could not controvert these factual aspects of the matter. After considering the rival submissions, we note that the issue involved stands in favour of the assessee in view of the factual findings given by the AO in his order u/s 251 of the Act. We also find merit in the primary contention of the assessee that such disallowance was legally untenable as the AO was unable to correlate the same with any incriminating document or evidence found in the

course of search. We therefore hold that the impugned addition was both legally as well as factually unsustainable.

24. The third addition which is disputed in the appeals filed both by assessee and Revenue relates to addition of Rs.63,81,702/- made by the AO on account of undisclosed interest on deposits. At the onset it was brought to our attention that in the impugned order the Ld. CIT(A) did not adjudicate the said issue at his end but restored the issue back to the AO for verification of the ITS details with the books of accounts and passing the order afresh. At the time of hearing of the appeal, the Ld. AR brought to our attention that in the order u/s 251 passed by the AO found that the ITS data reconciled with the books of accounts. The AO, being satisfied that no addition on this count was warranted, himself deleted the addition of Rs.63,81,702/- in the order passed giving effect to the directions of the Ld. CIT(A). Besides the Ld. AR also submitted that in the assessment u/s 143(3), such disallowance was not made and no incriminating document or evidence was found in the course of search on 18.02.2013 to justify the addition made on account of undisclosed interest on deposits. The Ld. CIT, DR could not controvert these factual aspects of the matter. After considering the rival submissions, we note that the issue involved stands in favour of the assessee in view of the factual findings given by the AO in his order u/s 251 of the Act. We also find merit in the primary contention of the assessee that such addition was legally untenable as the AO was unable to correlate the same with any incriminating document or evidence found in the course of search. We therefore hold that the impugned addition was both legally as well as factually unsustainable.

25. Now we proceed to adjudicate the cross appeals for AY 2009-10 being ITA (SS) Nos. 26/Kol/2016 & 38/Kol/2016.In Ground Nos. 2 to 8 of the appeal, the assessee has challenged the validity of the additions of Rs.1,50,00,000/-& Rs.75,000/- made by the AO by way of unexplained cash credit u/s 68 of the Act and alleged commission paid thereon, respectively. It is the appellant's contention that no incriminating document or evidence was

unearthed in the course of search, which would justify the impugned additions and therefore urged that these additions be held legally unsustainable. The submissions both the parties were on identical lines as discussed in AY 2008-09 above. After considering the rival submissions, it is observed that the issue involved in this ground is identical to Ground No.1 of assessee appeal in A.Y. 2008-09. In the AY 2008-09, the AO had added back the share subscription monies of Rs.90,00,000/- and commission paid thereon of Rs.45,000/- referring to certain statements given by alleged entry operators. The reasons for making these additions in the year under consideration are same as discussed in the assessment order for AY 2008-09. The order of the Ld. CIT(A) was also passed on identical lines on which the addition was confirmed in the appellate order for AY 2008-09. As there is no change in material facts in the AY 2009-10, following our conclusions drawn in A.Y. 2008-09, we hold that since the AO did not establish any live nexus or link between these additions with any incriminating material found or unearthed in the course of search; the impugned additions of Rs.1,50,00,000/- & Rs.75,000/- held to be legally unsustainable. Ground No. 1 of the assessee's appeal therefore stands allowed.

26. In Ground Nos. 9 to 12 of the assessee's appeal and Ground Nos. 1 & 2 of the Revenue's appeal; the issues involved relate to (a) disallowance of Rs.26,52,48,663/- u/s 40(a)(ia), (b) addition of Rs.43,04,00,000/- on account of evasion of railway freight and (c) addition of Rs.18,17,25,000/- on account of difference in stock exported from Paradip Port. At the onset it was brought to our attention that in the impugned order the Ld. CIT(A) did not adjudicate the said issues at his end but restored these issues back to the AO for verification and passing the order afresh. At the time of hearing of the appeal, the Ld. AR brought to our attention that in the order passed u/s 251 the AO being satisfied with the assessee's explanations, himself refrained from retaining these additions in the total income assessed in the order passed u/s 251 of the Act. Besides the Ld. AR also submitted that in the original assessment u/s 143(3), such disallowances were not made and no incriminating document or evidence was found in the course of search on 18.02.2013 to justify these

additions. The Ld. CIT, DR could not controvert the factual aspects of the matter. After considering the rival submissions, we note that the issues involved stand decided in favour of the assessee in view of the factual findings given by the AO in his order u/s 251 of the Act. We also find merit in the primary contention of the assessee that these additions were legally untenable as the AO was unable to correlate them with any incriminating document or evidence found in the course of search. For the reasons set out in the foregoing, Ground Nos. 9 to 12 of the assessee's appeal stands allowed and Ground Nos. 1 & 2 of the appeal of the Revenue stands dismissed.

27. Now we proceed to adjudicate the cross appeals for AY 2010-11 being ITA (SS) Nos. 27/Kol/2016&39/Kol/2016. In Ground Nos. 2 to 4 of the assessee's appeal and Ground No. 2 of the Revenue's appeal; the issues involved relates to (a) disallowance of Rs.90,018/- u/s 40(a)(ia) and (b) addition of Rs.43,12,00,000/- on account of evasion of railway freight. At the onset it was brought to our attention that in the impugned order the Ld. CIT(A) did not adjudicate the said issues at his end but restored these issues back to the AO for verification and passing the order afresh. At the time of hearing of the appeal, the Ld. AR brought to our attention that in the order passed u/s 251 the AO being satisfied with the assessee's explanation, himself refrained from retaining those additions in the total income assessed in the order passed u/s 251 of the Act. Besides the Ld. AR also submitted that in the original assessment u/s 143(3), such disallowances were not made and no incriminating document or evidence was found in the course of search on 18.02.2013 to justify these additions. The Ld. CIT, DR could not controvert these factual aspects of the matter. After considering the rival submissions, we note that the issues involved stands decided in favour of the assessee in view of the factual findings given by the AO in his order u/s 251 of the Act. We also find merit in the primary contention of the assessee that these additions were legally untenable as the AO was unable to correlate them with any incriminating document or evidence found in the course of search. For the reasons set out in

the foregoing, Ground Nos. 2 to 4 of the assessee's appeal stands allowed and Ground No. 2 of the appeal of the Revenue stands dismissed.

28. Ground No. 1 of the Revenue's appeal is against the relief allowed by the Ld. CIT(A) in deleting the disallowance of loss of Rs.6,26,000/- on sale of fixed assets. We note from the impugned order of the Ld. CIT(A) that in arriving at the returned income the assessee had suomoto added back the loss on sale of fixed assets which was added back again by the AO while passing the order u/s 153A. Taking note of the double disallowance, the Ld. CIT(A) directed the AO to delete the same. At the time of hearing the Ld. CIT, DR could not controvert this factual finding of the Ld. CIT(A) and in that view of the matter we find no reason to interfere with the order of the Ld. CIT(A). This ground therefore stands dismissed.

29. Now we proceed to adjudicate the cross appeals for AY 2011-12 being ITA (SS) Nos. 28/Kol/2016 & 40/Kol/2016. In Ground Nos. 2 to 4 of the assessee's appeal and Ground Nos. 2 of the Revenue's appeal; the issues involved relates to (a) disallowance of Rs.55,97,91,262/- u/s 40(a)(ia) & (b) addition of Rs.109,95,00,000/- on account of evasion of railway freight. At the onset it was brought to our attention that in the impugned order the Ld. CIT(A) did not adjudicate the said issues at his end but restored these issues back to the AO for verification and passing the order afresh. At the time of hearing of the appeal, the Ld. AR brought to our attention that in the order passed u/s 251 the AO being satisfied with the assessee's explanation, himself refrained from retaining those additions in the total income assessed in the order passed u/s 251 of the Act. Besides the Ld. AR also submitted that no incriminating document or evidence was found in the course of search on 18.02.2013 to justify these additions. The Ld. CIT, DR could not controvert these factual aspects of the matter. After considering the rival submissions, we note that the issues involved stands decided in favour of the assessee in view of the factual findings given by the AO in his order u/s 251 of the Act. We also find merit in the primary contention of the

assessee that these additions were legally untenable as the AO was unable to correlate them with any incriminating document or evidence found in the course of search. For the reasons set out in the foregoing, Ground Nos. 2 to 4 of the assessee's appeal stands allowed and Ground No. 2 of the appeal of the Revenue stands dismissed.

30. Ground No. 1 of the Revenue's appeal is against the relief allowed by the Ld. CIT(A) in deleting the disallowance of loss of Rs.1,75,000/- on sale of fixed assets. We note from the impugned order of the Ld. CIT(A) that in arriving at the returned income the assessee had suo moto added back the loss on sale of fixed assets which was added back again by the AO while passing the order u/s 153A. Taking note of the double disallowance, the Ld. CIT(A) directed the AO to delete the same. At the time of hearing the Ld. CIT, DR could not controvert this factual finding of the Ld. CIT(A) and in that view of the matter we find no reason to interfere with the order of the Ld. CIT(A). This ground therefore stands dismissed.

31. Now coming to the cross appeals for AY 2012-13 in ITA (SS) Nos. 29/Kol/2016&41/Kol/2016; we note that the main grievance in Ground Nos. 1 to 7 of the assessee's appeal isthe addition of Rs.64,45,11,500/- made by the AO u/s 68 of the Act. Briefly stated facts of the case are that during the FY 2011-12, the appellant had disclosed receipt of share application monies of Rs.223,88,21,500/- from four bodies corporate which inter alia included sum of Rs.64,45,11,500/- received from M/s. Mundat Securities & Services Pvt. Ltd. In the course of assessment proceedings the AO had required the assessee to establish identity, creditworthiness of the share applicants and genuineness of these transactions. In the impugned order the AO noted that the share application monies to the extent of Rs.159,43,10,000/- were received from three companies which were group entities of the assessee. Accordingly the AO accepted the genuineness of the transactions with these 3 group entities. It is only in respect of the sum of Rs.64,45,11,500/- received from M/s. Mundat Securities & Services Pvt. Ltd that the AO disbelieved the genuineness of the

transaction principally because in his opinion payer of the application monies was not a group entity belonging to the promoter. The AO thereafter proceeded to examine the source of the monies received by M/s. Mundat Securities & Services Pvt. Ltd and after discussing the sources of sources the AO came to conclusion that he was able to identify the cash deposits to the extent of Rs.9,16,95,000/-. These facts in AO's opinion established his conclusion that the appellant was unable to explain the genuineness of the transaction. The AO also supported his conclusion on the premise that no prudent businessman would invest substantial funds by way of subscription to equity capital at huge premium. According to AO the entire transaction lacked commercial substance and therefore he concluded that the amount received by the appellant from M/s. Mundat Securities & Services Pvt. Ltd was assessable as income u/s 68 of the Act. Aggrieved by the order of the AO, the appeal was filed before the Ld. CIT(A) who confirmed the addition. Being aggrieved by the Ld. CIT(A)'s order, the assessee is now in appeal before us.

32. At the time of hearing of the appeal the Ld. AR in the first instance brought to our attention that the share applicant, M/s. Mundat Securities & Services Pvt. Ltd was one of the group company and it belonged to the promoter group. In the paper book he filed copies of the assessment orders dated 31.03.2015 passed u/s 153C/143(3) for the AYs 2007-08 to 2013-14. With reference to these orders, he pointed out that the assessment records of M/s. Mundat Securities & Services Pvt. Ltd were centralized to the charge of ACIT, CC-2(2), Kolkata as a consequence of the search conducted in the case of 'Rashmi Group'. In other words, the AO of the appellant as well the share applicant was one and the same and in both the cases the assessment orders were framed on 31.03.2015. The Ld. AR further invited our attention to the fact that in the audited accounts of the share applicant company the investment made in the appellant company's shares was disclosed. In the income-tax assessment order passed for AY 2012-13 dated 31.03.2015 u/s 153C/143(3), the same AO did not draw any adverse inference with regard to the source of the monies invested by M/s. Mundat Securities & Services Pvt. Ltd in the share capital of the appellant. The Ld. AR

therefore argued that if in the assessment of the share applicant, the same AO accepted the genuineness of the transaction involving payment of share application monies to the appellant then it was not open for the same AO to allege and conclude that the receiver of the share application monies was the actual owner of the monies invested by M/s Mundat Securities & Services Pvt. Ltd. The Ld. AR further submitted that since it was evident from the records that M/s. Mundat Securities & Services Pvt. Ltd belonged to promoter group and when the AO had accepted the genuineness of the assessee's transactions with remaining three group entities then there was no reason for the AO to adopt a contrary view and make the addition u/s 68 of the Act on different footing. He therefore urged that the impugned addition should be deleted. The Ld. CIT, DR on the other hand submitted that at no stage the assessee had raised the plea that M/s. Mundat Securities & Services Pvt. Ltd belonged to same Group and was part of promoter group. He therefore submitted that either the AO's order be confirmed or in the alternative the matter be restored to the file of AO for verification of facts.

33. After considering the facts on record and the documents placed before us, we find that admittedly the assessment records of the share applicant, M/s. Mundat Securities & Services Pvt. Ltd were transferred to the charge of the Dy.CIT, CC-2(2), Kolkata only because search u/s 132 was conducted on 18.02.2013 in Rashmi Group. It is a well-established practice for the Income-tax Department to centralize all cases belonging to any one Group which is subjected to search & seizure proceedings u/s 132 of the Act. We also note that not only the assessment records of M/s. Mundat Securities & Services Pvt. Ltd was transferred to the charge of the DCIT, CC 2(2), Kol but the proceedings u/s 153C were also taken up against the share applicant on the ground that some incriminating material or books of accounts or documents belonging to the said company were found in the course of search conducted against 'Rashmi Group' to which the appellant as well as the share applicant belonged. On these facts therefore we find merit in the Ld. AR's primary submissions the share applicant belonged to 'Rashmi Group' which was the promoter of the appellant. We

also note that the share applicant, M/s. Mundat Securities & Services Pvt. Ltd was subjected to assessment proceedings u/s 153C for AYs 2007-08 to 2013-14 and the orders were passed for these years u/s 153C/143(3) on 31.03.2015 being the same date on which the same AO who passed the impugned assessment order. We therefore find that both in the case of the appellant company as well as M/s. Mundat Securities & Services Pvt. Ltd the assessment orders for AY 2007-08 to 2013-14 were simultaneously passed after conducting thorough enquiries and investigation. Neither the AO nor the Ld. DR could dispute the fact that the investment made in the equity of appellant was duly disclosed in the books of the share applicant. We also note that in the same accounts of the share-applicant, the source of making investment was also recorded. From the assessment order of M/s Mundat Securities and Services Pvt. Ltd. for AY 2012-13 passed u/s 153C dated 31.03.2015, we note that no adverse finding was recorded by the same AO in relation to its transactions involving purchase of shares of the appellant and source of making such investments was accepted by the same AO. We also find that nowhere in the assessment orders passed for any of the seven years the AO recorded any finding to the effect that M/s. Mundat Securities & Services Pvt. Ltd was either a shell company or jamakharchi company engaged in providing accommodation entries. On the contrary we find that its genuine existence was accepted by the AO in the regular assessment orders passed for AYs 2007-08 to 2013-14. Having considered the conspectus of all facts we do not find merit in the orders of the lower authorities justifying the impugned addition. From the assessment order we find that the share subscription amounts received from three group entities during the same year was accepted by the AO on the premise that these corporate assessees were promoters of the assessee and these entities being identifiable. The AO not only accepted identity of the applicants but also creditworthiness and genuineness of the transactions. From the material on record we note that the share applicant, M/s. Mundat Securities & Services Pvt. Ltd was subjected to proceedings u/s 153C of the Act for the AY 2007-08 to 2013-14 on the ground the documents or books of accounts belonging to the company were found & seized in the course of search in the case of ‘Rashmi Group’. We also note that the case records of M/s.

Mundat Securities & Services Pvt. Ltd were transferred to the charge of DCIT, CC 2(2), Kol i.e. the present respondent in the present appeal pursuant to the search conducted in case of the 'Rashmi Group'. These facts considered cumulatively lend credence to the Ld. AR's contention that M/s. Mundat Securities & Services Pvt. Ltd was also a group entity and belonging to promoter category because almost 28.78% of the fresh issue was subscribed by M/s. Mundat Securities & Services Pvt. Ltd. We therefore do not find any consistency in the AO's action to single out the subscription monies received from M/s. Mundat Securities & Services Pvt. Ltd for differential treatment. For the reasons discussed in detail in the foregoing therefore we also do not find any merit in the Ld. DR's pleading to the effect that the matter needs to be restored to the file of the AO for decision afresh. This is particularly in view of the fact that in the orders u/s 153C/143(3), the AO of M/s. Mundat Securities & Services Pvt. Ltd had accepted the genuineness of the transaction and therefore it was not open for the same AO to question the genuineness of the receipt of monies in the hands of the appellant. We therefore direct the AO to delete the addition of Rs.64,45,11,500/-. Ground Nos. 1 to 7 are therefore allowed.

34. Ground No. 8 is against the addition of Rs.32,22,558/- made on account of alleged commission paid for obtaining accommodation entries in the form of share capital. In view of our finding with regard to Ground Nos. 1 to 7 above, the impugned addition of Rs.32,22,558/- has no legs to stand on and is accordingly deleted. This ground stands allowed.

35. Ground No. 9 of assessee's appeal and Ground No. 2 of Revenue's appeal are against the addition of Rs.74,98,000/- on account of evasion of railway freight. At the onset it was brought to our attention that in the impugned order the Ld. CIT(A) did not adjudicate the said issue at his end but restored this issue back to the AO for verification and passing the order afresh. At the time of hearing of the appeal, the Ld. AR brought to our attention that in the order passed u/s 251 the AO being satisfied with the assessee's explanation, himself refrained from retaining this addition in the total income assessed in the order passed u/s

251 of the Act. The Ld. CIT, DR could not controvert this factual aspect of the matter. After considering the rival submissions, we note that the issues involved stands decided in favour of the assessee in view of the factual findings given by the AO in his order u/s 251 of the Act. For the reasons set out in the foregoing, Ground No. 9 of the assessee's appeal stands allowed and Ground No. 2 of the appeal of the Revenue stands dismissed.

36. Ground No. 1 of the Revenue's appeal is against the relief allowed by the Ld. CIT(A) in deleting the disallowance of loss of Rs.95,000/- on sale of fixed assets. We note from the impugned order of the Ld. CIT(A) that in arriving at the returned income the assessee had suo moto added back the loss on sale of fixed assets which was added back again by the AO while passing the order u/s 153A. Taking note of the double disallowance, the Ld. CIT(A) directed the AO to delete the same. At the time of hearing the Ld. CIT, DR could not controvert this factual finding of the Ld. CIT(A) and in that view of the matter we find no reason to interfere with the order of the Ld. CIT(A). This ground therefore stands dismissed.

37. Now we take up the cross appeals for AY 2013-14 in ITA (SS) Nos. 30/Kol/2016 & 42/Kol/2016. Ground No.1 of the Revenue's appeal is against the directions of the Ld. CIT(A) setting aside the addition of Rs.35,85,00,000/- made u/s 68 and returning the same back to the file of the AO for verification of facts. Brief facts of the case are that during the FY 2012-13 the appellant raised share application monies of Rs.162,84,85,000/- from nine bodies corporate through private placement which inter alia included sum of Rs.35,85,00,000/- received from M/s. Pragya Tie-Up Pvt. Ltd. In the course of assessment proceedings the AO had required the assessee to establish identity, creditworthiness of the share applicants and genuineness of these transactions. In the impugned order the AO noted that the share application monies to the extent of Rs.126,99,85,000/- was received from eight entities and this was found to be genuine. It is only in respect of the sum of Rs.35,85,00,000/- received from M/s. Pragya Tie-Up Pvt. Ltd Ltd that the AO disbelieved the genuineness of the transaction on the premise that the said company existed only on paper. The AO thereafter proceeded to examine the source of the monies received from M/s.

Pragya Tie-Up Pvt. Ltd and after discussing the sources of sources the AO came to conclusion that he was able to identify the cash deposits to the extent of Rs.35,85,00,000/-. These facts in AO's opinion established his conclusion that the appellant was unable to explain the genuineness of the transaction. According to AO the entire transaction lacked commercial substance and therefore he concluded that the amount received by the appellant from M/s. Pragya Tie-Up Pvt. Ltd was assessable as income u/s 68 of the Act. Aggrieved by the order of the AO, the appeal was filed before the Ld. CIT(A).Before the Ld. CIT(A) the appellant brought to his notice that in the income-tax assessment of M/s. Pragya Tie-Up Pvt. Ltd framed for AY 2013-14, the ITO, Ward 1(1), Kolkata had made an addition on account of unexplained cash credits of Rs.51,57,01,340/- which inter alia included the source of monies of Rs.35,85,00,000/- invested by the share applicant in the appellant company. It was therefore urged that when the Department had treated the sum of Rs.35,85,00,000/- as income of M/s. Pragya Tie-Up Pvt. Ltd, then in the same breath the same amount could not be treated to be the undisclosed monies of the appellant company as well. Having regard to these facts, the Ld. CIT(A) set aside the addition back to the file of the AO with the direction to verify the claim of the appellant as to whether there was any addition made in the hands of M/s. Pragya Tie-Up Pvt. Ltd and if it was found to be correct then the AO was directed to delete the addition. Being aggrieved by this order of the Ld. CIT(A), the Revenue is now in appeal before us.

38. We have heard the rival submissions of the parties. At the outset the Ld. CIT, DR claimed that in terms of provisions of Section 251 of the Act the Ld. CIT(A) did not have power to set aside the assessment and direct the AO to re-decide the matter afresh. The Ld. CIT, DR therefore argued that the order of the Ld. CIT(A) was contrary to statutory provisions of Section 251 and therefore liable to be vacated. The Ld. CIT, DR further supported the order of the AO and urged to reverse the findings of the Ld. CIT(A) and restore the AO's order. Per contra, the Ld. AR supported the order of the Ld. CIT(A).

39. After giving thoughtful consideration to the facts of the case, we agree with the preliminary objection of the Ld. CIT, DR but at the same time we are of the opinion that there is no fetter on the powers of the Tribunal to direct re-examination of relevant facts by the AO. The Legislature has not curtailed the powers of the Tribunal to set aside any issue to the file of the AO, if the facts of the case warrant such re-examination. In the instant case, we note that the impugned addition of Rs.35,85,00,000/- was made by the AO on the ground that the assessee was unable to establish identity & creditworthiness of the share applicant and genuineness of the transaction. We note that for the AY 2013-14 the ITO Ward 1(1), Kolkata passed order u/s 143(3) assessing total income at Rs.51,57,01,340/- on substantive basis. The said assessment order supported the Ld. AR's contention that the identity of the share applicant had been accepted by the Department and therefore regular assessment was completed u/s 143(3) of the Act. We also find merit in the Ld. CIT(A)'s finding that if the addition has been made in the hands of the share applicant company then no addition is warranted in the hands of the investee company because any such addition would result in double taxation of the same sum which is not permitted in law. We therefore, in the facts and circumstances do not find any infirmity in the directions as such given by the Ld. CIT(A). However, since the Ld. CIT(A) does not enjoy the power to set aside the issue to AO to re-examine, and we have the power to do so, we modify the Ld. CIT(A)'s order and hold that the directions contained in the Ld. CIT(A)'s order be regarded as integral part of the order passed by this Tribunal and the AO is directed to re-frame the assessment on this issue keeping in view the directions contained in Para 4 at page 40,41 and 42 of the order of the Ld. CIT(A). Before doing so, the AO shall give sufficient opportunity of being heard to the assessee. Ground No. 1 of the Revenue's appeal is treated as partly allowed as discussed above.

40. Ground No. 2 of the Revenue's appeal is against the relief allowed by the Ld. CIT(A) in deleting the disallowance of loss of Rs.2,85,000/- on sale of fixed assets. We note from the impugned order of the Ld. CIT(A) that in arriving at the returned income the assessee had suo-moto added back loss on sale of fixed assets which was added back again by the

AO while passing the order u/s 143(3). Taking note of the double disallowance, the Ld. CIT(A) directed the AO to delete the same. At the time of hearing the Ld. CIT, DR could not controvert this factual finding of the Ld. CIT(A) and in that view of the matter we find no reason to interfere with the order of the Ld. CIT(A). This ground therefore stands dismissed.

41. Ground No. 1 is against the addition of Rs.17,92,500/- made on account of alleged commission paid on obtaining accommodation entries in the form of share capital. We have heard the rival submissions and perused the material on record. We note that the impugned addition was made by the AO purely on suspicion and there was no material available on record to justify the same. We note that the AO was unable to correlate them with any incriminating document or evidence found in the course of search. Instead the addition was made purely on conjecture. We note that there is nothing on record to suggest that such expenditure was actually incurred by the assessee. The impugned addition is therefore being set aside and is hence deleted. This ground stands allowed.

42. In the result, the appeals of the assessee in ITA (SS) Nos. 24 to 30/Kol/2016 for AYs 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13& 2013-14 stands allowed and the appeals of the Revenue in ITA (SS) No. 37-41/Kol/2016 for AYs 2008-09, 2009-10, 2010-11, 2011-12 & 2012-13 stands dismissed and the appeal of revenue in IT(SS)A No. 42/Kol/2016 for AY 2013-14 stands partly allowed for statistical purpose.

Order is pronounced in the open court on 1st May, 2019.

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 1st May, 2019

Jd. (Sr. P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Rashmi Metaliks Ltd., 39, Shakespeare Sarani, 6th floor, Kolkata-700 017.

2 Respondent – DCIT, Central circle-2(2), Kolkata.

3. CIT(A)-20, Kolkata (sent through e-mail)

4. CIT- , Kolkata.

5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy, By order,

Assistant Registrar