Kostub Investment Ltd., New Delhi vs Assessee

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

SHRI RAJPAL YADAV, JUDICIAL MEMBER
and
BEFORE SHRI B.C. MEENA, ACCOUNTANT MEMBER

ITA No.195/Del./2010
(ASSESSMENT YEAR : 2006-07)

ITA No.1975/Del./2011
(ASSESSMENT YEAR : 2007-08)

ITA No.5198/Del./2011
(ASSESSMENT YEAR : 2007-08)

ITA No.1354/Del./2012
(ASSESSMENT YEAR : 2007-08)

M/s. Kostub Investment Limited, S - 6, Paradize Plaza, Alakhnanda Shopping Complex, Alakhnanda, New Delhi.	vs.	ACIT, Circle 5 (1), New Delhi.
(PAN : AACCK0688Q)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Ms. Premlata Bansal, Advocate
REVENUE BY : Shri D.K. Mishra, DR

ORDER

PER B.C. MEENA, ACCOUNTANT MEMBER :

The assessee is in appeal before us. In Assessment Year 2007-08, it has filed three appeals, ITA No.1975/Del/2011 emanates from the order of CIT (A) dated 28.02.2011 passed u/s 250 of the Income-tax Act, 1961 (hereinafter ITA No.5198/Del./2011 & 1354/Del./2012 referred to as 'Act'), ITA No.5198/Del/2011 emanates from an order of the ld. CIT (A) dated 27.10.2011 passed u/s 154 of the Act and ITA No.1354/Del/2012 emanates from the order of CIT (A) dated 11.11.2011 which was passed on the appeal of the assessee against the order u/s 154/250 dated 09.05.2011 passed by the Assessing Officer. ITA No.195/Del/2010 emanates from the order of CIT (A) dated 12.11.2009 passed u/s 250 of the Act in Assessment Year 2006-07. The issues involved in all these appeals are interconnected with each other, therefore, we heard all the appeals together and deem it appropriate to dispose off them by this common order.

2. Firstly, we take ITA No.1975/Del/2011 and if we find any ground interconnected with the grounds of appeal raised in this year, then we will take up all those grounds together.

3. The grounds of appeal taken by the assessee read as under :-

> "1. That the CIT (A) was not justified in sustaining addition of Rs.2,05,00,000/- made by the Assessing officer as unexplained income u/s 68 towards share capital.
>
> 2. That CIT (A) had not properly appreciated the facts of the case and vital evidence produced in support of the genuineness of the share capital received from corporate entities.
>
> 3. That the CIT (A) was unjustified in sustaining addition of Rs.5.48 lacs made by the Assessing officer on account of education expenses of Shri Dushyant Poddar.
>
> 4. That CIT (A) failed to consider the necessary evidence in support of claim to-wards education expenses of Shri Dushyant Poddar.
>
> 5. That the CIT (A) committed an error in confirming the addition of Rs.19,53,402/- regarding disallowance of expenditure made u/s 14A of the Income Tax Act. 1961.
>
> ITA No.5198/Del./2011 & 1354/Del./2012
>
> 6. That the CIT (A) was not justified in not accepting the judgements of the Punjab & Haryana High Court and decision of the I.T.A.T. - Delhi Bench - E, New Delhi in ITA No. 4046/De1/2009 in the case of Minda Investment regarding disallowance u/s 14A of the I.T.Act.
>
> 7. That the CIT (A) confirmed the disallowance of Rs.19,53,402/- u/s 14A worked out under Rule 80 which is not applicable to the facts of the case as the application of Rule D is prospective and is not applicable to the assessment year under reference.
>
> 8. That the CIT (A) was not justified in applying the explanation to section 73 of I.T.Act. 1961.
>
> 9. That the CIT (A) was unjustified in treating loss of Rs.19,41,82,909/- as speculation loss and further holding that the same would not be available for set off against any other income shown by the appellant company.
>
> 10. That the CIT (A) was wrong in coming to the conclusion that the assessee company is not an investment company.
>
> 11. The CIT (A) was unjustified in concluding that the loss suffered by the assessee company was not business loss as the case of the assessee clearly falls with in proviso

A to D of section 43 (5) of the I.T. Act, 1961.

12. That CIT (A) acceded in his powers vested u/s 251(2) of the I.T. Act, 1961.

13. That without prejudice to the above the loss arising out of mark to mark (F&O) of Rs.32,78,412/- is a business loss in view of proviso D of section 43 of the I.T. Act, 1961 and is liable to adjusted against other income of the assessee company.

14. That the CIT (A) was wrong in disallowing expenses of Rs.49,12,798/- alleged to have been incurred to-wards speculation business and thus increasing the speculation loss to that extent.

15. That the disallowance of expenses of Rs.49,12,798/- is against the facts and circumstance of the case as such expenses had been disallowed without mentioning specific section of I.T. Act."

4. In ground nos.1 & 2, assessee is impugning the confirmation of an addition ofRs.2,05,00,000/- which was made by the Assessing Officer with the aid of section 68 of the Act. The brief facts are that assessee is a company engaged in the business of stocks and shares broker and dealing in shares and ITA No.5198/Del./2011 & 1354/Del./2012 securities. It has filed in its return of income on 28.10.2007 declaring a loss of Rs.2,62,08,560/-. The case of the assessee was selected for scrutiny assessment and notice u/s 143(2) was issued and served upon the assessee. In response to the notice, Shri Dinesh Mittal, Chartered Accountant duly authorized by the assessee has appeared before the Assessing Officer from time to time and submitted the requisite details. On scrutiny of the accounts, it revealed to the Assessing Officer that assessee had shown receipts of share application money amounting to Rs.2.05 crores from 13 parties. In order to fulfill the conditions contemplated in section 68 of the Act for explaining the source of investment, ld. Assessing Officer called for explanation of the assessee. It emerges out from record that assessee has filed confirmations from all the 13 applicants, copies of acknowledgement of IT return in 8 cases and copies of bank statement in 10 cases. The remaining details were not filed by the assessee. The ld. Assessing Officer deputed an Inspector in order to verify the identities of the companies. The Inspector submitted hers report on 07.12.2009, whereby she communicated to the Assessing Officer that on local enquiries on the premises of the companies at Sl.Nos.5, 6, 9, 11 and 13, it revealed that no such companies were ever existed. The whereabouts of these companies were also searched by Departments of FERA, VAT, etc. Armed with this information, the ld. Assessing Officer has confronted the assessee to produce Directors/Principal Officers of these companies so that genuineness ITA No.5198/Del./2011 & 1354/Del./2012 of the transactions can be verified. The assessee wrote a letter to the Assessing Officer that its Directors have made efforts with the Directors of share applicant companies for appearing before the Assessing Officer but, in spite of their best efforts, they did not agree for appearing before the Assessing Officer. According to the assessee, it made a request to the Assessing Officer for procuring the presence of those Directors by using the statutory powers. The ld. Assessing Officer has gone through the evidence submitted by the assessee and arrived at a conclusion that it failed to prove the ingredients of section 68 because it could not prove the identities of the share applicants, genuineness of the transaction and their

creditworthiness.

Ld. Assessing Officer in this way made an addition of Rs.2.05 crores in the total income of the assessee.

5. Dissatisfied with the addition, the assessee carried the matter before the CIT (A) and contended that during the assessment proceedings, the assessee has submitted the return of allocation of shares to the share applicants before the Registrar of Companies, the acknowledgement of filing of returns, details of permanent account numbers, copies of the bank accounts in case of certain applicants, the cheques issued by the subscribers were credited in the accounts of the assessee. It was also contended that Assessing Officer had made an observation that out of 13 applicants, 4 applicants were managed by hawala operators and these companies were engaged in providing ITA No.5198/Del./2011 & 1354/Del./2012 accommodation entries. According to the assessee, no material to substantiate this conclusion was supplied to the assessee. Therefore, such an inference by the Assessing Officer is not sustainable. The assessee has relied upon a large number of decisions. The ld. First Appellate Authority has considered arguments of the assessee as well as decisions relied upon by it. The ld. CIT (A) has concurred with the conclusion of the Assessing Officer. It is advantageous to take note of the findings recorded by the ld. CIT (A) which read as under :-

> "4. I have carefully considered the submissions made on behalf of the appellant company and the findings recorded by the ld. AO. I have also very carefully gone through the judgments relied upon by the ld. Counsels for the appellant. On consideration I find that during the course of assessment proceedings, the appellant company has filed copies of confirmations, copies of acknowledgments of IT returns in the cases of all the 13 share applicants. In 10 cases, the appellant company has also filed copies of bank statements so as to establish the fact that the amount of Rs.20500000 was paid out of the bank accounts of the share applicants. Therefore, I find myself in agreement with the ld. Counsels that the initial burden of proving identity of the share applicants was duly discharged. However, as stated earlier, having received the documents filed by the appellant company, the ld. AO made scrutiny of such documents and also took into consideration the fact that out of 13 companies, 4 companies, namely, M/s. Ethnic Creations (P) Ltd., M/s. Fair N Square (P) Ltd., M/s. Shegal Fluid Line & Equipment (P) Ltd. and M/s. Shattarchi Financial & Leasing Ltd. were found to be involved in Hawala operations and therefore, to find out the real nature of transactions decided to make further investigations. Accordingly, he deputed his inspector to go to the respective premises of all the 13 share applicant companies and find out the business activities and other related informations and also to get their confirmations in regard to the money paid to the appellant company. However, in the course of spot enquiries, the inspector could not find any of the 13 share applicant companies operating from the respective addresses and thus failed to carry out necessary investigation. The inspector also found that other departments including FERA, ROC and Sales Tax etc were also searching for the aforesaid companies so as to make investigations under their respective laws. In view of the aforesaid, the revenue, in my view, has 'rebutted the genuineness and

correctness of the documents filed by the appellant company in support of receipt of share application money.

ITA No.5198/Del./2011 & 1354/Del./2012 Thereafter, the ld. AO, vide order sheet entry dated 8-12-09 brought the result of enquiry to the notice of the counsel of the appellant company and required him to produce the concerned parties for examination. However, as stated earlier, the appellant company failed to comply with the requirement of the AO. As regards, the request of the appellant company to provide an opportunity to cross examine the directors / promoters of the share applicant companies in case they state anything against the appellant company, I find it totally unacceptable. It has to be appreciated that it is the appellant which is claiming receipt of huge amount of Rs.20500000 from the 13 parties. Therefore, in my view, it is the responsibility of the appellant company only to establish 3 necessary things, namely, (i) identity of investors, (ii) their creditworthiness/investments and (iii) genuineness of the transactions.

4.1 The ld. Counsels have placed reliance on a plethora of judgments to buttress the arguments that once the initial burden of proving existence and creditworthiness of the share applicants is proved, no addition can legitimately be made in the hands of the appellant company. In this regard, I would like to make a reference to a recent judgment of the Hon'ble Jurisdictional Delhi High Court in the case of Vijay Power Generators Ltd Vs Director of Income Tax & Other wherein after making detailed reference to most of the judgments delivered by the on Hon'ble Apex Court and other High Courts, has made the following important observations:

"When we keep in mind the principle of law laid down in the ratio in the aforesaid decisions and apply the same to the facts of this case, it is difficult to find fault with the approach of the Tribunal. We have to keep in mind that the ratio in a decision cannot be applied in each case. The facts and circumstances of each case are to be weighed and examined as to whether a particular ratio decided in a particular case could be applied. As noted above, the initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 of the Act. These are: (i) Identity of investors; (ii) their creditworthiness/investments and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, it is only then the Department is required to .undertake further exercise as discussed above. In the instant case, no such documents are filed and no steps taken by the assessee which could establish the aforesaid three ingredients.

44. Additional evidence in the form of bank statement, etc. is given, but the assessee has not done anything to prove these bank accounts. On this evidence produced by the assessee, remand report was called for and the AO in his remand report dated 23.12.2003 submitted as under :

> "None of the 6 alleged share holders produced any documents in support of their identity. The fact was intimated to the assessee vide order sheet entries dated 13.6.2002 & 17.3.2003 they are not assessed to tax. They have not produced any documentary evidence showing that they are capable of saving/investing any amount at all. If the persons produced are ITA No.5198/Del./2011 & 1354/Del./2012 not carrying relevant documents to establish their identity, creditworthiness at the time of recording of the statements and furnishing photo copy of some documents after a gap of substantial period, it is not possible to verify its correctness unless the concerned persons are produced with necessary documentary evidences (in original) in support of their identity and creditworthiness. The assessee has not even furnished basic requirements of share capital i.e. cheque number, date, amount(s), details of drawee bank etc. The assessee's bank account was also not produced. Hence the assessee's claim regarding investment by the share-holders remained unverifiable. No comments can now be offered at this stage without necessary verification. Proof of identity produced at a later stage cannot be verified in the absence of concerned person original documents."

45. Order of the CIT (A) clearly demonstrates that this remand report was sent to the assessee who had submitted his reply dated 10.02.2004, which is even reproduced in the order and thereafter the CIT (A) discussed the same in the light of certain decision cited before him and came to the conclusion that the assessee had not given satisfactory evidence to discharge the onus. It had merely given names of the arties without anything more. That would not be sufficient compliance. Even the an statement of the assessee which was submitted has not been proved.

46. For all these reasons, we are of the view that the assessee had not been able to discharge the onus ptomaine and addition was rightly made. We, therefore, answer the question in the negative and dismiss this appeal of the assessee."

4.2 When the facts of the present case are analyzed in the light of the aforesaid observations of the Hon'ble Court, it becomes clear that the evidences filed by the appellant company in order to discharge initial/primary burden which lay upon it were rebutted by the AO by way of going for spotting enquiries. As stated earlier, in the course of spot enquiries neither the share applicant companies were found existing at the given addresses nor any whereabouts of the responsible persons could be gathered by her. The AO has recorded a finding of facts that having received the report of the inspector, the fate of the enquiry was duly brought to the notice of the ld. Counsel of the appellant company and it was only thereafter that he was requested to produce the concerned parties for examination. In view of the aforesaid fact situation and keeping in view the result of enquiry got conducted by the ld. AO in the course of assessment proceedings and also keeping in view the basic parameters laid down by the Hon'ble Court in the case of Vijay Powers Generators Ltd (supra), I am of the view that the assessee had not been able to discharge the onus ptomaine and the addition of Rs.20500000 has been rightly made by the ld.AO. Accordingly, the addition in question is being sustained."

ITA No.5198/Del./2011 & 1354/Del./2012

6. Dissatisfied with the order of the CIT (A), assessee came in appeal before the Tribunal. Ld. Counsel for the assessee while impugning the order of CIT (A) has filed written submissions. Apart from these submissions, she has advanced arguments in detail. The submissions made by the ld. Counsel for the assessee read as under :-

> "a) Share capital of ` 205 lac received from 13 parties had been added by the AO u/s 68 of the Act basically on the ground that as per the report of Inspector parties were not existing at the given address and that 04 of the parties were appearing in the list of accommodation entries providers as detected by Investigation Wing. AO was also influenced by the fact that the assessee had not produced any of the parties.
>
> b) The existence and identity of the parties from whom share application money had been received by the assessee, was duly established by the assessee during the course of assessment proceeding as well as during appellate proceeding, supported with the evidence in the form of
>
> i) return of allotment Le. Form NO.2 submitted before ROC,
>
> ii) confirmation of all the 13 share subscribers who had applied for allotment of equity shares of the assessee Co.,
>
> iii) proof of allotment I PAN of all the entities,
>
> iv) proof of filing of income tax return of all the entities i.e. income tax return acknowledgements depicting the Ward / Circle where they were being assessed,
>
> v) copies of bank account statement of all the entities.
>
> c) It is stated that these share subscribers are still existing as is evident from the website of the Ministry of Company Affairs.
>
> d) Assessee had filed confirmations which were reflecting the amounts subscribed by the share subscribers, Cheque no, date of Cheque and the name of the bank on which, Cheque was drawn, also stating the no of shares allotted with face value and the date of allotment of the said shares.

Thus assessee had proved identity of the shareholders.

e) Assessee had established identity of the shareholders from PAN because before issuing PAN, Department requires address proof of the assessee. Similarly, even ROC requires address proof of the registered office of the assessee Co. Even from the Income Tax Returns, identity was established, moreover, banks also requires address proof before opening the accounts of the customers. Since the assessee had produced bank statement of all the 13 companies, identity had been duly established.

f) That the AO has made a reference to the information being available with the Department that M/s Ethnic Creations Pvt. Ltd, M/s Fair N Square Export Pvt. Ltd, M/s Sehgal Fluid Line & Equipments Pvt. Ltd and M/s Shattarchi Finance & Leasing Ltd were appearing in the list of accommodation entry providers. However, neither a copy of report of the Investigation Wing had been provided nor any statement of the Directors of the above said companies was provided stating that the assessee Co. had received cheques in lieu of cash paid to such companies on payment of commission. It was not available as to when this report was made available by the Investigation Wing, whether the statement was recorded even before receiving the Cheque by the assessee Co. etc. The finding of the AO was not based on any evidence or material. Moreover, even the information sent by the Investigation Wing, if any, had not been confronted by the AO to the assessee. The AO himself had not made any inquiries to the fact that the above said companies were entry providers. Thus the observation made by the AO was based on suspicion, surmises and conjectures. It is needless to say that mere suspicion cannot take the place of evidence as held by the Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd vs CIT (26 ITR 775) (SC)

g) The AO has very heavily relied upon the Inspector's report which had not been confronted to the assessee. Even the assessee was not aware of any inquiry made by the Inspector. It was obtained by the assessee only during the appellate proceeding before CIT(A).

h) It is also to be stated that addresses of some of the companies are the residential addresses of the Directors of the Companies and therefore, it is apparent that the report of the Inspector is incomplete or not genuine. It establishes that no proper inquiries had been conducted by him.

i) Inspector's report is also silent on the fact that in the cases of which companies, other Departments like FERA, VAT etc were behind them. The report of the Inspector is very vague based on no material.

j) The AO has wrongly stated that the Inspector's report was confronted to the assessee vide order sheet entry-dated 08.12.2009. Vide this entry, assessee had mere required the assessee to produce the share applicants. It was very categorically stated by the assessee vide letter-dated 14.12.2009 that the Directors of the Co. had approached all the 13 shareholders and had requested them to present themselves in person before the AO alongwith their books of accounts and relevant record. However, these parties had shown their reluctance stating that they had already given confirmations and other documents which were more than sufficient to establish their identity. Some of them had expresses their disgust / anger. Therefore, assessee had requested that the Department is empowered under the Income Tax Act to summon a person and also direct him to produce any document, it wants in connection with the assessment proceeding.

ITA No.5198/Del./2011 & 1354/Del./2012 However, the AO did not issue any summons to the shareholders. He did not make any inquiry which he was supposed to do, he closed the proceeding on 14.12.2009 itself and passed the order on 17.12.2009. Thus no proper opportunity has been given by the AO to the assessee.

k) It is submitted that the assessee had discharged the initial and primary onus laid upon it and this fact has also been accepted by the CIT(A) himself that the assessee had discharged the onus laid upon him. However, CIT(A) was wrong in saying that this onus had been rebutted by the AO by way of going for spot inquiries, during which, it was found that parties were not existing. The CIT(A) is also wrong in saying that vide order-sheet entry dated 08.12.2009, AO had brought the result of inquiry made by the Inspector to the notice of the counsel of the assessee and required him to produce the concerned parties. It was also wrong on the part of CIT(A) that the request of the assessee to the AO to provide an opportunity to cross examine the Directors / Promoters of the share applicant companies in case, was unacceptable.

l) It is a well established principle of law that any evidence collected by the Department at the back of the assessee and used against him in framing the assessment without confronting the same to the assessee either in the shape of statement or any other material had no evidentiary value. The evidences collected by the Department cannot be used against the assessee without affording the opportunity of cross examination. Kindly see:

> CIT vs Pradeep Kr Gupta (303 ITR 95) (Del) CIT vs SMC Share-brokers Ltd (288 ITR 435) (Del) CIT vs Pradeep Kumar Gupta (303 ITR 95) (Del)
>
> m) Reference is also made to the judgement of Supreme Court in the case of CIT vs Orissa Corporation (P) Ltd (159 ITR 78) wherein it was held that the assessee had given names and addresses of the alleged creditors, which were income tax assessees, their index nos. were also in the file of the Revenue, however, Revenue after issuing notices u/s 131 did not pursue the matter further and examined the source of income of the alleged creditors. There was no effort made to pursue the so called alleged creditors. In these circumstances, Supreme Court held that no addition could be made. The assessee had discharged the burden laid upon it.

In the present case also, it is an admitted fact that assessee had discharged the burden laid upon it, however, the AO did not issue the summons u/s 131 nor made any inquiry despite the request made by the assessee. In these circumstances, no additions could have been made.

n) CIT(A) has wrongly placed reliance on the judgement of Jurisdictional High Court in the case of Vijay Powers Generators Ltd vs CIT (333 ITR 119) wherein the assessee had not even discharged the primary onus laid upon it.

ITA No.5198/Del./2011 & 1354/Del./2012

o) It is submitted that the principles laid down in the various rulings are that the assessee Co. has to establish that the share-holders exists and they have invested in the share capital of the assessee Co. The assessee had produced substantial evidence before the AO in the form of confirmations, copies of applications for allotment of shares, copies of income tax returns, PAN, copies of companies master details obtained from ROC, the amount subscribed Cheque No, date of Cheque, name of the bank on which, cheques had been drawn, no of shares allotted with face value, date of allotment,

bank statement of the shares subscribers indicating the debit entries against Cheque issued to the assessee and the copy of bank statement of the assessee showing that the cheques were credited in the bank account of the assessee. The AO has made the additions without rejecting the material placed before him. AO has not made any efforts to make inquiry from the AO of these share subscriber companies.

It needs to be mentioned that in the case of CIT vs Sofia Finance Ltd (205 ITR 98) (Del) (FB), it has been held that if the shareholders are identified and it is established that they have invested money for the purchase of shares then the amount received by the assessee Co. would be regarded as a capital receipt and no additions can be made u/s 68 of the Act.

p) In r/o genuineness of the deposits, it is submitted that all the payment had been received by way of Account Payee Cheques. On a perusal of bank account statements of the respective share subscribers, it is amply clear that the respective shareholder had credits in their bank account by way of clearing, no cash had been deposited before issuing Cheque to the assessee companies.

q) The identity and creditworthiness of the shareholder and genuineness of the deposit has been in the present case more than established. Applicability of Section 68 to the share capital is very limited, as per law, the duty of the assessee is to prove only the identity of the shareholder as held in following cases:

> Sofia Finance Ltd (205 ITR 98) (Del) (FB) CIT vs Steller Investment Ltd (192 ITR 287) (Del) CIT vs Steller Investment Ltd (251 ITR 263) (SC) Achal Investment Ltd vs CIT (268 ITR 211) (Del) DCIT vs Esteem Towers (P) Ltd. (99 TTJ 472) (Del) CIT vs Dolphin Canpack Ltd (204 CTR 50) (Del) CIT vs Glocom Impex (P) Ltd. (205 CTR 571) (Del) CIT vs Gangaur Investment Ltd. (335 ITR 359) (Del) CIT vs Dwarkadhish Investment (P)Ltd. (330 ITR 298)(Del)
>
> r) Regarding credit worthiness, it is submitted that assessee was not required to prove the source of the source as has been held by the Supreme Court in the case of CIT vs Daulat Ram Rawat Mull (87 ITR 349)(SC).

ITA No.5198/Del./2011 & 1354/Del./2012

s) In the case of Sarogi Credit Corporation vs CIT (103 ITR 344), Patna High Court have held that once the identity is established and the creditor pledged with oath that they have advanced the amount in question to the assessee, the burden shifts to the Department to show as to why it must be held that entry, though purporting to be in the name of 03rd party, still represented the income of the assessee from suppressed sources.

t) Hon'ble Jurisdictional High Court in the case of CIT vs Value Capital Services Ltd. (307 ITR 334) have held that the additional burden lay on the revenue to show that even if the applicant does not have means to make the investment in shares, the investment has emanated from the coffers of the assessee. In case, this additional burden is not discharged, the investment cannot be treated as

undisclosed income of the assessee.

u) Hon'ble Jurisdictional High Court in the case of CIl vs Divine Leasing & Finance Ltd. (299 ITR 268), General Exports & Credit Ltd. and Lovely Exports (P) Ltd. have after considering the various judgement deleted the addition made by the AO u/s 68 of the Act holding that the assessee had discharged its onus of proving the identity of the share subscribers. Had any suspicion still remained in the mind of the AO, he could have initiated coercive process but this course of action had not been adopted. Similar are the facts of the present case, assessee had discharged the onus laid upon it. If the AO had any suspicion in his mind on the basis of ITI report, he could have initiated coercive process but he had not issued even the summons u/s 131 of the Act. This judgement have been upheld by the Hon'ble Supreme Court in the case of CIT vs Lovely Exports (P) Ltd. (216 CTR 195), (319 ITR ST 5).

v) Thereafter, the judgement of the Delhi High Court in the case of CIT vs Oasis Hospitalities (P) Ltd. (333/119), wherein it is held that where the assessee had filed copies of PAN, acknowledgement of filing ITRs of the companies, there bank account statements for the relevant period but had not produced the Directors of the Co., the addition made by the AO could not be sustained as the primary onus had been discharged by the assessee. The AO had not investigated whether the modus operandi by the entry operator discussed by the Investigation Wing existed in the present case or not.

w) Now the latest judgement has been delivered by the Jurisdictional High Court on 23rd December 2011 in the case of CIT vs Kamdhenu Steel & Alloys limited (ITA NO.972 of 2009) wherein the Hon'ble High Court has discussed the entire case law on the subject that where the assessee had given the required information by way of furnishing confirmations, PAN, copy of returns, bank account details etc. Then the burden shifts on Revenue, the fact that the parties do not exist at the given address, no doubt raises the suspicion but it has to be conclusively established by the Assessing Officer that company is non-existent. In these circumstances what is to be done by the Assessing Officer and what is not has been done ITA No.5198/Del./2011 & 1354/Del./2012 by the Assessing Officer, has been explained by the Hon'ble Court in Para 36 of the order. In Para 40, it is concluded that once adequate evidence 1 material is given, which would prima facie discharge the burden of the assessee in proving the identity of share holders, genuineness of the transaction and credit worthiness of the share holders, thereafter in case, such evidence is to be discarded or it is proved that it has "created" evidence, the revenue is supposed to make thorough probe of the nature indicated in the order before it could mail the assessee and fasten the assessee with such a liability u/s 68 & 69 of the Act. The !J Hon'ble Court has also observed that for the negligence on the ' l!;:) part of Assessing Officer for not making inquiry, matter cannot be remanded back and the Assessing Officer cannot be provided with fresh inning.

x) However, in the case of CIT vs Nova Promoters & Finlease (P) Ltd. (ITA No. 342 of 2011, decided on 15.02.2012), Delhi High Court have confirmed the addition on the basis of facts of that case. In para 38 of the order, it is categorically observed that a ratio of a decision is to be understood and appreciated in the background of the facts of that case. Again in the case of CIT vs Goel Sons Golden Estate (P) Ltd. (ITA No. 212 of 2012 decided on 11.04.2012), Hon'ble Delhi High Court has deleted

the addition on account of share application money in the background of the facts that the assessee during the course of assessment proceedings had filed various details as has been filed by the present assessee. The AO had not conducted any inquiry in consequent thereto and had closed the proceedings. Accordingly, the Hon'ble Court held that in the absence of inquiries and non-verification of the details at the time of assessment proceeding, the factual finding recorded by the AO were incomplete.

y) In the case of CIT vs Expo Globe India Ltd.(ITA NO.1257 of 2011 decided on 20.07.2012), Hon'ble Delhi High Court had again deleted the additions on similar facts holding that the assessee had produced considerable material including ITRs, Balance Sheets, ROC particulars, bank statements etc. and on consideration of the same, CIT(A) had deleted the additions. Even ITAT had confirmed the order of CIT(A) and thus Hon'ble High Court dismissed the appeal filed by the Revenue.

z) The recent order of the IT AT Delhi Bench in the case of ITO vs India Texfab Marketing Ltd. (ITA NO.1177/Del/2012 decided on 05.10.2012) is worth noting. In this case, the Tribunal has considered all the judgement including Nova Promoters on the subject and thereafter deleted the addition made by the AO on account of share application money. Hon'ble Bench observed that there was an adverse material against the assessee in the case of Nova Promoters which was not there in the present appeal. Hence Nova Promoters is not applicable.

In view of above, additions of `205 lac made by the AO on account of share application money u/s 68 of the Act cannot be sustained and be deleted in the interest of justice.

ITA No.5198/Del./2011 & 1354/Del./2012

7. On the other hand, the ld. DR has also filed written submissions. He pointed out that the ld. Counsel for the assessee has relied upon a large number of decisions of Hon'ble Supreme Court as well as Hon'ble Delhi High Court. According to him, a judgment is based on facts direct as well as inferential and on the legal principle relating to those facts. The judgment should not be put in service merely on the basis of its result, rather it is the ratio flowing from the judgment is required to be followed by the authorities below. In the written submissions, he has not given the name of the case but put reliance upon the decision of Hon'ble Supreme Court reported in (1996) 6 SCC page 44. Referring to section 68 of the Act, he contended that this section contemplates fulfillment of three conditions before considering the explanation of assessee and with regard to source of any money found credited in the books of the assessee. According to him, assessee has to prove the identity of the creditor, genuineness of the transaction and the creditworthiness. The explanations given by the assessee in the shape of permanent account number, income-tax returns and confirmations are to be considered in a way to prove the identity of the creditor and if, on verification of these details, it revealed that such details are on papers only, then the onus discharged by the assessee in order to explain the identity of the share applicant would again shift upon the assessee. For buttressing his contention, he relied upon the judgment of Hon'ble Delhi High Court in the case of CIT ITA No.5198/Del./2011 & 1354/Del./2012 vs. Nova Promoters & Finlease (P) Ltd. in ITA No.342/2001 dated 15.02.2012. He placed on record copy of the order. He further relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. P. Mohanakala, 291 ITR 278. The ld. DR while

emphasising on the expression, "The assessee offers no explanation." employed in section 68 of the Act pointed out that explanation offered by the assessee mean that explanation should be reasonable and acceptable as regards the sums found credited in the books maintained by the assessee. He also pointed out that opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory should be based on proper appreciation of material and other attending circumstances. Ld. DR on the strength of Hon'ble Supreme Court's decision in the case of Sumati Dayal vs. CIT reported in Suppl. (2) SCC page 453 has apprised us how to appreciate the material available on record. He also relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. Durga Prasad More reported in 82 ITR 540 and submitted that evidence available on the record has to be weighed according to the human probabilities.

8. We have duly considered the rival contentions and gone through the record carefully. Section 68 of the Act contemplates that where any sum found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or ITA No.5198/Del./2011 & 1354/Del./2012 the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee for that previous year. A plain reading of section 68 would indicate that when any money is found to be credited in the books of the assessee, then, it is the assessee who has to offer an explanation about the nature and source thereof. The Assessing Officer found a credit of Rs.2.05 crores in the books of the assessee in the shape of share application money. It is for the assessee to explain the source of share application money and its nature. In order to fulfill such conditions, assessee has to prove the identity of the share applicants, genuineness of the transactions and creditworthiness of the share applicants. The assessee has submitted list of the persons to whom shares were allotted along with their addresses as per its record and their income-tax PAN particulars. The assessee has also produced copy of the return filed with the Registrar of Companies indicating the shares allotted by it. It has filed confirmations from the share applicants. It has filed copy of the bank accounts of some of the share applicant showing the payment for the share application money to the assessee company. It has also filed copy of its bank account showing receipt of share application money. It has filed acknowledgement of income-tax return for the assessment year in which share application money was received by the assessee. On the strength of these documents, it was contended by the assessee that it has proved identity ITA No.5198/Del./2011 & 1354/Del./2012 of the share applicants by producing their confirmations and the details of their income-tax returns. On the strength of bank statements, it was contended that transactions were genuine. On the strength of income-tax particulars and the status of share applicant companies, it was contended that they have contributed the money through account payee cheques and it suggests that they are worthy of credence. The assessee had made reference to a large number decision. The Assessing Officer did not find the force in the claim of the assessee on the ground that details submitted by the assessee were merely available on papers. In fact, these share applicant companies are not working as claimed by the assessee. We have taken note of the detailed reasoned finding of ld. CIT (A). The contentions of the ld. Counsel for the assessee before us were that assessee has proved the identity and it has demonstrated the genuineness of the transactions. The only evidence possessed by the Assessing Officer is the inspection report of the inspector. This report was not confronted with the assessee at the time of assessment proceedings and, therefore, its cognizance cannot be taken. For buttressing this contention, ld.

Counsel for the assessee relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Pradeep Kumar Gupta reported in303 ITR 95. Thus, according to the ld. Counsel for the assessee, if this report is excluded from the record on the ground that assessee was not granted an opportunity to explain its position qua the report, then, there is no evidence available with ITA No.5198/Del./2011 & 1354/Del./2012 the Assessing Officer to doubt the evidences submitted by the assessee. She had relied upon number of judgments, namely, Sofia Finance Ltd (205 ITR

98) (Del) (FB), CIT vs. Value Capital Services P. Ltd. reported 307 ITR 334, CIT vs. Divine Leasing and Finance Ltd. 299 ITR 268 and CIT vs. Lovely Exports P. Ltd. (2008) 216 CTR (SC) 195 She has also relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Kamdhenu Steel Ltd. reported in 248 CTR 33/206 Taxman 254 and apprised us as to how this Tribunal should not remand the matter back to the Assessing Officer for further investigation.

8.1 On an analysis of these case laws, we find that time and again, this controversy is baffling not only to the Tribunal but to the Hon'ble High Court as well as Hon'ble Supreme Court. Hon'ble High Court had an occasion to deliver number of judgments on this issue. Let us first consider the observations made by the Hon'ble Court in some of the cases before embarking upon the view required to be taken in the present case. In a recent judgment delivered in the case of CIT vs. Fair Finvest Ltd. in ITA No.232/2012, Hon'ble High Court has considered the judgment of Nova Promoters & Finlease (P) Ltd. also and made following observations :-

> " This Court has considered the submissions of the parties. In this case the discussion by the CIT (Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for ITA No.5198/Del./2011 & 1354/Del./2012 company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68.
>
> Having regard to the entirely of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (Supra).

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

In the case of Kamdehenu Steel Ltd., Hon'ble Delhi High Court has made the following observations which was emphasized by the ld. Counsel for the assessee :-

> ITA No.5198/Del./2011 & 1354/Del./2012 "12. What does follow from the aforesaid? It is not in doubt that the assessee had given the particulars of registration of the investing/applicant companies; confirmation from the share applicants; bank accounts details; shown payment through account payee cheques, etc. As stated by us in the beginning, with these documents, it can be said that the assessee has discharged its initial onus. With the registration of the companies, its identity stands established, the applicant companies were having bank accounts, it had made the payment through account payee cheques.
>
> 13. No doubt, what the AO observed may make him suspicious about such companies, either their existence, which may be only on papers and/or genuineness of the transactions.

When he found that investing companies are not available at given addresses or that the issuance of the cheque representing share application money or preceded by the deposit of cash in the bank account of these investment companies.

14. The important question which arises at this stage is as to whether on the basis of these facts, could it be said that it is the assessee which has not been able to explain the source and receipt of money. According to the assessee, he had given the required information to explain the source and was not obligated to prove source of the money. It is the submission of the assessee that even in case there is some doubt about the source of money in giving into coffers of the share applicants which they invested with the assessee, it would not automatically follow that the said money belongs to the assessee and becomes unaccounted money. According to us, the assessee appears to be correct on this aspect. We feel that something more which was necessary and required to be done by the AO was not done. The AO failed to carry his suspicious to logical conclusion by further investigation. After the registered letters sent to the investing company had been received back undelivered, the AO presumed that these companies did not exist at the given address. No doubt, if the companies are not existing, i.e., they have only paper existence, one can draw the conclusion that the assessee had not been able to disclose the source of amount received and presumption under Section 68 of

the Act for the purpose of ITA No.5198/Del./2011 & 1354/Del./2012 addition of amount at the hands of the assessee. But, it has to be conclusively established that the company is non-existence.

15. The AO did not bother to find out from the office of the Registrar of Companies the address of those companies from where the registered letter received back undelivered. If the address was same at which the letter was sent or the Inspector visited and no change in address was communicated, perhaps it may have been one factor. In support of the conclusion which the AO wanted to arrive at, that by itself cannot be treated as the conclusive factor. As pointed out above, these applicant companies have PAN and assessed income tax. No effort was made to examine as to whether these companies were filing the income tax return and if they were filing the same, then what kind of returns these companies were filing. If there was no return, this could be another factor leading towards the suspicion nurtured by the AO. Further, if the returns were filed and scrutiny thereof reveals that such returns were for namesake, this could yet another be contributing factor in the direction AO wanted to go. Likewise, when the bank statements were filed, the AO could find out the address given by those applicant companies in the bank, who opened the bank accounts and are the signatories, who introduced those bank accounts and the manner in which transactions were carried out and the bank accounts operated. This kind of inquiry would have given some more material to the AO to find out as to whether the assessee can be convicted with the transactions which were allegedly bogus and or companies were also bogus and were treated for namesake. We say so with more emphasis because of the reason that normally such kind of presumption against the assessee cannot be made as per the law laid down in various judgments noted above. Just because of the creditors/share applicants could not be found at the address given it would not give the Revenue a right to invoke Section 68 of the Act without any additional material to support such a move. We are reminding ourselves of the following remarks of a Division Bench of this Court in its decision dated 02.8.2010 in the case of CIT v. Dwarkadhish Investment (P) Ltd. [2010] 194 Taxman 43 /[2011] 330 ITR 298 (Delhi) in the following words:

> ITA No.5198/Del./2011 & 1354/Del./2012 "Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke Section 68. Once must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "source of source". (Emphasis supplied) x x x x x x x x x x x x x x x "During the arguments, we had posed these queries. Ld. Counsel appearing for the Revenue understood the limitation of their case. For this reason, a fervent plea was made that this case be remitted back to the AOs to enable him to make further investigation.
>
> However, in the facts and circumstances of these, would be difficult to give such an opportunity to the Revenue. cases There are number of reasons for denying this course of action which are mentioned below:
>
> It is not a case where some procedural defect or irregularity had crept in the order of the AO. Had that been the situation, and the additions made by the AO were deleted because of such infirmity, viz., violation of principle of natural justice, the Court

could have given a chance to the AO to proceed afresh curing such procedural irregularity. One example of such a case would be when statement of a witness is relied upon, but opportunity to cross-examine is not afforded to the assessee.

On the contrary, it is a case where the AO(s) did not collect the required evidence which they were supposed to do. To put it otherwise, once the assessee had discharged their onus and the burden shifted on the AO(s), they could not come out with any cogent evidence to make the additions. No doubt, as indicate by us above, the AO(s) could have embarked upon further inquiry. If that is not done and the AO(s) did not care to discharge the onus which was laid down, for this "negligence" on the part of the AO(s), he cannot be provided with "fresh innings".

ITA No.5198/Del./2011 & 1354/Del./2012 The order of the AO(s) had merged in the order of the CIT(A) and in some of the cases before us and before the CIT(A), the assesses had succeeded.

This court is acting as appellate court and has to act within the limitations provided under section 260 of the Act. The appeals can be entertained only on substantial questions of law. In the process, this Court is to examine as to whether the order of the Tribunal is correct and any substantial question of law arises therefrom. The Tribunal has passed the impugned orders, sitting as appellate authority, on the basis of available record. When the matter is to b examined from this angle, there is no reason or scope to remit the case back to the AO(s) once it is found that on the basis of material on record, the order of the Tribunal is justified. Even the Tribunal acts purely as an appellate authority. In that capacity, the Tribunal has to see whether the assessment framed by the AO, all for that matter, orders of the CIT(A) were according to law and purportedly framed on facts and whether there was sufficient material to support it. It is not for the Tribunal to start investigation. The Tribunal is only to see as to whether the additions are sustainable and there is adequate material to support the same if not the addition has to be deleted. At that stage, the Tribunal would not order further inquiry. It is to be kept in mind that the AO is prosecutor as well as adjudicator and it is for the AO to collect sufficient material to make addition. There may be exceptional circumstances in which such an inquiry can be ordered, but normally this course is not resorted to.

In the facts of these cases, where the appeals relate to the assessment years, which are of 7-8 years old or even more and going by the nature of evidence which is required, it may not."

In the case of CIT vs. M/s. Neelkanth Ispat Udhyog Pvt. Ltd reported in 12 Taxman India Online 606 rendered in ITA No.427/2012, Hon'ble High Court has made following observations :-

> ITA No.5198/Del./2011 & 1354/Del./2012 "12. It would be clear that the nature of enquiry undertaken by the income tax authorities would vary from case to case, depending on the nature of the material furnished to them by the assessee, when called upon to do so. In this case, the material in the form of addresses and documents pertaining to the share applicants of the assessee were enquired into thoroughly by the AO. He found a pattern in the way funds were moved into the accounts of those investors. The pattern was common to each of them; the amounts were received within a few days or weeks before the shares were allotted; there was no material to show how they knew that shares could be purchased. Furthermore, the AO's efforts to get them involved, through summons were unsuccessful. The applicant made no attempt to assist the AO in these proceedings. While it is true that the AO did look into the investigation report and did not allow cross examination of the individuals who made the statement under Section 131 of the Act, that alone cannot be termed as a fatal infirmity in his order.

Even if that material were to be ignored, the pattern of share money infusion was the same; amounts were usually deposited in the account of the share applicants a few days before the issue of the shares. Moreover, the material provided about the share applicants' financial and fiscal standing was sketchy; they did not respond to summons under Section 131. Under these circumstances, the inferences drawn by the AO were justified and warranted. The Appellate Commissioner and the Tribunal fell into error in directing their deletion.

13. For the above reasons, this Court is of opinion that the revenue's appeal has to succeed. The questions framed are answered in the affirmative, in favour of the revenue; the impugned order (and that of the Appellate Commissioner), are hereby set aside and the order of the AO is restored. The Appeal is therefore allowed."

Similarly, it is also worth to take note of Hon'ble Court's observation in the case of CIT vs. N.R. Portfolio (P.) Ltd. reported in (2013) 29 taxmann.com 291 (Delhi) rendered in ITA No.134 of 2012, which read as under :-

> ITA No.5198/Del./2011 & 1354/Del./2012 "8. This court is conscious of a view taken in some of the previous decisions that the assessee cannot be faulted if the share applicants do not respond to summons, and that the state or revenue authorities have the wherewithal to compel anyone to attend legal proceedings. However, that is merely one aspect. An assessee's duty to establish that the amounts which the AO proposes to add back, under Section 68 are properly sourced, does not cease by merely furnishing the names, addresses and PAN particulars, or relying on entries in a Registrar of Companies website. One must remember that in all such cases, more often than not, the company is a private one, and share applicants are known to it, since they are issued on private placement, or even request basis. If the assessee has access to the share applicant's PAN particulars, or bank account statement, surely its relationship is closer than arm's length. Its request to such concerns to participate in income tax proceedings, would, viewed from a pragmatic perspective, be quite strong,

because the next possible step for the tax administrators could well be re-opening of such investor's proceedings. That apart, the concept of "shifting onus" does not mean that once certain facts are provided, the assessee's duties are over. If on verification, or during proceedings, the AO cannot contact the share applicants, or that the information becomes unverifiable, or there are further doubts in the pursuit of such details, the onus shifts back to the assessee. At that stage, if it falters, the consequence may well be an addition under Section 68. This court recollects the robustness with which the issue was dealt with, in A. Govindarajulu Mudaliar v CIT, (1958) 34 ITR 807, in the following terms:-

"Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the ITA No.5198/Del./2011 & 1354/Del./2012 receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs."

9. Having regard to the totality of facts and circumstances, particularly the remand report, which was not considered by the Commissioner (Appeals) and the ITAT in its proper perspective, this Court is of the opinion that the question of law requires to be answered in favour of the revenue, and against the assessee. The appeal is therefore, allowed, but without any order as to costs."

On an analysis of the authoritative pronouncements of Hon'ble High Court in various judgments, some of which referred by us in the foregoing paragraphs, it emerges out that Hon'ble Court has categorized this issue in two segments.

One segment is where Assessing Officer has received information from investigation wing and did not carry out any investigation on the information.

He made the additions by treating such information as a gospel truth. The Hon'ble Court has upheld the deletion of additions. The other segment is where Assessing Officer has made enquiries and tried to locate the share ITA No.5198/Del./2011 & 1354/Del./2012 applicants but failed to locate them and assessee did not produce the Principal Officers or Directors or individual share applicants then additions may not be deleted because, in such cases, the Assessing Officer will not be in a position to investigate the genuineness or the veracity of the share applicants. It is also difficult to find out from where the share applicants had brought the money, whether they are entry providers or they are genuine share applicants. In the present case, the Assessing Officer had deputed the inspector to make a spot enquiry and he reported that none of these companies were ever operated from those places. The ld. Counsel for the assessee has tried to dislodge this finding of the Assessing Officer on the ground that inspector's report was not communicated to the assessee, it was only given at the time of first appellate stage. To our mind, it is incorrect to suggest that assessee was not confronted with the outcome of the inquiry. Vide order sheet entry dated 08.12.2009, assessee was apprised that none of the 13 parties were found existing on the given address. The reply of the assessee to this query is available on page no.1 of the paper book. It submitted vide letter dated 14.12.2009 that the Directors of the company had apprised all the 13 shareholders and requested them to present themselves in person before the Assessing Officer. This suggest that claim of the assessee that outcome of the inspector's investigation was not confronted is incorrect. The assessee is a private limited company. As observed by the Hon'ble High Court in the case of N.R. ITA No.5198/Del./2011 & 1354/Del./2012 Portfolio (P.) Ltd. that in a private limited company, share applicants are known to the Directors of the assessee company. Had the assessee submitted to the ld. Assessing Officer vide letter dated 14.12.2009 that these are the Principal Officers/Directors of the share applicant companies and these are their residential addresses, you issue the summons and send the process server with the representative of the assessee to effect the service on those persons, then, there could be some substance in the plea of the assessee. By merely pleading that it has approached the shareholders for appearing before the Assessing Officer, who refused to appear, would not absolve the assessee from its duty to file correct and latest addresses, more particularly when it is claiming the bona fide and honesty in its dealing. This type of statement is a self-serving statement only to make space for raising arguments in higher appellate forum. We have independently examined the other details submitted by the assessee. Ld. Counsel for the assessee during the course of hearing placed on record certain details in tabular form. Let us consider the details of first share applicant in these details, i.e. Bhalotia Industries. It has submitted that this company has a share capital of Rs.1 crore as on 31.07.2007. It has reserves and surpluses of unsecured loans and the total balance is of Rs.4,02,72,000/-. The audit report of this company ha been placed on page 229 of the paper book. This report is for the accounting period ending on 31.03.2008. The auditor has observed that this company has no fixed assets.

ITA No.5198/Del./2011 & 1354/Del./2012 This company has no stock. The company has not granted any loans secured or unsecured. The income shown by the company is a negative figure of Rs.1,587/-. In a way, this company is not carrying out any business activity.

This company has shown investments with others in Schedule-V but the details of investment are not available. Therefore, taking into consideration, the facts and circumstances and the failure of the assessee to comply with the requirement of the Assessing Officer in producing Principal

Officers/Directors of the share applicant companies, it failed to prove the identity as well as genuineness of the transaction. All these companies are not carrying out any business activities. They have shown very nominal income. It gives an inference that such returns were filed for creating evidence to be used in future. Ld. Revenue Authorities below have examined all these aspects in detail. In view of the above discussion, we do not find any merit in these grounds of appeal raised by assessee. They are rejected.

9. Ground Nos.3 & 4 : These grounds of appeal are interconnected with ground nos.1.1 & 1.2 in Assessment Year 2006-07. The grievance of the assessee in these grounds of appeal is that ld. CIT (A) has erred in confirming the addition of Rs.5,48,000/- and Rs.23,67,000/- incurred on the higher education of Shri Dushyant Poddar. The brief facts of the case are that according to the assessee, it is engaged in trading of shares and securities in the Stock Exchange of India. It has a turnover of Rs.23.4 crores. Hence, it was ITA No.5198/Del./2011 & 1354/Del./2012 essential for the assessee to have an MBA (Finance) in order to study the economy of India and other advance countries to catch the market moves and prospects. Nowadays an MBA trained graduate would command a salary of Rs.10 to Rs.30 lacs per annum, therefore, it has decided to finance the study of Dushyant Poddar, a graduate in economics from Delhi University, who was taken as an employee at a salary of Rs.10,000/-. He got admission in MBA (Finance) in UK and the assessee took the responsibility of his expenses. He executed a bond of five years for working with the assessee company at a salary ranging between Rs.10,000/- to Rs.25,000/-. According to the assessee, it is a profitable exercise for the assessee and it will save at least Rs.50,000/-

per month for the next five years after the return of Dushyant Poddar. Ld. Assessing Officer has rejected the claim of the assessee on the ground that Dushyant Poddar is the son of the Directors. It is a closely held company where majority shares are being held by Shri Lalit Poddar, Smt. Saroj Poddar and Kaladhar Impex & Traders Limited, who is controlled by Shri Lalit Poddar and Smt. Saroj Poddar, who are the father and mother of Dushyant Poddar. Therefore, according to the Assessing Officer, the personal expenditure for educating one's progeny has been tagged with the company.

He disallowed the claim.

10. On appeal, the ld. CIT (A) has confirmed the disallowance. Findings of ld. CIT (A) in Assessment Year 2007-08 read as under :-

> ITA No.5198/Del./2011 & 1354/Del./2012 "5.1 However, on a careful consideration, I find that the issue in question is covered against the assessee vide by my own order dated 12-11-2009 for the AY 2006-07 in the assessee' s own case wherein the following findings have been recorded :
>
> "3.4 In order to find out the factual position, as aforesaid, the learned counsels for the appellant company were requested to submit the copy of application made by Shri Dushyant Poddar for seeking admission for doing MBA alongwith all necessary declarations etc made for admission alongwith the sources of finance to meet the

educational expenses. This was done because no foreign university would even entertain any application, let alone granting admission~ without being satisfied with regard to the financial capacity of the candidate seeking admission. However, the appellant company has failed to file the necessary documents for the reasons best known to them. Thus, answer to the first question remains unanswered and goes against the assessee's claim that it was at the instance of the management of the company to send Shri Dushyant Poddar for doing MBA from a foreign university. Now coming to the second issue, namely, availability of services of Shri Dushyant Poddar for a minimum period of 5 years at a salary lower than the prevailing market rates, it is seen that in support of this claim the assessee company has filed a copy of an Employment Bond, purportedly, executed between the appellant company and Shri Dushyant Poddar on 1st April,2005. On a careful examination of the Employment Bond, as it is titled, it is seen that the document is executed on a plain paper and the same has not been certified/ attested by a notary or any other independent body. It is also not clear as to whether Shri Dushyant Poddar was already in employment with the appellant company or he was supposed to join as an employee after his return from the UK, as none of the clauses in the so called 'Employment Bond' has any specific information in this regard.

Further, the employment bond is also silent as to what was the qualification of Shri Dushyant Poddar other than the fact that he was son of the main Directors which inspired confidence and prompted the assessee company to select him for this costly training.

3.5 Interestingly, though the employment bond was executed on 1st April, 2005, Shri Dushyant Poddar had already been selected for doing MBA from the University in UK. This fact is clearly stated in clause (a) on page 1 of the employment bond.

3.6. Therefore, in the above fact situation, I do not find myself in agreement with the appellant company in so for as the claim that the expenditure of Rs.23,16,942/- was in connection with and necessitated out of business expediency of the appellant company. Accordingly, the disallowance of Rs. 23,16,942/- is being up-held."

5.2 In view of the aforesaid and looking to the commonality of circumstances, the disallowance made b the ld.AO is being sustained."

ITA No.5198/Del./2011 & 1354/Del./2012

11. Before us, the learned AR for the assessee relied upon the written submissions which read as under :-

"a) Expenditure incurred by the assessee on education and training of the employee is eligible for deduction u/s 37(1) of the Act. Copy of Section 37(1) is annexed at page 14.

b) As per provisions of Section 37(1) of the Act, any expenditure not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profit & Gains of Business or Profession".

c) As stated in the bio-data produced by the assessee before the CIT(A), Mr Dushyant Poddar was an employee of the assessee Co. from 01st April 2004 to 16th August 2005 and 20th September 2006 till date. Salary paid by the assessee to Mr Dushyant Poddar had been allowed by the AO in all the 03 years i.e. AY 2005-06, 2006-07 and in the year under consideration. Merely because Mr Dushyant Poddar is a son of Directors, assessee Co. does not loose the eligibility for deduction. Salary paid to Mr Dushyant Poddar in these years is as under:

AY 2005-06	:	`1,20,000/-
AY 2006-07	:	` 40,000/-
AY 2007-08	:	`1,24,932/-

No salary has been paid to Mr Dushyant Poddar from Aug.2005 to Sep.2006 as he was on study & training in UK.

d) Veracity and genuineness of the documents filed by the assessee either before AO or before CIT(A) has not been doubted.

e) The AO has disallowed the expenditure basically on the ground that the expenditure claimed by the assessee cannot be treated as business expenditure. It is to be stated that Mr Dushyant Poddar was a Graduate having BA in Economic (Hons) from University of Delhi when he was sent to UK for further studies in Business Administration and he was having good experience in securities market and F&O.

f) Observations of the AO that there was no necessity of any MBA in the business of purchase and sale of shares, was merely a presumption arrived at on surmises and conjectures. The business in stock market is a volatile business requires sharp mind, thorough studies in the results of the Co., economic viability of the companies in whose shares, investment was to be made I' and so on.

ITA No.5198/Del./2011 & 1354/Del./2012

g) While making addition u/s 14A of the Act, the AO himself has stated that investment decisions are complex in nature, I maintenance and management of the investments requires ongoing market research and analysis, the decisions regarding acquisition, retention, maintenance and disposal of investments \ necessarily entail administrative and other expenses. Therefore, the disallowance made by the AO is contrary to his own observations when he made the addition holding that there was no necessity of MBA (Master of Business Administration) in the business of purchase and sale of shares.

h) It is needless to say that the commercial expediency has to be seen from the view point of the businessman. As stated by the Jurisdictional High Court in the case of CIT vs Dalmia Cement (B) Ltd (254 ITR 377), the jurisdiction of the Revenue u/s 37(1) of the Income Tax Act is confined to deciding the reality of the business expenditure viz. whether the amount claimed as deduction was factually expended or laid out and whether it was wholly and exclusively for the purpose of business. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was nexus between the expenditure and the purpose of the business, the revenue cannot justifiably claimed to put itself in the arm chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits.

i) In the present case, incurring of expenditure has not been doubted. Mr Dushyant Poddar was a degree holder in Economic (Hons) having experience in the stock market. He was sent for further study in Business Administration subject to the condition that after coming back, he will serve the Co. at least for 05 years and in breach of contract, he will be liable to reimburse the entire expenditure incurred by the assessee. There was a direct nexus between the expenditure incurred and the business of the assessee and therefore, the expenditure incurred was wholly and exclusively for the purposes of the business, eligible for deduction u/s 37(1) of the Act. It is needless to say that reasonableness of the expenditure can be gone into by the AO only u/s 40A(2) of the Act, which has not been invoked in the present case. It is also to be stated that while examining the reasonableness of the expenditure, AO has not taken into consideration the expenditure incurred by the companies in the similar line of business. He has not compared the expenditure with other comparable companies and therefore, the observation made by the AO for making disallowance is contrary to law.

j) Observation of CIT(A) for failure to file copy of application made by Mr Dushyant Poddar for seeking admission has no relevance particularly in view of the fact that Mr Dushyant Poddar had received the degree from University of Bath, UK.

ITA No.5198/Del./2011 & 1354/Del./2012

k) The observation of CIT(A) that Employment Bond was silent with respect to certain conditions is also irrelevant. It is not necessary to execute a contract in writing. There may also be verbal contract. Therefore, weightage given by the CIT(A) to the Employment Bond is incorrect. It was only when Mr Dushyant Poddar was selected for doing MBA by University of Bath, UK that the Employment Bond was executed on 01.04.2005 otherwise, it would have been the futile exercise.

l) Bombay High Court in the case of Sakal Papers Pvt. Ltd vs CIT (114 ITR 256) has allowed the similar expenditure holding that the expenditure incurred on the foreign education of the daughter of the Directors was allowable as deduction in determining the business profit of the assessee Co. Hon'ble High Court have held that merely because there was no Commitment or Contract or Bond taken from the trainee, the expenditure which was otherwise proper, cannot be disallowed to the Co., particularly when as a result of that expenditure the trainee had secured both a degree and

training which would be of assistance to the assessee Co. and she had, in fact, served the Co. on her return to India.

m) Calcutta High Court in the case of Hindustan Aluminium Corporation Ltd vs CIT (159 ITR 673) have allowed the expenditure incurred by the assessee on 28 employees for advance training in foreign country, in order to enable the assessee to run its factory efficiently and competently. In the present case also, assessee had incurred expenditure on the training of his employee, being the son of the Directors, to run its business efficiently and competently.

n) Madhya Pradesh High Court in the case of CIT vs Kohinoor Paper Products (226 ITR 220) have also allowed similar expenditure to the assessee holding that the expenditure so incurred was not in the nature of capital expenditure or for personal expenses but was expended wholly and exclusively for the purpose of the business of the assessee.

o) Delhi High Court in Netco Exports Pvt. Ltd. vs CIT (206 Taxmann

491) has dismissed the appeal of the assessee on the ground that the daughter of Director had not executed any bond that she would work for assessee company and that on failure, she will return the money spent. It is submitted that in the present case, similar bond has been executed by Shri Dushyant Poddar. He has agreed to work for the assessee company for 05 years after completing his studies and in breach of the same, he would return the expenses to the assessee company. Hence the expenses are to be allowed.

p) In CIT vs RAS Information Technologies (P) Ltd. (238 CTR (KAR)

76), Karnataka High Court has allowed foreign education expenses incurred by the company on the son of a Director.

q) Madhya Pradesh High Court in CIT vs Naidunia News & Networking (P) Ltd. (210 Taxmann 73), has allowed similar expenses ITA No.5198/Del./2011 & 1354/Del./2012 holding that the same were incurred wholly and exclusively for the purpose of business of the assessee company. Merely because the student was a son of an ex-Director of a company, the same would not furnish a ground for disallowing the expenditure when on facts, the other conditions are satisfied.

In view of above, it is prayed that the expenditure claimed by the assessee is eligible for deduction."

12. On the other hand, ld. DR relied upon the judgment of Hon'ble Delhi High Court in the case of Natco Exports Private Limited rendered in ITA No.150/2012 decided on 12.03.2012. He pointed out that arguments raised by the ld. Counsel for the assessee are similar to those raised and considered in this judgment.

13. We have duly considered the rival contentions and gone through the record carefully. The case of the assessee is that expenses incurred by a company on the education of its employee are an allowable expenditure because that employee would render services to the assessee. The ld. Counsel

for the assessee highlighted that Shri Dushyant Poddar has executed a bond which suggest that he will work with the assessee company for five more years and help the assessee in its growth by his valuable ideas learnt while doing his MBA. She put reliance on the judgment of Hon'ble Madhya Pradesh High Court in the case of CIT vs. Nai Duniya News and Networking. The whole philosophy under which claim of education expense were made allowed/denied have been noticed by Hon'ble Delhi High Court while taking note of CIT (A)'s order in the case of Natco Exports Private Limited vs. CIT.

ITA No.5198/Del./2011 & 1354/Del./2012 It is advantageous to take note of the Hon'ble High Court's observation including the findings of CIT (A) in that case :-

> "2. Ld. counsel for the appellant relies upon paragraph 3 and 5 of the impugned order and submits that in the present case, the Tribunal has erred in holding that the expenditure incurred on education of one of the directors Ms. Ruchika Grover, who had undergone a course called Master of Science in Entrepreneurship at United Kingdom from University of Nottingham, was not expenditure wholly and exclusively incurred for the purpose of business. Ld. counsel for the appellant relies on decision of the High Court of Karnataka in Krishna Fabrications Ltd. Vs. Joint Commissioner of Income Tax (2010) 192 Taxman 287 (Kar). The relevant quote from the decision of Karnataka High Court reads as under :-
>
> "After hearing the learned counsel for the parties, we are of the view just because the two directors were children of the managing director, of the company, cannot be a ground for the AO to reject the claim of the assessee, until and unless. It is established that these two children of the managing director, sponsored to acquire higher education are not connected with the business of the company, even though they are directors. Since the vital issue has not been considered by the AO and such a mistake is committed by the CIT(A) as well as the Tribunal, we have no other business, except to set aside all the orders and remand the matter to the AO for fresh consideration without answering questions of law framed herein, keeping open all the contentions since the order of dismissal is in the nature of best judgment assessment."

3. Section 37 of the Act postulates that expenditure which is wholly and exclusively incurred for the purpose of business can be allowed as a deduction in computing the taxable business income. The twin conditions must be satisfied. The onus is on the assessee to show and establish that the twin conditions are satisfied. Personal expenses cannot be claimed under Section 37 of the Act.

ITA No.5198/Del./2011 & 1354/Del./2012

4. In the present case, the findings recorded by the CIT(Appeals) read as under :-

> "3.2 I have considered the submissions made by the authorized representative of the appellant company. During the course of present proceedings, it has been observed

that there were four directors in the appellant company namely Sh. Ajay Grover, Smt. Manju Grover, Ms Ruchika Grover and Sh. Naresh Inderpal Singh. It is further observed that in earlier years as well as in later years, the appellant company has not sent any of his employees/directors for studying abroad. Bio-data of Ms Ruchika Grover has been perused as per which the date of birth is 30.09.1984 and she completed her graduation from Shri Ram College of Commerce, Delhi University in the year 2005. The graduation result was declared on 12.07.2005 whereas Ms. Ruchika Grover applied to University of Nottingham, UK much earlier than the declaration of graduation result by Delhi University as in a later (sic.) dated 25.05.2005 written by Nottingham University to Ms. Ruchika Grover (intimating her selection for the post graduate course) clearly suggestive of the fact that the expenditure is in the nature of personal expenditure and has no relation with the business activities of the appellant company. The appellant company is a family concern where the parents of Ms. Ruchika Grover and Ms. Ruchika Grover are the directors. Sh. Naresh Inderapal Singh has been taken as director only till the time of property owned by him at Cottage No.9, West Patel Nagar, New Delhi-110008 is mortgaged to Union Bank of India with rider that he shall automatically cease to be the director of appellant company as and when the property is released from mortgage of the Bank meaning thereby that Sh. Naresh Inderpal Singh has no say in the day-to-day running of the appellant company. Ms. Ruchika Grover did Commerce from one of the very reputed institution of Delhi University is concerned and if the argument of the appellant company that higher studies shall benefit the appellant company then the same reasoning is applicable as far as doing graduation from Delhi University and the appellant or for that matter all other assessees doing business shall start taking the plea ITA No.5198/Del./2011 & 1354/Del./2012 that the studies are in connection with the business and hence to be allowed as "business expenditure".

3.2.1 The case laws of JB Advani & Co. Ltd. Vs JCIT (supra) and Sakal Paper P. Ltd. Vs. CIT (Supra), on which the appellant relied, are not applicable to the present case as these decisions had been distinguished later on is Mustang Mouldings P. Ltd. Vs ITO 306 ITR 361 (ITAT Mum) where the assessee company was controlled by the family members and it was held that the expenditure on higher education of a child was personal expenditure of father/parents. Reference can be made to the case law of Mac Explotec Pvt. Ltd. Vs Cit 286 ITR 378 (Kar) where the High Court held that the expenses incurred by the assessee company in sending its director's son aboard for training in general management were not allowable since the training did not pertain to the assessee s business. In doing so, the Karnataka High Court concurred with the ratios of case laws of CIT vs. Hindustan Hosiery Ind. 209 ITR 383, M. Subramanium Brothers vs. CIT 250 ITR 769 and CIT vs. R.K.K.R. Steels Pvt. Ltd. 258 ITR 306. As there is no business connection between the expenditure incurred on higher education of Ruchika Grover who went abroad for doing M.Sc. in Entrepreneurship immediately after completing her graduation and there being no history of the appellant company as far as sending its workforce abroad for training which can be said to have relation with relation with the business activities hence, I uphold the action of the Assessing Officer in making addition on account of expenditure relating to higher studies of Ms. Ruchika Grover. This ground of appeal is

taken as rejected accordingly".

5. The aforesaid findings are findings of fact and have been upheld by the Tribunal. We may also note that in the present case Ruchika Grover had not executed any bond that she would work for the appellant company after she completes the course and on failure shall return the money spent. The findings of the Tribunal clearly show that Ruchika Grover, who had completed her graduation in the year 2005 and immediately thereafter applied for further studies in University of Nottingham in United Kingdom. It is a case where she continued with her studies. The ITA No.5198/Del./2011 & 1354/Del./2012 said application for undertaking the studies abroad was made even prior to her completing the course. The alleged board resolution has rightly not been relied upon as it was not relied and filed before the Assessing Officer. Considering the facts and circumstances of the case, the aforesaid expenditure, it has been held, cannot be regarded as wholly and exclusively incurred for the purpose of business. The findings are findings of fact. The findings are not perverse."

In the present case also, there is no policy formulated by the assessee company vide which it had invited applications from all the employees for sponsoring their higher education. Rather we have confronted ld. Counsel to show whether any policy in principle is available in the company to provide assistance for higher education. The reply of the ld. Counsel was a negative.

Had Dushyant Poddar was not the son of the Directors, his education expenses would have not been met by the company. The assessee claimed that higher education of Dushyant Poddar would give a benefit of more than R.50,000/- per month to the assessee company but who has checked the credentials of Dushyant Poddar and what salary he would claim in the open market. Without there being any material on record, how the assessee can say that the decision to sponsor education of Dushyant Poddar was not influenced by the parental love and affection of the Directors. After taking into consideration the evidence on record, we do not see any reason to interfere in the orders of the ld. CIT (A) on this issue. The grounds of appeal in both the years are rejected.

ITA No.5198/Del./2011 & 1354/Del./2012

14. Ground Nos.5 to 7 : These grounds of appeal are interconnected with ground no.2 in Assessment Year 2006-07. The grievance of the assessee relates to the confirmation of disallowance u/s 14A read with Rule 8D of the Income-tax Rules. The brief facts of the case are that in Assessment Year 2007-08, the Assessing Officer has observed that assessee company had received dividend of Rs.6,19,091/-. However, it has not shown any expenditure for disallowance u/s 14A. Similarly, in Assessment Year 2006- 07, it has shown dividend income of Rs.7,03,311/- and it has not shown any expenditure which is relatable to earning of exempt income. In Assessment Year 2007-08, ld. Assessing Officer has straightway computed the disallowance on the basis of Rule 8D. He relied upon the order of ITAT's Special Bench in the case of Daga Capital reported in 117 ITD 169 (Mum). In Assessment Year 2006-07, he made an addition of R.2 lacs on an estimate basis.

15. The appeal to the CIT (A) did not bring any relief to the assessee.

16. The ld. Counsel for the assessee has placed elaborate arguments in her written submissions which read as under :-

> "a) Section 14A had been inserted by the Finance Act 2001 with retrospective effect from 01.04.1962.
>
> b) Object and purpose of inserting Section 14A is explained in the Memorandum explaining provisions in Finance Bill 2001 is reported at 248 ITR ST 162 at Pg 195.

ITA No.5198/Del./2011 & 1354/Del./2012

c) Explanatory notes on provisions of Finance Act 2001 are given in circular no.14 which is reported at 252 ITR ST 09. Explanatory notes on Section 14A is reported at page 86 Para 25.

d) The first Para of the Memorandum and the explanatory notes makes it clear that the provisions of Section 14A are attracted when deduction of expenditure have been claimed by the assessee in r/o exempted income. In the present case, no deduction has been claimed by the assessee. In fact, assessee is engaged in the business of sale/purchase of shares, the shares which could not be sold and held during the year, dividend was received with respect to some of these shares. Thus it is 1he income incidental and ancillary to the business activity of 1he assessee. Earning of dividend is not an outcome of any separate activity but it is an outcome of the same activity, income/loss of which has been declared as business profit/loss. Section 1 4A disallows only such expenditure which had been incurred in relation to earning of dividend income. As stated, assessee had incurred the expenditure during the course of its business activity. Expenses had been incurred only for the purpose of its business activity of purchase and sale of shares, positive I negative income of which, had been declared under the head "Business Income". Merely because assessee had received dividend on some of its shares, which could not be sold or are held during the year, it will not change the nature and character of expenditure. Since the assessee had not incurred any expenditure in relation to earning the dividend income, provisions of Section 14A are not attracted.

e) Section 14A has been amended by the Finance Act 2006 w.e.f. 01.04.2007 whereby the provision which was already existing was renumbered as sub-Section (1) and thereafter sub-Section (2) & (3) are inserted.

f) Notes on relevant clause of the Finance Bill is reported at 281 ITR ST 131 at page 139.

g) Similarly, memorandum explaining the relevant provision of the Finance Bill is reported at 281 ITR ST 178 at page 190.

h) Circular no.14 of 2006 dated 28.12.2006 giving explanatory notes on the relevant provision relating to Finance Act 2006 is reported in 288 ITR ST 09 at page 19 in Para 11.

i) Looking to the amended provision, it appears that Section 14A is applicable only if the AO, having regard to the accounts of the assessee is not satisfied with the correctness of the claim of the

assessee in r/o expenditure in relation to income which does not form part of total income. The provisions are amended because the existing provision had not provided the method of computing the expenditure incurred in relation to the income which does not form part of total income and there was dispute between the tax payer and the Department on the method of determining such expenditure. The satisfaction has to be recorded in writing. The ITA No.5198/Del./2011 & 1354/Del./2012 opinion of the AO has civil consequences and therefore, due opportunity has to be given to the assessee before applying the provisions. In the present case, before applying sub-Section (2) & (3), no opportunity has been given by the AO to the assessee.

j) The Bombay High Court in the case of Godrej Boyce Manufacturing Company Ltd. vs Deputy Commissioner of Income Tax (328 ITR 81) at 109 in Para (viii) & (ix) have observed that the AO can. proceed with the determination under the Rules only if he is not satisfied with the correctness of the claim of the assessee. Such a satisfaction is an objective satisfaction, which is a safeguard introduced by the legislature for a fair & reasonable exercise of power by the AO.

k) In the present case, dividend received by the assessee was incidental to the main business activity of the assessee, expenditure incurred for earning such business income is allowable u/s 28 to 43D particularly Section 36(1)(iii) and Section 37(1) of the Act. Merely because dividend is received by the assessee, it would not bring the expenditure out of the realm of Section 36(1)(iii) and Section 37(1) of the Act. If such an interpretation is given to the provisions of Section 14A then it would negate the exemption already allowed u/s 10(33) of the Act and would lead to an absurdity. Therefore, such interpretation has to be avoided.

l) In the present case, assessee has started its business from the year 1985 and since then the expenditure incurred by the assessee had been treated as business expenditure and had been allowed under various provisions of Section 28 to 43D of the Act, even after inserting the provisions of Section 14A of the Act by the Finance Act 2001. Nature and character of the expenditure has not been changed with insertion of Section 14A. Therefore, Rule of consistency would demand that the AO cannot disallow the business expenditure invoking provisions of section 14A of the Act.

m) Throughout all the years, assessee had shown the assets as trading assets and not as investment on capital account. As held by the Hon'ble Supreme Court in the case of G Venkatswarny Naidu & Co. vs CIT (35 ITR 594), it is the intention of the assessee at the time of making the purchase which is relevant. Where he purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, it would raise a strong presumption that the transaction is an adventure in the nature of trade. The presumption may be rebutted. In the present case, the AO has accepted that the assessee was in the business of dealing in shares, huge amount of sale and purchase i.e. `24,34,50,010/- and `25,02,24,463/- respectively reveals that the intention of 1he assessee was to resale the shares and not to hold the same. Merely because assessee had incidentally received some dividend, it will not convert the business expenditure into no expenditure or the expenditure related to exempted income.

ITA No.5198/Del./2011 & 1354/Del./2012 193 ITR 321 (SC) Radha Soami Satsang vs CIT

n) Again in the present case, the assessee had the paid-up share capital of `7,79,68,550/- whereas the shares were held to the tune of ` 6,66,11,001/- as on 01.04.2006 and of ` 6,57,63,752/- as on 31.03.2007. Thus there is a strong presumption that the assessee had purchased the shares out of its own funds. The loans whether secured or unsecured were taken by the assessee purely for the purposes of its business dealing,· which is voluminous in nature and therefore, any interest paid on such loan is eligible for deduction u/s 36(1)(iii) of the Act and does not call for any disallowance u/s 14A of the Act.

o) It is needless to say that the dividend received by the assessee was incidental and ancillary to its business activity and therefore, even if it is assessed as income from other sources, it is to be treated as "Business Income". Kindly see 55 ITR 17 (SC) CIT vs Chugan Das & Co.

57 ITR 306 (SC) CIT vs Cocanada Radha Soami Bank Ltd 80 ITR 21 (SC) Western States Trading (P) Ltd vs CIT 162 ITR 373 (SC) Brooke Bond Co. Ltd vs CIT 282 ITR 423 (Del) Excellent Commercial Enterprises & Investment Ltd

p) The use of the words "incurred" and "in relation to" together in Section 14A implies that the expenditure must be actually incurred for earning exempt income in order that the mischief of that Section can be invoked.

Punjab & Haryana High Court in the case of CIT vs M/s Hero Cycles Ltd (ITA NO.331 of 2009 dated 04.11.2009) have held tl1at disallowance u/s 14A can be made only where it is found tl1at assessee has incurred some expenditure, where it is found that for earning exempted income, no expenditure has been incurred, disallowance u/s 14A cannot stand. The contention of the revenue that directly or indirectly some expenditure is always incurred which must be disallowed u/s 14A and the impact of expenditure so incurred cannot be allowed to be set off against the business income which may nullify the mandate of Section 14A, cannot be accepted. Also see 318 ITR 417(Bom) CIT vs Shapoorji Pallonji & Co.

319 ITR 204 (P&H) CIT vs Winsome Textile Industries Ltd. 193 ITR 321 (SC) Radha Soami Satsang vs CIT

q) Even Supreme Court in the case of CIT vs Wallfort Share & Stock Brokers (P) Ltd (326 ITR 01 AT 17) have held that for attracting Section 14A, there has to be a proximate cause for disallowance of expenditure, which it is its relationship with the tax exempt income.

ITA No.5198/Del./2011 & 1354/Del./2012 This judgement has also been discussed by the Bombay High Court in 328 ITR 81 point (X) at page 117.

r) Section 14A does not authorize estimating the expenditure alleged to "have been" incurred CIT vs Printers House (322 ITR St. 7)(SC)-dismissing SLP of the Revenue against the order-dated 14.04.2009 passed by this Hon'ble Court in ITA No.227 of 2009.

CIT vs Sushma Kapur (319 ITR 299)(Del) CIT vs Chemical & Metallurgical Design Co. Ltd. (ITA No.803 of 2008 (Del)

s) The similar issue had arose before the Hon'ble Jurisdictional High Court in the case of Maxopp Investment Ltd. vs CIT (ITA No.587 of 2009 decided on 18.11.2011) in which it is held that the expression in relation to in Section 14A cannot be ascribed a narrow meaning. However, the expression "expenditure incurred" refers to actual expenditure and not to some imagined expenditure. It is also made clear that the actual expenditure that is in contemplation u/s 14A(1) of the Act is the "actual" expenditure in relation to or in connection with or pertaining to exempt income. The corollary to this is that if no expenditure is incurred in relation to the exempt income, no disallowance can be made u/s 14A of the Act. It is further held that the Assessing Officer is to satisfy himself with the claim of assessee with regard to the expenditure or no expenditure, as the case may be, the Assessing Officer is to accept the claim of the assessee in so far as the quantum of disallowance u/s 14A is concerned. In such eventuality, the Assessing Officer cannot embark upon a determination of the amount of expenditure for the purposes of Section 14A(1). In case, the Assessing Officer is not, on the basis of subjective criteria and after giving the assessee a reasonable opportunity, satisfied with the correctness of the claim of the assessee, he shall have to reject the claim and state the reasons for doing so. Having done so, the Assessing Officer will have to determine the amount of expenditure incurred in relation to income which does not form part of the total income under the Act.

t) It is to be submitted that as stated earlier assessee had held the shares as stock-in-trade which was purchased out of its own capital. Even if it is held that the stock was held I purchased out of borrowed money then also interest cannot be disallowed, merely because assessee had earned dividend on certain shares. In the following cases, it is held that though the income from dividend has to be assessed under a separate head, payment of interest by the assessee on amounts borrowed for purpose of investment must be allowed as business expenditure and not as expenditure incurred for earning dividend.

ITA No.5198/Del./2011 & 1354/Del./2012 125 ITR 227 (Guj) AT 238 Addl CIT vs Laxmi Agents Pvt. Ltd. 208 ITR 616 (Cal) CIT vs Rajeev Lochan Kanoria 238 ITR 777 (Bom) CIT vs Amrita Ben R Shah 210 ITR 991 (Cal) CIT vs Jardine Handersion Ltd 284 ITR 586 (Bom) CIT vs Emerald Co. Ltd 183 Taxmann 159 (Bom) CIT vs Srishti Securities (P) Ltd.

u) In CIT vs Frick India Ltd. (ITA No.1185/2008), ITAT has accepted 10% of the dividend income as reasonable for earning dividend income following the principle laid down in Section 80HHC and the same has been upheld by the Hon'ble Jurisdictional High Court.

v) It is submitted that as held by the Bombay High Court in the case of Godrej Boyce Manufacturing Company Ltd. vs Dy GIT (328 ITR 81) Rule 80 does not apply to AY 2007-08. It is observed at page 134 that it is a trite principle of law that the law which would apply to an A Y is the law prevailing on the first day of April. Consequently, Rule 80 which has been notified on March 24, 2008 would apply w.e.f. AY 2008-09.

w) It is also to be stated that the dividend received during the year reveals that out of a sum of `6,19,091/-, amount of ` 3,96,526/- had been received by the assessee on the shares held as opening stock, the expense, if any, in r/o which had been incurred during the preceding years and therefore, no expenditure can be attributed in the present year in the guise of Section 14A of the Act. Assessee has received dividend of ` 96,556.09 on the shares purchased during the year and sold during the year whereas a sum of `1,26,009.50 has been received by the assessee on shares purchased during the year and have been held as closing stock. This shows that the dividend has been received by the assessee incidentally due to his business activity.

x) In CCI Ltd. vs Joint Commissioner of Income Tax (2012) (20 Taxmann.com 196), Karnataka High Court have held that section 14A cannot be invoked when dividend is received by the assessee, dealer in shares, from unsold stock."

17. Ld. DR, on the other hand, submitted that though Assessing Officer has made the disallowance on the strength of Special Bench order of ITAT in the case of Daga Capital but ld. First Appellate Authority has considered the judgment of Hon'ble Mumbai High Court in the case of Godrej & Boyce vs. DCIT, 328 ITR 81 (Mum.) and thereafter confirmed the disallowance on an estimate basis. Therefore, no interference is required to be made.

ITA No.5198/Del./2011 & 1354/Del./2012

18. We have duly considered the rival contentions and gone through the record carefully. The assessment years involved herein are Assessment Years 2006-07 and 2007-08. As per the decision of Hon'ble Delhi High Court in the case of Maxopp Investment Ltd. vs. CIT reported in 347 ITR 272, the Hon'ble Court has held that Rule 8D is not applicable, prior to two Assessment Year 2008-09. Hon'ble Court has explained the ambit and scope of section 14A as well as Rule 8D and thereafter apprised as to how the disallowance has to be made in the years where Rule 8D is not applicable. The observation of Hon'ble Court from paragraph nos.29 to 32 read as under :-

> "Scope of sub-sections (2) and (3) of Section 14A
>
> 29. Sub-section (2) of Section 14 A of the said Act provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. However, if we examine the provision carefully, we would find that the Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the said Act. In other words, the requirement of the Assessing Officer embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure

incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub- section (2) of Section 14A. Sub-section (3) applies to cases ITA No.5198/Del./2011 & 1354/Del./2012 where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the said Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of Section 14A of the said Act. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the said Act in accordance with the prescribed method. The prescribed method being the method stipulated in Rule 8D of the said Rules. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same.

Rule 8D

30. As we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed".

We have already mentioned above that by virtue of Notification No.45/2008 dated 24/03/2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it clear that where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the Assessing Officer shall determine the amount of the expenditure in relation to such income in ITA No.5198/Del./2011 & 1354/Del./2012 accordance with the provisions of sub-rule (2) of Rule 8D. We may observe that Rule 8D(1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the provisions of Sub-sections (2) and (3) of Section 14A, the condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not

includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

31. It is, therefore, clear that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest [other than the amount of interest included in clause (i)] incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of the assessee, on the first day and the last day of the previous year. It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under Section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects - (a) ITA No.5198/Del./2011 & 1354/Del./2012 direct and (b) indirect. The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above. And, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value of the investment, income from which does not or shall not form part of the total income, is taken.

Do sub-sections (2) and (3) of Section 14A and Rule 8D apply retrospectively?

32. While examining the legislative history of Section 14A and Rule 8D, we have already noted that Section 14A, as introduced by virtue of the Finance Act, 2001, was with retrospective effect from 01.04.1962. The proviso was inserted by virtue of the Finance Act, 2002 and it was made clear that nothing in Section 14A empowered the Assessing Officer to either re-assess under Section 147 or pass an order enhancing the assessment or reducing the refund already made or otherwise increasing the liability of the assessee under Section 154, for any assessment year beginning on or before the first day of April, 2001. Thus, in respect of all the assessment years prior to the assessment year beginning on or before the 1st day of April, 2001, concluded assessments could not be disturbed despite the fact that Section 14A had been expressly made retrospective with effect from 01.04.1962. The provisions of Section 14A, which were retrospective with effect from 01.04.1962 are now encapsulated in sub-section (1) of Section 14A. It is also clear that sub-sections (2) and (3) of Section 14A were introduced subsequently by virtue of the Finance Act, 2006 and were introduced with effect from 01.04.2007. However, although sub- sections (2) and (3) had been introduced with effect from 01.04.2007, they remained empty shells inasmuch as the expression "such method as may be prescribed" got meaning only by the introduction of Rule 8D by virtue of the Income-tax (Fifth Amendment) Rules, 2008 which was notified by the Central Board of Direct

Taxes by its notification No.45/2008 dated 24/03/2008."

ITA No.5198/Del./2011 & 1354/Del./2012 Respectfully following the judgment of Hon'ble jurisdictional High Court, we deem it appropriate to set aside this issue to the file of the Assessing Officer for re-adjudication. Ld. Assessing Officer shall keep in mind the judgment of Hon'ble jurisdictional High Court while deciding the issue in both the years.

19. Ground Nos.8 to 15 : These grounds are interconnected with the solitary issue agitated by the assessee in its appeal against the order of CIT (A) dated 27.10.2011 passed u/ 154 as well as in its appeal against the order of ld. CIT(A) dated 11.11.2011 which was passed against the order of Assessing Officer dated 09.05.2011 which is an order giving effect of CIT(A)'s order dated 27.10.2011. Though the assessee has taken number of arguments in its grounds of appeal but its grievance revolves around three issues, namely, whether the activity of the assessee in purchase and sales of the shares is to be treated as a speculative activity by applying Explanation to section 73, if yes, then, how much loss is to be computed under the head 'Speculation loss'. The next contention is whether assessee is entitled to claim set off of the additions made u/s 68 against the brought forward business losses of earlier years as well as it is entitled to claim set off of the additions in this year against the losses in the share trading activities. The Assessing Officer has not applied Explanation appended to section 73 of the Act for treating the activity of sale and purchase of shares as a speculative activity but the ld. CIT (A) while exercising his powers co-terminus to the Assessing ITA No.5198/Del./2011 & 1354/Del./2012 Officer had issued a notice u/s 251(2) of the Act on 04.02.2011 inviting the explanation of the assessee as to why assessee be not treated as indulging in speculative business as per Explanation appended to section 73 of the Act. In response to the query of the CIT (A), the assessee has filed detailed written submissions which have been duly considered by ld. First Appellate Authority. The contentions of the assessee before the ld. CIT (A) were that Explanation appended to section 73 is not a substantive provision but it is appended only with a view to explain and clarify certain ambiguities which may crept in the statutory provisions. This Explanation cannot override the main provision and enlarge its scope. It was also contended that assessee is a registered broker with the SEBI and all the trading in these shares are through National Stock Exchange and Bombay Stock Exchange. The principal business of the assessee is acquiring, holding and dealing in shares and securities. It is also engaged in the broking business of shares since its inception. Thus, the income from business that is share dealing, share brokering, etc. is a composite business which has to be taken as a whole. If all these factors are located together then it would suggest that assessee is an investment company and Explanation appended to section 73 would not be applicable upon the activities of the assessee.

20. The ld. First Appellate Authority has rejected the contention of the assessee. According to the ld. First Appellate Authority, sub-section (1) to ITA No.5198/Del./2011 & 1354/Del./2012 section 73 provides that any loss computed in respect of speculation business carried on by an assessee shall not be set off except against profits and gains, if any, of another speculation business. Ld. CIT (A) has observed that Explanation provides the definition of expression "speculation business" for the purpose of section 73. It is not meant either to clarify any provision of law nor it is directed towards removing any ambiguities in the implementation of any statutory provisions. The ld. First Appellate Authority has held that out of the total income of Rs.24,43,85,488/-, income from sales of shares

and securities is Rs.24,34,50,010/-. Thus, it indicates that main income of the assessee is from the share dealings. It cannot be an income from other sources and, therefore, it cannot be held as an investment company. If the income of the assessee is not an income from other sources being earned from investment, then, the deeming fiction provided in Explanation to section 73 would come in play and brand the assessee engaged in the business of speculation. In this way, ld. CIT (A) has held that assessee is engaged in the speculation business. The loss incurred of share transaction is to be treated as speculation loss. The ld. First Appellate Authority thereafter computed the speculation loss and adjudicated the expenses for earning such speculative income.

21. Dissatisfied with the order of CIT (A) dated 28.02.2011, assessee has filed an application u/s 154 and apprised the ld. CIT (A) that it has committed ITA No.5198/Del./2011 & 1354/Del./2012 certain factual errors while computing the speculative losses. Ld. CIT (A) has disposed off this application vide order dated 27.10.2011 and arrived at a conclusion that there are certain apparent errors which crept in the order. Ld. CIT (A) has rectified those errors and directed the Assessing Officer to verify the facts and then computed the speculative losses.

22. In compliance to the order of the CIT (A) dated 28.02.2011, ld.

Assessing Officer has passed an order giving effect on 09.05.2011. The assessee was not satisfied with this order and filed an appeal before the CIT (A). This appeal has been disposed off by order dated 11.11.2011.

23. The ld. Counsel for the assessee has made elaborate arguments before us and also filed written submissions. Her written submissions read as under:-

> "a) As per Memorandum & Articles Of Association, the main objects of the assessee Co. are as under:
>
> i) to carryon the business of dealing in shares, stocks, debentures, debentures stock, bonds, obligations and securities issued or guaranteed by any Co. constituted or carrying on business in India or elsewhere and debentures, debentures stocks, bonds, obligations and securities issued or guaranteed by any Govt., State, Dominant, Sovereign, Ruler Commissioner, Public Body or Authority Supreme, Municipal, Local or otherwise whether in India or elsewhere,
>
> ii) to carryon the business and to Act as commission agents, brokers and to buy, sell and deal in stocks and shares.

Memorandum is enclosed at page 64.

b) In order to achieve these objects, assessee had registered itself with SEBI and was, during the relevant year, dealing in shares.

c) As per the Para 2 of the assessment order itself, the assessee Co. is engaged in the business of stocks and share broker and dealing in shares and securities and making investments.

ITA No.5198/Del./2011 & 1354/Del./2012

d) The assessee had during the year, purchased the shares and had sold them either on behalf of its constituents or on its own behalf. From the constituents, it had charged the commission and reflected the same as brokerage income in the Profit & Loss Ale. Similarly, assessee had purchased the shares and sold them on its own behalf. The profit / loss earned / incurred on shares and securities purchased and sold during the day itself had been shown as clearing difference whereas the shares which could not be sold during the day itself, were carried forward to the next cay and so on. As and when the same were sold, profit/loss earned/incurred thereon was reflected in the Trading and Profit & Loss Ale itself. Profit/loss earned / incurred on mark to mark (F&O) transaction was also reflected in the Profit & Loss Ale. It is also to be stated that during the process, the shares, which could not be sold within the short time and were held by the assessee, dividend was received, was also reflected in the Profit & Loss A/c as business income only. Thus the business of the assessee was a composite business. It was the single business activity of the assessee as per the object clause of MOA and therefore, income or expenses could not have been bifurcated by the AO.

e) Assessee Co. was incorporated in the year 1989-90 on 01.01.1990 and since then was declaring the income in the same manner as is declared in the present year. Explanation to Section 73 had been inserted by the Taxation Laws (Amendment) Act 1975 w.e.f. 01.04.1977 and in none of the years Revenue had treated part of income as speculation loss. Always the income had been treated as normal business income. Even the CIT(A) himself had decided the appeal of the same very assessee for immediately preceding year 15 months back i.e. on 12.11.2009 and no such action had been initiated. Facts and circumstances in this very year had not been changed and therefore, CIT(A) is not justified in initiating the proceeding for disallowance under Explanation to Section 73 of the Act, in view of the judgement of Supreme Court in the case of Radha Soami Satsang (193 ITR

321), Rule of Consistency would apply to the present year as well. Also see 244 ITR 734(Del) DIT(E) vs Apparel Export Promotion Council 245 ITR 492(Del) CIT vs Neo Polypack (P) Ltd.

281 ITR 346 (Del) CIT vs Dalmia Promotors Developers 300 ITR 75 (Del) DIT vs Escorts Cardia Diseases Hospital

f) CIT(A) has exceeded its jurisdiction while making disallowance invoking the provisions of Explanation to Section 73 of the Act. Explanation to Section 73 had been inserted by the Taxation Laws (Amendment) Act 1975 w.e.f. 01.04.1977. The scope and effect of the Explanation have been elaborated in Circular NO.204 dated 24.07.1976, which is reported at 110 ITR ST 21 AT 32, which is annexed at page 36 to

38.

g) It may be stated that Explanation to Section 73 had been inserted on the basis of recommendations of the Wanchoo Committee, which is ITA No.5198/Del./2011 & 1354/Del./2012 reported in the commentary of Sampath Iyanger, 10th edition, Vol-3, page 5002:

> "A tax avoidance device often resorted to by business houses controlling group of companies is manipulation of results from dealing in shares of the companies controlled by them. In our opinion, such manipulation in share dealings for the purpose of tax avoidance can be checked effectively if the results of dealing in shares by such companies are treated for lax purposes in a manner analogous to speculation. No doubt, companies whose main business activities center around investment in shares will have to be left out. Accordingly, we recommend that the results of dealing in shares by companies, other than investment, banking and finance companies, should be treated in a manner analogous to speculation business".

h) The provisions of Explanation to Section 73 are remedial in nature. Before inserting the Explanation, the loss of a speculation business was not being allowed against profit and gains of any other business. However, as per Wanchoo Committee's Report, the business housing controlling groups of companies were manipulating their results from share dealing in such a manner within the group so as to avoid the tax. Therefore, it was recommended to treat such companies other than investment, banking and finance companies as the companies carrying on speculation business. Accordingly, the Explanation was inserted. Circular NO.204 is also to the same effect. Therefore, it is evident that the Explanation has been inserted to cure the mischief or defect embedded into the main provision. Thus Explanation is remedial in nature and has to be strictly construed. Its scope cannot be widened so as to include all the companies dealing in shares. It is to be applied to the business houses controlling group of companies which were avoiding taxes. The present company does not fall within the ambit of such companies.

i) The term "Speculation business" has not been defined in the Section or under the Act, though the terms speculation transaction has been defined in Section 43(5). Speculative transactions means a transaction in which, a contract for purchase or sale of commodity including stocks and shares is settled otherwise than by actual delivery or transfer of the commodity or scrips. There are exceptions provided for hedging, jobbing or arbitrage transactions and from A Y 2006-07 trading in derivatives covered by Section 2 of Securities Contracts (Regulation) Act 1956 carried on in a recognized stock exchange. Therefore, speculation business envisaged under Explanation to Section 73 does not include such transactions i.e. hedging, jobbing etc., particularly in view of the fact that speculation business incorporated in Explanation has not been given any other meaning.

j) In the present case, assessee had entered into the transactions mark- to-mark (F&O) which cannot be treated as part of speculation business in ITA No.5198/Del./2011 & 1354/Del./2012 view of proviso (d) to Section 43(5). In the recent judgement of Bombay High Court in the case of CIT vs Shri Bharat R Ruhia (HUF) (199 Taxmann 87) have held that the exchange traded derivative transactions were not speculative transaction after the insertion of proviso (d) to Section 43(5) w.e.f. 01.04.2006 by the Finance Act 2005 as the inserted clause is prospective in nature. Thus CIT(A) has erred in treating the loss of ` 32,78,412/- as speculative loss. The true copy of Notes on Clauses (273

ITR ST 139 AT 149) & Memorandum explaining provisions (273 ITR ST 187 AT 207) are enclosed at page 41 to 42 and 43 to 45.

k) It is submitted that as stated in preceding paras, business of the assessee is a composite business i.e. dealing in shares on behalf of customers and on his own behalf. Therefore, the same cannot be bifurcated into the speculation business and non-speculation business. Entire profit/loss earned / incurred by the assessee is a normal business loss. The transactions involving purchase of shares which could not be sold during the day were carried forward to be subsequent date and sold thereafter. The loss incurred by the assessee from the transactions settled during the day itself had been shown by the assessee as clearing difference though the same is not speculation business. It is also to be stated that the shares are held by the main broker in Demat form on behalf of the assessee and therefore, it cannot be said that assessee was carrying on speculation business.

I) It is also to be stated that as per the AO himself, assessee has shown income from brokerage, dividend and interest and loss from share dealing. The AO has allocated a sum of ` 19,53,402/-to the exempted dividend income. Similarly, sub-brokerage expenses of ` 8,09,793/- have been allocated to brokerage income. If the administrative expenses are also allocated to it then under all the 03 heads, there are losses. Thus it can be said that assessee have not sought to adjust losses of so called speculation business against any other income. Therefore, provisions of Section 73 are not at all attractive. There was no occasion for the CIT(A) to apply the provisions of Explanation to Section 73 of the Act.

m) CIT(A) has treated a sum of ` 1 ,94,82,909/- as speculation loss, the details of which are as under :

share trading loss	` 76,21,702/-
loss arising out of Mark to Mark (F&O)	` 32,78,412/-
clearing difference	` 85,82,795/-
	`1,94,82,909/-

The loss of ` 76,21,701.91 can further be bifurcated as under :

> Loss due to valuation of stock as per mercantile Method ` 1,78,80,662.29 ITA No.5198/Del./2011 & 1354/Del./2012 Less Profit on sale of stock during the year ` 1,02,58,960.38 ` 76,21,701.91 If the provisions of Explanation to Section 73 are read carefully then it becomes evident that the business of purchase and sale of shares shall be deemed to be a speculation business only to the extent to which the business consist of purchase and sale of shares. Thus the deeming provision is applicable only to the loss incurred by the assessee on transfer of shares. In the present case, assessee has earned profit of `1,02,58,960/- from purchase and sale of shares. Loss is pertained to the valuation of stock as on 31.03.2007. It is needless to say that closing stock of the present year is the opening stock of the subsequent year and therefore, no prejudice is caused to the Department. Since long, assessee is adopting the method "cost or market value whichever is lower" for valuation of closing stock. Due

to this method adopted by the assessee that the loss has arisen. As per AS-2 (valuation of inventories) or AS-13(accounting for investment) it is a well recognized method of valuation and the assessee was consistently following this method.

In the case of Chainrup Sampatram vs CIT (24 ITR 481) Supreme Court have held that it is a misconception to think that any profit arises out of the valuation of closing stock. Though valuation of unsold stock at the close of an accounting year if; a necessary part of the process of determining the trading result of that period, it can in no sense be regarded as source of such profits. The source of the profit and gain of a business is indubitably the business.

It is submitted that the income can be taxed only if such has been accrued or arose during the course of business. It is the trading activity of the assessee due to which profit arises. Moreover, the closing stock of the present year will become the opening stock of the subsequent year and therefore there is no loss to the revenue. In CIT vs Shah Doshi & Company (133 ITR 23), Gujarat High Court have held that no profit could be said to arise out of the valuation of closing stock.

The purpose of showing closing stock in the Trading Account is to adjust the cost of only those goods which are sold during the year, so as to determine the true profit generated during the year out of business activities. The closing stock itself do not generate any profit.

It is again, though at the cost of repetition, stated that the loss on account of clearing difference may first be adjusted against the profit of ` 1,02,58,960.38 earned by the assessee on sale of stock and other expenses are also to be adjusted against this profit. Loss on account of valuation of stock cannot be said to be the loss on transfer of shares and therefore, deeming provision cannot be made applicable to it.

ITA No.5198/Del./2011 & 1354/Del./2012

n) In the case of Aman Portfolio (P) Ltd. vs DCIT (2005) (92 ITD 324) I (2005) (92 TT J 351), the identical issue have been involved and IT AT Delhi Bench itself have decided the issue in favour of assessee and" the scope of Explanation to Section 73 has been discussed in detail in Para 7 of the Act and thereafter it is held that the Explanation is a provision against tax avoidance, which deems certain actual transactions in shares as speculative transactions. There is absolutely no material brought on record by the IT Authorities to show that the assessee is a company controlled by a business house and that the share transactions have been effected with a view to manipulate and reduce its taxable income.

In the present case also, CIT(A) have not shown that the assessee is a company controlled by a business house and that the share transactions have been effected with a view to manipulate and reduce the taxable income. There is no evidence to show that the requirements of Para 19.2 of the

Circular issued by CBDT have been satisfied. Therefore, the loss has to be treated as normal business loss. Kindly see Godawari Capital Ltd. vs Dy CIT (2004) (91 ITD 274, 278-79, 279) (Hyd) Apportionment of Expenses by CIT(A)

a) CIT(A) has erred in treating a sum of ` 85,82,975/- as establishment expenses when the said figure pertains to clearing difference. As per Profit & Loss A/c annexed at page 145, a sum of ` 59,54,517/- are establishment expenses. Without admitting, even if it is presumed that the establishment expenses are to be allocated to brokerage income, share trading and exempted dividend income then also a sum of ` 59,54,517/- is to be allocated. CIT(A) have treated 20% of the expenses as the expenditure towards routine and day-to-day activities. Further ` 19,53,402/- have already allocated by the AO to the exempted dividend income (though this issue has been challenged by the assessee), the balance amount has to be allocated to the brokerage income proportionately. Thus assessee had losses under all the 03 heads and therefore, Section 73 cannot be applied.

b) CIT(A) has also held that the speculative loss of ` 1,94,82,909/- and the expenses of ` 49,12,978/- (this is incorrect figure as stated in preceding Para) have to be disallowed and added back. It is submitted that the additions made by the AO have also to be adjusted against this loss only.

c) Without prejudice to the aforesaid contention, even if it is presumed that the additions are not adjusted against the so called speculation loss then also the said additions can be adjusted against the brought forward losses. In the case of M/s Lavish Apartment (P) Ltd. vs Assistant Commissioner of Income Tax (ITA NO.254 of 2006 decided on 23.07.2012), Hon'ble Delhi High Court have held that the brought forward losses can be adjusted against other income i.e. income from other expenses of the current year in view of correct interpretation of the provisions of section 72(1) of the Act.

ITA No.5198/Del./2011 & 1354/Del./2012

24. On the other hand, ld. DR relied upon the order of the CIT (A). He further relied upon the order of ITAT in the case of SPFL Securities Limited vs. DCIT rendered in 6 SOT 562. He also relied upon the order of ITAT rendered in the case of SRJ Securities Limited vs. ACIT reported in 86 ITD

583. For not granting set off of addition made u/s 68 against brought forward losses of earlier years, he relied upon the order of ITAT in the case of ITO, Ludhiana vs. Dulari Digital Photo Service Ltd. reported in 53 SOT page 210.

25. We have duly considered the rival contentions and gone through the record carefully. Sub-section (1) of section 73 and Explanation appended to this section have a direct bearing on the controversy, therefore, it is imperative upon us to take note of these provisions, which read as under :

Losses in speculation business.

"73. (1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.

x x x x x
x x x x x
x x x x x

Explanation.--Where any part of the business of a company [other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources"], or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a ITA No.5198/Del./2011 & 1354/Del./2012 speculation business to the extent to which the business consists of the purchase and sale of such shares.]"

A bare perusal of the provision would suggest that any loss computed in respect of speculation business carried on by the assessee shall not be set off except against any profit and gains arose from another speculation business.

The Explanation to the section provides that if any part of the business of a company consists in the purchase and sales of shares of other companies, then, such company shall for the purpose of this section be deemed to be treated as carrying on speculation business to the extent of which the business consist of purchase and sales of shares. This Explanation exclude certain companies whose gross total income consist mainly of income which is chargeable under the heads 'Interests on securities', 'Income from house property', 'Capital gains' and 'Income from other sources' or whose principal business is of banking or granting of loans. The activities of the assessee do not fall in the ambit of the nature of business provided in the Explanation. The main business of the assessee includes sales of shares. It has shown losses of Rs.76,21,702/- on such activities. Thus, prima facie, Explanation appended to section 73 is clearly applicable on the facts of the assessee's case. The first contention raised by the ld. Counsel for the assessee is based upon the principle of consistency. She submitted that assessee company was incorporated in 1989-90. Since then it was declaring the income in the same ITA No.5198/Del./2011 & 1354/Del./2012 manner as is declared in the present year. Explanation to section 73 has been inserted w.e.f. 01.04.1977 and in none of the years, revenue had treated part of the income as a speculation loss. She made reference to the judgments of Hon'ble Delhi High Court as well as Hon'ble Supreme Court. On due consideration of her arguments, we are of the view that under the Act, every year is an independent year. If assessee has shown losses in the share trading activities and its case falls within the mischief of deeming fiction provided in section 73, then, on the basis of principle of consistency, assessee cannot plead that requirement of law should not be followed. It has not been demonstrated before us that every year in the past there was a loss in this activity. In this year, ld. First Appellate Authority has noticed the loss and it struck to his mind that Explanation to section 73 is applicable. The next contention raised by her is that expression 'speculative business' has not been defined in section or under the Act, though

expression speculative transaction has been defined in section 43(5). According to this definition, speculative transaction means a transaction in which, a contract for purchase or sale of commodity including stock and shares is settled otherwise than by actual delivery or transfer of the commodity scrips. Therefore, the Explanation to section 73 is not applicable upon the activities of the assessee. We find that similar argument was raised before the First Appellate Authority and ld. First Appellate Authority while dealing with this argument has observed that ITA No.5198/Del./2011 & 1354/Del./2012 definition u/s 43(5) are general in nature and do not lay down that the same would have overriding effect on any other provision of the Act. The deeming fiction provided in Explanation to section 73 is for specific and for a limited purpose, which suggests that if an assessee has losses in respect of speculation business, then, such losses would only be allowed against another speculation business. The Explanation further explained the scope and make it mandatory that if any company whose any part of the business is related to sale and purchase of shares and that company does not fall within the exception of four classes of companies, then, such activity would be considered as carrying on a speculative business. Therefore, this argument has no more relevance in this case. At the strength of Hon'ble Bombay High Court decision in the case of Bharat R. Ruia HUF reported in 199 Taxman 87, it was contended that exchange traded derivative transactions were not speculative transactions after the insertion of Proviso (d) to section 43(5) w.e.f. 01.04.2006. Thus, according to the assessee, the loss arising out of mark-to-mark (F&O) at Rs.32,78,412/- should not be treated as a speculative loss. The judgment relied upon by the assessee is in respect of specific transactions. The issue in the judgment was altogether different. Applicability of Explanation appended to Section 73 was not called for in that case. It was a case of section 43(5).

We have gone through the replies of the assessee available on pages no.328 to 333 before the CIT (A). It has nowhere raised this plea and it was nowhere ITA No.5198/Del./2011 & 1354/Del./2012 submitted this bifurcation in the reply. More so trading of derivative at exchange may not be speculative transaction as per section 43(5), but it is trading in shares, which would also trigger the deeming fiction available in Explanation to section 73. The next contention raised by the ld. Counsel for the assessee is that CIT (A) has computed a sum of Rs.1,94,82,909/- as a speculation loss. It has a loss of Rs.1,78,80,662/- on account of valuation of stock which will be an opening stock for the next year. It has a profit on sale of stock at Rs.1,02,58,960/- and the resultant loss of Rs.76,21,701/-. Thus, according to the assessee, it has earned profit of Rs.1,02,58,960/- from purchase and sales of shares. Loss is pertained to the value of stock as on 31.03.2007. We have gone through the submissions of ld. Counsel but we do not find any substance in them. The valuation of a stock on the closing day of the accounts is an integral part of the business activity. The ultimate figure which is a loss has to be seen. It cannot be segregated that on a particular date, assessee has a profit and only that should be taken into account and not the ultimate result at the end of the year. Moreover, this plea was not raised before the CIT (A) nor this bifurcation was submitted, though details of inventory of the stock has been placed at pages 182 to 212. The ld. First Appellate Authority has taken a correct view after looking to the facts and circumstances and has rightly arrived that activity of the assessee in respect of sale and purchase of shares is to be treated as speculative activity.

ITA No.5198/Del./2011 & 1354/Del./2012

26. The next issue relates to quantification of speculative losses. In the order dated 28.02.2011, ld. First Appellate Authority has worked out speculative losses of Rs.1,94,82,909/-. This figure has been arrived at after adding the expenses of Rs.49,12,978/- which was treated as expenses related to speculative transactions. Since there was no speculative income, therefore, these were also added to the speculative losses.

27. On an application of the assessee for rectification of the order, ld. CIT (A) has realized these mistakes and rectified the order. The finding of the CIT (A) in the rectification order dated 27.10.2011 reads as under :-

> COMPUTATION OF INCOME Nature of Income/(Loss) Allocation of expenses Income As per Profit & Loss A/c as accepted by the A.O. and CIT (A) Brokerage Allocation of Correct Figure Balance Profit Paid Establishment (Rs.59,54,517/- & Loss Expenses 548360 -

(Rs.85,82,975/- 100000) wrongly taken by CIT (A)) Normal Business Income 1138060.05 809793.40 1716595.00 1061232.00 (-) 732965 Brokerage Speculation Business (alleged) Share Trading (-) 7621702.00 Mark to Mark (-) 3278412.99 (F&O) Clearing (-) 8582975.68 4912978.00 2291524.00 (-) 21774615 Difference (-)19483090.67 Capital Gain Profit on sale Of car 16315.00 Income from other sources Dividend ITA No.5198/Del./2011 & 1354/Del./2012 Interest on 619091.74 Deb & FDR 9260.00 1953402.00 1953402.00 (-) 1325050 8582975.68 5306158.00 3.1 I have carefully examined the nature of income shown by the appellant under different categories and the allocation of expenses made by the Id. counsel for the appellant. On consideration, I find that the allocation made by the Id. counsel is in order and deserves to be accepted. Accordingly, the AO is directed to re-calculate the activity wise Profit & Loss as per the computation furnished by the Id. counsel for the appellant and reproduced here as-in above.

3.2 Further, the Id. counsel for the appellant has also pointed out that the expenses claimed under the head depreciation are not included in the establishment expenses of Rs.5954517/- and therefore, the depreciation expenses also require to be allocated in the ratio of income under different categories. On consideration, this argument of the Id. counsel has also been found to be correct. The AO is directed to allocate the depreciation in the ratio of income/receipts shown under different categories of income.

3.3 It is pertinent to note here that in compliance to the aforesaid directions there may be a situation that there is resultant loss in the activity of brokerage, income from dividend and interest on debentures and FDRs. Therefore, the Id. AO would be required to first compute the Profit & Loss activity wise and thereafter, record finding with reference to carry forward and set off of such losses as per provisions of law.

3.4 In view of the aforesaid, issue no 2 raised by the appellant company is also stands allowed for statistical purposes.

4. Now coming to the last issue raised by the appellant company in the application u/s 154, namely, allowing set off of addition of Rs.20500000/- made on account of share application money and disallowances of Rs.548360/- and Rs.005157/- made on account of education and training expenses and S.1.1. respectively. On consideration, I find that the issue raised by the appellant company is not in accordance with the provisions of law. Subsection (1) of section 72 of the IT Act, 1961 clearly provides that "where for any assessment, the net result of the computation under the head "Profits & Gains of Business of Profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not only set off against income under any head of income in accordance with the provision of section 71.. ..... "Thus, it may be seen that only normal business loss is eligible for set off against income under any head of income and there is a clear restriction on setting off of speculation business loss against income under any head of income. In view of the aforesaid, the third issue raised by the appellant company is being rejected and dismissed.

ITA No.5198/Del./2011 & 1354/Del./2012

5. The AO is directed to modify the order giving effect to the appellate order dated 28.02.2011 in accordance with the directions contained here-in- above.

6. In the result, rectification application filed by the appellant company is being partly allowed."

28. As per grounds no.8 & 9 in ITA No.1975/Del/2011, the assessee has pleaded that CIT (A) was unjustified in treating the loss of Rs.19,41,82,909/-

as speculation loss. This figure has ultimately been determined at Rs.2,25,12,939/- in the order of Assessing Officer dated 09.05.2011. It includes deprecation of Rs.2,19,635/-. In the chart extracted supra, this figure has been worked out by the assessee at Rs.2,17,74,615/- which ultimately was found to be Rs.2.25 crores. The next computation error is pointed out by the assessee in ground no.13 is that ld. CIT (A) has wrongly included as sum of Rs.32,78,412/- in the speculative sales. According to the assessee, it is a loss arising out of mark-to-mark (F&O) transactions. We are of the view that this plea was duly considered by the CIT (A) and it is part of assessee's main activity, i.e., sale and purchase of shares. It cannot be excluded separately on the strength of Hon'ble Bombay High Court decision rendered altogether on different facts. In grounds no.14 & 15, assessee has pleaded that CIT (A) ha erred in disallowing expenses of Rs.49,12,798/-. This was accepted by the CIT (A) as a factual error. What had happened is that CIT (A) took into consideration expenses allocable to establishment at Rs.85,82,975/-. She directed that 20% of these expenses are to be attributed towards daily ITA No.5198/Del./2011 & 1354/Del./2012 administrative expenses which comes out a figure of Rs.17,16,595/-. The balance amount remained at Rs.68,66,380/-. The ld. CIT (A) further debited the expenses disallowed u/s 14A at Rs.19,53,402/-. The balance Rs.49,12,978/- was treated as allocable towards speculative transactions.

When it was pointed out to the ld. CIT (A) that he took an incorrect figure of Rs.85,82,975/- and the correct figure was Rs.59,54,517/-. The ld. CIT (A) realized the mistake in the rectification order which is discernible from the chart extracted above. Thus, this ground no more survive from the impugned order of ld. CIT (A) dated 28.02.2011.

29. As far as allocation of expenses for the purpose of speculative transactions are concerned, we deem it proper to set aside this issue to the Assessing Officer for a limited purpose because out of the total expenses, Rs.19,53,402/- were disallowed u/s 14A read with Rule 8D and we have set aside this issue to the file of Assessing Officer for re-adjudication. Therefore, ultimately quantification is dependent on this issue. Keeping in view this factor in mind, we direct the Assessing Officer to re-adjudicate the issue regarding allocation of establishment expenses. Out of Rs.59,54,517/-, CIT (A) has directed that 20% be allocated towards day-to-day activities and after excluding disallowance made u/s 14A, rest will be treated for the purpose of speculation losses. We set aside this finding of the ld. CIT (A). Ld. Assessing Officer shall decided independently how much expenses out of the total sum ITA No.5198/Del./2011 & 1354/Del./2012 of Rs.59,54,517/- is to be allocated towards day-to-day business activities and how much is to be worked out u/s 14A and how much is to be allocated towards speculation business. The ld. Assessing Officer shall not be influenced by our observation. He will decide independently and assessee will be at liberty to submit any explanation in support of its case for this quantification.

30. The next contention of the assessee is that the speculation losses be set off against brought forward business losses of earlier years. Ld. CIT (A) has specifically held that u/s 73, speculation losses can only be set off against speculation profit. It cannot be set off with normal business profits of current year or earlier years. Therefore, we do not find any merit in this contention.

31. The ld. Counsel for the assessee also raised alternative contention on the strength of the Hon'ble Delhi High Court decision in the case of M/s.

Lavish Apartment Pvt. Ltd. vs. ACIT rendered in ITA No.254 / 2006. She contended that in case an addition of Rs.2.5 crores on account of share application money is confirmed, then, it be set off against carry forward business losses of earlier years. She also contended that expenses added on account of establishment expenses and education expenses are also to be set off against carry forward of losses from earlier years.

32. We have duly considered the rival contentions and gone through the record carefully. In the case of Lavish Apartment Pvt. Ltd., Hon'ble Delhi ITA No.5198/Del./2011 & 1354/Del./2012 High Court on an analysis of section 72 observed that as far as heads of income are concerned, they are irrelevant for the purpose of setting off of the profit and gains of the business against the losses of earlier years. The Hon'ble Court has observed that if rental income, commission income, etc. are earned on commercial principles, though assessed under the different heads as per the Act, that is, income from house property or income from other sources, but for the purpose of setting off of the profits against loss u/s 72, they can be set off. The heads of income would not be relevant. It is profit and gains of a business which is earned on commercial principles though assessed under different heads. Thus, in other words, it is not necessary to make adjustment of the income under each head against the losses computed under each head.

However, we find that this judgment may not be very helpful to the assessee for the simple reason that addition made u/s 68 are not the profit and gains of the business. Such an income has not been generated on the basis of commercial principles. It is an addition on account of unexplained credit.

During the course of hearing, ld. DR brought to our notice order of ITAT in the case of ITO vs. Dulari Digital Photo Service (53 SOT 210). The ITAT, Chandigarh has considered this aspect elaborately and held that additions made u/s 68 cannot be set off against one head of income from other head u/s

71. The relevant discussion made by the ITAT read as under :-

> "10. We shall now deal with the issue as to whether unexplained cash credits, which are deemed to be the income of the assessee u/s 68, can ITA No.5198/Del./2011 & 1354/Del./2012 be considered for set-off against losses under various heads of income as enumerated in section 14. The answer to the aforesaid question lies in the fact as to whether unexplained cash credits taxed u/s 68 are assessable under a known source or head of income as enumerated u/s 14. If they are so assessable under a head of income specified in section 14, they would then and then only need to be set off against the loss from other heads of income in terms of section 71. Chapter IV of the Income-tax Act deals with "COMPUTATION OF TOTAL INCOME" under various heads of income. Section 14, which enumerates head of income, falls under Chapter IV and reads as under:
>
> CHAPTER IV Computation of Total Income Heads of income Heads of income.
>
> 14. Save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income:-
>
> A. - Salaries B. - [omitted by the Finance Act 1989] C. - Income from house property.
>
> D. - Profits and gains of business or profession. E. - Capital gains.
>
> F. - Income from other sources.
>
> 11. Some of the salient features of section 14 in so far as they have material bearing on the issue under appeal are as under:
>
> (i) Section 14 merely classifies the income under various heads of income for the purpose of computation of total income under them.

Section 14 does not deal with aggregation of income; it merely deals with classification of income under various heads of income.

> "Computation of total income under various heads of income" under Chapter IV is altogether different from "Aggregation of income"

under Chapter VI of the Income-tax Act. They do not mean one and the same thing. They are fundamentally different from each other.

(ii) Section 14 is not a charging section; it merely classifies income under various heads of income. It is total income of the previous year and not the head of income which is chargeable to income-tax u/s 4.

(iii) Opening words of section 14 are "Save as otherwise provided by this Act", all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the heads of income specified therein. Thus, section 14 is subject to the other provisions of the I-T Act. Taxability of income under the specific ITA No.5198/Del./2011 & 1354/Del./2012 provisions of the I-T Act outside Chapter IV is not affected by heads of income as classified in section 14. As a corollary, it follows that income liable to be taxed under the specific provisions of the I-T Act outside Chapter IV can be taxed without bringing the same under a head of income as specified under section 14/Chapter IV.

12. At this stage, it may be relevant to consider Chapter VI in general and the provisions of section 68 in particular. They read as under:

> Chapter VI Aggregation of income and set off or carry forward of loss Cash credits.
>
> 68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

13. Some of the salient features of Chapter VI and section 68 in so far as they have material bearing on the issue under appeal are as under:

> (i) Any sum, which is deemed to be the income of the assessee in terms of sections 68, 69, 69A, 69B and 69C, falls within the "Scope of total income' as defined in section 2(45)/5 and is therefore chargeable to tax under section 4. In terms of Chapter VI it is aggregated with the income computed under Chapter IV. Aggregation of income under Chapter VI is not the same thing as computation of income under various heads of income in terms of Chapter IV of the IT Act.
>
> (ii) Computation of income under each head of income in terms of Chapter IV requires determination of excess of gross receipts over expenses legally permissible in that behalf under the relevant head of income. Aggregation of income under Chapter VI does not provide for any deduction towards any expenditure. It brings the entire sum to the charge of income-tax and thus there is no element of 'computation' of income under Chapter VI as in the case of income falling under specific heads in terms of Chapter IV. It could be for this reason that the sums taxed under Chapter VI

have been kept outside the computational provisions of Chapter IV.

(iii) Amounts are taxed under the provisions of Chapter VI for the reason that their nature and source are not known. Once their nature and source are known, they have to be pegged to that source/head of ITA No.5198/Del./2011 & 1354/Del./2012 income and taxed under the respective heads of income as enumerated in Chapter IV and not under the provisions of Chapter VI. Conversely, if the nature and source of such amounts are not known, they have to be taxed under the specific provisions of Chapter VI. It therefore necessarily follows that what is taxed under the specific provisions of Chapter VI cannot be pegged to any of the sources/heads of income as specified in Chapter IV.

14. The aforesaid view is supported by the scheme of taxation under the Income-tax Act. Section 2(45) defines "total income" as "the total income referred to in section 5, computed in the manner laid down in this Act". It is relevant to note that the principal charging section 4 makes the "total income of the previous year" subject to the charge of income-tax. Section 5 defines the scope of total income referred to in the principal charging section. Section 14 classifies the heads of income while sections 15 to 59 provide for its quantification. Chapter VI of the Income-tax Act provides for aggregation of income and set off or carry forward of loss. Thus Chapter VI is in two parts; first part deals with aggregation of income while the second part deals with set off or carry forward of losses. Chapter VI has been placed after Chapter IV and V. It comes into play only after the computation of total income under various heads of income in terms of Chapter IV has been done. Income falling under Chapter VI is taxed by aggregating the same with the income quantified in terms of Chapter IV. Chapter VI is not subservient to Chapter IV. Besides, section 14 allows the taxability of income under specific provisions of the I-T Act outside Chapter IV. For the reasons aforestated, the income assessable u/s 68 cannot be assessed as income from other sources u/s

56.

15. Thus what is taxed under Chapter IV is income from a known source including income from other sources. A source of income means a specific source from which a particular income springs or arises. Once a source giving rise to a particular income is identified, it has then to be placed under a particular head of income as specified in section 14. Thus income can be taxed under a specific head of income as enumerated in section 14 only when it is possible to peg the same to a known source/head of income. If the nature and source of a particular receipt is not known, it cannot then be pegged to a known source/head of income. Chapter IV contemplates computation of income arising from known sources/heads of income whereas Chapter VI, on the other hand, contemplates aggregation of the entire sum the nature and sources of which are not known. The aforesaid two Chapters are completely different in their nature, scope and ITA No.5198/Del./2011 & 1354/Del./2012 effect. Though the incomes assessable under them are part of total income as defined in sections 2(45)/4/5 of the I-T Act yet that does not mean that the income assessable under section 68 has to be assessed u/s 56. In the case before us, source of unexplained cash credits is not known and hence they cannot be linked to any known source/head of income including income from other sources. In order to constitute income from "other sources", the source, namely, the "other

sources", has to be identified. Income from unexplained or unknown sources cannot therefore be considered or taxed as income from other sources. The aforesaid view is fortified by the judgment of the Hon'ble Gujarat High Court in Fakir Mohmed Haji Hasan v. CIT [2001] 247 ITR 290/[2002] 120 Taxman 11 in which the Hon'ble High Court has held as under:-

> "The scheme of sections 69, 69A, 69B and 69C of the Income- tax Act, 1961, would show that in cases where the nature and source of investments made by the assessee or the nature and source of acquisition of money, bullion, etc., owned by the assessee or the source of expenditure incurred by the assessee are not explained at all, or not satisfactorily explained, then, the value of such investments and money or the value of articles not recorded in the books of account or the unexplained expenditure may be deemed to be the income of such assessee. It follows that the moment a satisfactory explanation is given about such nature and source by the assessee, then the source would stand disclosed and will, therefore, be known and the income would be treated under the appropriate head of income for assessment as per the provisions of the Act. However, when these provisions apply because no source is disclosed at all on the basis of which the income can be classified under one of the heads of income under section 14 of the Act, it would not be possible to classify such deemed income under any of these heads including income from "other sources" which have to be sources known or explained. When the income cannot be so classified under any one of the heads of income under section 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise. If it is possible to peg the income under any one of those heads by virtue of a satisfactory explanation being given, then these provisions of sections 69, 69A, 69B and 69C will not apply, in which event, the provisions regarding deductions, etc., applicable to the relevant head of income under which such income falls will automatically be attracted. The opening words of section 14 "save as otherwise provided by this Act" clearly leave scope for "deemed income" of the ITA No.5198/Del./2011 & 1354/Del./2012 nature covered under the scheme of sections 69, 69A, 69B and 69C being treated separately, because such deemed income is not income from salary, house property, profits and gains of business or profession, or capital gains, nor is it income from "other sources" because the provisions of sections 69, 69A, 69B and 69C treat unexplained investments, unexplained money, bullion, etc., and unexplained expenditure as deemed income where the nature and source of investment, acquisition or expenditure, as the case may be, have not been explained or satisfactorily explained. Therefore, in these cases, the source not being known, such deemed income will not fall even under the head "Income from other sources". Therefore, the corresponding deductions which are applicable to the incomes under any of these various heads, will not be attracted in the case of deemed incomes which are covered under the provisions of sections 69, 69A, 69B and 69C of the Act in view of the scheme of those provisions."

16. In view of the foregoing, we are unable to hold that unexplained cash credits assessed u/s 68 are to be assessed as income from other sources u/s 56.

17. The ld. counsel for the assessee, however, relied upon the judgments in Lakhmichand Baijnath's case (supra) and Kevalchand Nemchand Mehta's case (supra). We have carefully gone through them. They have been rendered in the context of old Indian Income- tax Act of 1922 in which there was no provision corresponding to section 68 or Chapter VI of the Income-tax Act 1961. In the absence of any specific provision in the old Indian Income-tax Act of 1922, a view was taken that unexplained cash credits would be assessable as income from other sources. Section 68 under Chapter VI has been inserted in the present Income-tax Act to provide that any sum found recorded in the books of the assessee would be taxed as income of the assessee if he failed to satisfactorily explain the nature and source thereof. In this view of the matter, unexplained cash credits have to be brought to tax under section 68 and not under section 56. Both the aforesaid sections operate in the fields reserved for them. It cannot therefore be said that what is assessable as income u/s 68 must be assessed as income from other sources u/s 56. Judgments rendered in the context of the old Income-tax Act are therefore hardly relevant to decide the issue under appeal.

18. The assessee claims set off of loss from business assessed by the AO u/s 28 against the income being unexplained cash credits assessed by the AO u/s 68 on the ground that income assessed by the AO u/s 68 is income from other sources u/s 56. Section 71 permits set off of loss from one head against income from another head of income as ITA No.5198/Del./2011 & 1354/Del./2012 enumerated in section 14. We have already held earlier that income assessable u/s 68 cannot be assessed under any particular head of income including income from other sources u/s 56. In this view of the matter, the business loss assessed by the AO cannot be set off against the amount taxed u/s 68 as unexplained cash credits taxed under section 68 cannot be pegged to any head of income.

19. In view of the forgoing, the appeal filed by the department is allowed."

Therefore, this addition cannot be set off against the business losses computed in earlier years. However, as far as expenses disallowed on account of education expenses and on account of establishment expenses are concerned, they are to be set off. We direct the Assessing Officer to grant set off of education expenses added in both the Assessment Years, i.e., 2006-07 and 2007-08. The Assessing Officer first compute the expenses required to be added on account of establishment expenses and thereafter grant a set off of these expenses against the brought forward business losses of earlier years because these are the expenses which are related to the business of the assessee.

32. In the result, all the appeals are allowed for statistical purposes.

Order pronounced in open court on this 31st day of May, 2013.

Sd/-	sd/-
(RAJPAL YADAV)	(B.C. MEENA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated the 31st day of May, 2013
TS

ITA No.5198/Del./2011 & 1354/Del./2012

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-VIII, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.