

\$~35 to 37 & 39 to 47

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 13/2017**

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST INFRASTRUCTURE (INDIA) PVT. LTD.

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No. 11/2017**

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST INFRASTRUCTURE (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No. 12/2017**

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST CITY REALTORS (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and

Mr. Pranjal Srivastava, Advocates

+

ITA No. 20/2017

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST REALTORS (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+

ITA No. 14/2017

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST INFRASTRUCTURE (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+

ITA No. 15/2017

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST INFRASTRUCTURE (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No.16/2017**
PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2 ...Appellant
Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST CITY DEVELOPERS INDIA PVT. LTD ...Respondent
Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No. 17/2017**
PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2 ...Appellant
Through: Mr. Rahul Kaushik, Senior Standing
Counsel

:

versus

BEST CITY PROJECTS (INDIA) PVT. LTD ...Respondent
Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No.18/2017**
PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2 ...Appellant
Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST CITY PROJECTS (INDIA) PVT. LTD ...Respondent
Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No. 19/2017**

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST CITY REALTORS (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No. 21/2017**

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST CITY DEVELOPERS INDIA PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

+ **ITA No. 22/2017**

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-2

...Appellant

Through: Mr. Rahul Kaushik, Senior Standing
Counsel

versus

BEST REALTORS (INDIA) PVT. LTD

...Respondent

Through: Mr. Ved Kumar Jain, Ms. Rano Jain and
Mr. Pranjal Srivastava, Advocates

CORAM:

**JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

%

01.08.2017

Dr. S. Muralidhar, J.:

1. These appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') are against a common order dated 31st May, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in the appeals filed by the Assessee for Assessment Years ('AYs') 2005-06 to 2009-10. The Assessee belongs to the 'Best Group'.

Questions of law

2. In three of the appeals filed by the Revenue i.e. ITA Nos. 11, 12 and 21 of 2017 the question of law framed by the Court by the order dated 21st March, 2017 reads as under:

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

3. In the other appeals, ITA Nos. 13 to 20 and 22 of 2017, the question of law framed by this Court by the order dated 21st March, 2017 reads as under:

“Whether having regard to the materials seized in the course of search under Section 132 and the statements made on behalf of the assessee, additions made by the Assessing Officer under Section 153A, were not justified as held by the ITAT?”

Background facts

4. The facts which lead to the filing of these appeals are that a search took place in the case of both Mr. Tarun Goyal as well as the Best Group of Companies on 15th September, 2008. During the search various loose papers were found. According to the Revenue, the seized documents were with regard to unaccounted receipts from sale of certain properties and unrecorded expenditure in the construction business.

5. In support of its assumption of jurisdiction under Section 153 A of the Act, the Revenue places reliance on the statements of Mr. Tarun Goyal and Mr. Anu Aggarwal as recorded on the day of search i.e. 15th September 2008 and the statements of Mr. Anu Aggarwal and Mr. Harjeet Singh, Directors of the Best Group, as recorded on 24th October, 2008. These statements were made under Section 132 (4) of the Act. The case of the Revenue is that for the purposes of Section 153A of the Act these statements, by themselves, constitute incriminating material. The Revenue also places reliance on three documents i.e. A-1, A-4 and A-11.

Statement of Tarun Goyal

6. The relevant portion of the statement of Mr. Tarun Goyal as recorded on 15th September, 2008 during the survey/search and relied upon by the Revenue reads as under:

Q. No.2 Please provide details of your transaction with Best Group of Companies, such as M/s Best Infrastructure (I)(P) Ltd, M/s Best City Projects (I)(P) Ltd., their directors, Sh. Harjeet Singh Arora, Sh. Balvinder Singh, Sh. Anu Aggarwal and other group concern?

Ans. Personally, I had made no transactions with Best Group of Companies or their directors. However, certain companies for which I am the authorized signatory has made transactions with the Best Group of Companies, such as M/s Best Infrastructure (I) (P) Ltd., M/s Best City Projects (I) (P) Ltd., M/s Best City Realtors (I) (P) Ltd. and other group concerns. M/s Best group of companies, through their Directors, Sh. Harjeet Singh Arora had approached us for providing them entry for share capital. They had provided us cash, against which we issued him cheques through companies of which I am the authorized signatory. These companies have taken a commission of 0.25% for providing them cheque against the cash received. We have provided them approx. 8 crores of bogus share capital against which we have received commission income in these companies we are offering this income for taxation, which is over and above the normal income earned by me during the course of the year. At the rate of 0.25% of the undisclosed income earned by us would tantamount to Rs. 2 lakhs.

Q. No.3 Have you provided entries to the Best Group of Companies or to their directors also?

Ans. The companies for which I am authorized signatory have provided entry to the Best Group of Companies only and not to their directors.

Q. No. 4 Please confirm that regarding your answer to Q.No.2 of this statement you were taken to the office of the Best Group of Companies at Plot No. H-8, Best Plaza, Netaji Subash Place, Pitampura, New Delhi to confront your statement with them. However they refused any such confrontation or cross examination.

Ans. I confirm that I was taken to the office of Best Group of Companies for confrontation/cross examination by the directors of the company however they refused any such cross examination/confrontation regarding transactions mentioned in my answer to Q. No. 2 of this statement.

Q. No. 6 Please mention the name of the companies and the bank accounts which are used for the purpose of accommodation entries as stated by you in the answer to question No. 5.

Ans. Though I do not remember exactly the name of the companies and name of the bank accounts which are used for accommodation entry purpose however I confirm that the accounts of M/s Max-well Securities (P) Ltd. are mostly used for accommodation entries. Regarding rest of the companies and bank accounts used for the purpose can be stated by me after going through the records, which I will submit later on.

Q. No. 7 Please state for the last six years what amount of accommodation entries have been given by you through the entities controlled by you. Please also give the name of the beneficiary with corresponding amount and the year of the transactions.

Ans. For the last six years the total amount of accommodation entries given by me through the entities controlled by me is around 30 to 35 crores of rupees. Some of the beneficiaries along with approximate value of accommodation entries are given as under;-

- (i) MTech Developers (P) Ltd. (Delhi Ashram)
- (ii) Green City Buildtech (P) Ltd. Noida
- (iii) AMR Infrastructure (P) Ltd. Noida .
- (iv) Natraj Buildwell (P) Ltd. Mahipalpur, Delhi
- (v) Best Group of Companies - Pitampura, New Delhi
- (vi) S.K. Enterprises -Ashok Vihar, New Delhi

The amount of accommodation transaction are with above mentioned six companies are Rs. 5.0 Cr, Rs. 5.0 Cr, Rs. 3.0 Cr, Rs. 2.0 Cr., Rs. 8.0 Cr. and Rs. 2.0 Crores respectively. The same is also represented in the table at next page. Regarding other beneficiaries and amount at accommodation entries can

only be stated after going through the records which I will submit later on.

S.No.	Name of the beneficiary	Amount
1	M. Tech Developers (P) Ltd. (Delhi Ashram)	Rs.5.00 Cr.
2	Green City Buildtech (P) Ltd. Noida (UP)	Rs.5.00 Cr.
3	AMR Infrastructure (P) Ltd. Noida	Rs.3.00 Cr.
4	Natraj Buildwell (P) Ltd. Mahipalpur, Delhi.	Rs.2.00 Cr.
5	Best Group of Companies Pitampura, New Delhi.	Rs.8.00 Cr.
6	S.K. Enterprises-Ashok Vihar, New Delhi	Rs.2.00 Cr.

7. The following statement of Mr. Tarun Goyal was recorded on 15th September, 2008 under Section 133A:

Q. No. 13 (Survey u/s 133A dt 15-09-2008) What do you know about the following companies:

- (a) M/s Aparna Credit (P) Ltd.
- (b) M/s Bhavani Portfolio (P) Ltd.
- (c) M/s Compari Fiscal Services (P) Ltd.
- (d) M/s Sai Baba Finvest (P) Ltd.
- (e) M/s Tejasvi Investment (P) Ltd.

And also explain whether you have any interest in the above stated companies and connected in any manner what so ever?

Ans. All the companies mentioned in question had their registered office in this premises i.e. 13/34, 4th Floor, WEA, Main Arya Samaj Road, Karol Bagh, New Delhi-110005.

Statement of Anu Aggarwal

8. As far as Mr. Anu Aggarwal, Director of the Best Group, is concerned, the questions put to him and the answers given by him on 15th September, 2008 read as under:

Q.No.11 Please provide the details of share capital of various companies of Best group for the last six year.

Ans. I will be providing these details in due course of time as the computer prints is being taken out.

Q. No. 12 Please provide the details of share premium of various companies of M/s Best Group for the last six years.

Ans. I will be providing these details in due course of time as the computer prints is being taken out.

Q. No. 13 Please provide the details of secured loans raised by you for your various projects and also give details of the security provided against the secured loan.

Ans. We have taken a secured loan of Rs. 16 Cr from Bank of Baroda, Naharpur, Rohini, New Delhi in our company M/s Best City Developers (I) (P) Ltd. against the security of our flat no. 14 and No. 26 both situated at Sector-20, Dwarka, New Delhi.

Q. No. 14 Please provide the details of unsecured loans raised by you for your various projects by your various companies, during last six years.

Ans. I am not able to give an immediate reply and I could give details of the unsecured loan after going through the looks of accounts in short time.

Q. No. 15 I am showing you Annexure A-I of party BO-1 page No. I to 71, which gives details of cash received for sale of property not reflected in the books of accounts, Annexure A-4,

pages 1 to 31 and Annexure A-11 pages I to 100 which give details of expenses made for construction work which are also not reflected in the books of accounts. You are requested to explain these documents and reconcile them with your regular books of accounts.

Ans: I have gone through these documents in Annexure A-1, A-4 and A-11 and I am unable to explain these documents. We have received cash as Advance for sale of property in certain instances which has not been reflected in our books of accounts. Part of the cash received which has not been accounted by us in regular books of accounts has been utilized for making expenses in our construction business. This reflects our unexplained, unaccounted work in progress. This is the explanation for the seized documents Annexure A-4 and A-11. The unaccounted cash reflects are reflected in the seized documents Annexure A-I To account for these seized documents and other seized documents which cannot be adequately explain by us, we voluntarily offer a sum of Rs. 8 Crores (Rs. Eight Corers) which is over and above the normal income earned by us during the course of the year. This Rs. 8 Crores (Eight Crores) represents our undisclosed income earned during the year on accounts of unexplained cash receipts, unexplained work in progress as well as share capital and share premium received This discloser of Rs. Eight Corers which is over and above the normal income earned by us during the course of the year is being made to buy peace of mind, to avoid penalty and prosecution proceedings and also to avoid protected litigation.

Q. No. 16 During the course of search at your office premises, H-8, 1st floor, Best Plaza, - Netaji Subhash Place, Pitampura, New Delhi cash of Rs.59,96,800/- (Rs Fifty nine lakh Ninety six thousand Eight hundred only) was found, and inventoried, however as per the looks of accounts, the cash in hand is Rs. 30,01,000/- (Rs. Thirty lakh one thousand only), please explain the source of cash.

Ans. I am unable to give the explanation right now.

9. The further statement of Mr. Anu Aggarwal, Director of Best Group, as recorded on 24th October, 2008 reads as under:

Q. No. 3 Please provide the details of share premium of various companies of the Best Group of companies for the last 6 year.

Ans. The required information is being produced/submitted today itself.

Q.No.5 During the course of search cash of Rs.59,96,800/- was found and as per the books total cash in hand was Rs. 30,01,000/-. Please explain the difference and give explanation.

Ans: The cash in question was received from different persons on account of advance on account of sale of properties. As I have already mentioned in my earlier statement dated 15-09-2008 to question No. 15 where I had clearly mentioned that we have received cash from different persons in lieu of bookings of properties. I may clarify that the amount of Rs. 8 crores surrendered at the time of search, includes this unexplained cash of Rs. 30 Lacs (Approximately.)

Q. No. 6 During the course of search on Sh. Tarun Goyal, he has stated in his statement that he has provided you accommodation entries. Please explain the same.

Ans. I personally do not know Sh. Tarun Goyal, except that he may have invested in our group companies. However we have not received any accommodation entries from anybody. I have already given my statement on 15-09-2008 in which in my answer to question no. 15. I had surrendered a total amount of Rs. 8 Cr. on account of unexplained cash received from various bookings in my group companies and the unexplained expenses towards the work in progress of various projects in those companies and other outgoing. These unexplained receipts and out goings can be correlated and detailed at the time of

assessment after going through the seized material and other available records.

Q. No. 7 At the time of search on 15-09-2008 to the question No. 15, you also confirmed in your answer that this surrender of Rs. 8 Cr. includes receipt of share capital and share premium. Please explain and clarify the same.

Ans. As explained in the answer to the question no. 6, the utilization of the unexplained receipts and its correlation with the outgoings can be ascertained after examining the seized material and therefore it is difficult to detail if any amount from the surrender was utilize towards the receipt of any share capital or not.

Q. No.8 During the course of statement on oath u/s 131(IA) of Sh. Mahesh Garg, who was running two companies namely M/s Dreamland Solutions (P) Ltd. and M/s Meghdoot Express (P) Ltd. having business address at 104, B.D. Chambers, D.B. Gupta Road, New Delhi has stated that he has provided your group accommodation entries. Please explain.

Ans. We don't know Sh. Mahesh Garg personally. However, we can't add anything more to our statement given on 15-09-2008 in regard to the unexplained receipts and unexplained outgoings and our further answer to question No. 6 & 7 above.

Q. No.9 Please give bifurcation of the surrendered amount i.e. heads in which you are willing to surrender and the companies in which you desire to surrender.

Ans. It has already been explained in our answer to question no. 6 that the surrendered amount is towards the group of companies from unexplained receipts and outgoing there against and we shall be able to provide the precise details at the time of assessment after examining the seized material and other documents in our possession in detail.

Statement of Harjeet Singh

10. The statement of Mr. Harjeet Singh as recorded on 24th October, 2008 reads as under:

Q. No. 3 During the course of search on 15-09-2008, you were not present at your premises. You were requested to come and co-operate and you joined your office late night. In your absence, Sh. Anu Aggarwal who is also Director in the Best Group of Companies gave his statement. In his statement Sh. Anu Aggarwal had surrendered an amount of Rs. 8 Crores on account of undisclosed income earned during the year on account of unexplained cash receipts, unexplained work in progress as well as the share capital and share premium received. Do you agree with the statement given by Sh. Anu Aggarwal?

Ans. Yes I agree with the statement given by Sh. Anu Aggarwal. He is fully authorized to take decision in the best interest of the Group. I stand by his statement and promise to pay tax liabilities within the time allowed by the Department.

Assessment Order

11. Although separate assessment orders were passed in respect of each Assessee for the AYs in question, illustratively, the assessment order dated 30th December, 2010 passed by the Assessing Officer ('AO') in the case of Best Infrastructure (India) Pvt. Ltd. For AY 2005-06 is being discussed herein.

12. In the above assessment order, the AO set out a tabulated chart on the basis of the above statements of Mr Tarun Goyal and Mr Anu Aggarwal and concluded that the share premium and share application money was nothing but an unexplained credit and accordingly added Rs. 3.60 Crores to the assessable income of the Assessee under Section 68 of the Act. The reason

given by the AO for this addition was that the Assessee had failed to give any explanation or furnish any documentary evidence to prove the identity of the investors and their creditworthiness. They were also unable to prove the genuineness of the above transactions. It was also noted that the Assessee failed to produce the persons who purportedly advanced the alleged share application money or their bank accounts.

13. In para 5.3 of the assessment order, the AO noted that “the Assessee has submitted some evidences in the form of affidavit and certificate of incorporation regarding Tarun Goyal Group of Companies, which were examined on test check basis.” The AO further noted that the said affidavits were undated and not countersigned by Notary/Oath Commissioner. These affidavits were on forms that were purchased before the date of payment by the so called Directors of Tarun Goyal Group of Companies. The AO also noted that Mr. Anu Aggarwal in her statement had “categorically denied knowing these directors of Tarun Goyal Group of Companies” and he went on to state that he is not aware if these Employees/Directors who have signed the affidavits have left the companies.

14. The AO proceeded to also add the commission that might have been paid for the accommodation entries. It was found that since Assessee company had taken accommodation entries to the tune of Rs. 3.60 crores, therefore, by applying the rate of commission at the rate of 2.25%, it must have paid a sum of Rs. 8.10 lakhs out of its undisclosed income.

Order of the CIT (A)

15. The Commissioner of Income Tax (Appeals) [‘CIT (A)’] dismissed the

appeal in the case of 'Best Infrastructure (India) Pvt. Ltd.' for AY 2005-06 by order dated 11th November, 2013. The ground taken by the Assessee that the addition was made by the AO without any evidence being collected during the search and seizure operation under Section 132 of the Act, was negated. The CIT (A) also noted that when Mr. Anu Aggarwal, Director of Best Group of Companies, was confronted with those seized documents, he admitted the undisclosed income of Rs. 8 crores for the entire Group under Section 132 (4) of the Act, which, included bogus share capital/ share application money.

16. The CIT (A) noted that during the search proceedings, Mr. Tarun Goyal had stated under Section 132(4) of the Act that he had received cash from Best Group and in return he had given them share capital in the form of a cheque. It was observed by the CIT (A) that the evidence "does not mean only documentary evidence. Judicially it has been held that statement under Section 132(4) is an important evidence collected as a result of search and seizure operation. Therefore, I hold that in the instant case the addition of share capital is based on evidence gathered during the search."

17. Reference was made by the CIT (A) to the decision of this Court in ***CIT v. Anil Kumar Bhatia (2013) 352 ITR 493 (Del)*** where it was held that the AO had the jurisdiction under Section 153A of the Act to make assessment for all the six years and compute the total income of the Assessee, including the undisclosed income, notwithstanding that the Assessee filed returns before the date of search which stood processed under Section 143 (1) of the Act. Therefore, the challenge to the assessment orders on the ground of

erroneous assumption of jurisdiction under Section 153A of the Act was negated by the CIT (A).

18. As regards the merits of the additions made under Section 68 of the Act, the CIT (A) again referred to the statements recorded in the course of search and in particular the statement of Mr. Anu Aggarwal where he accepted undisclosed income of Rs.8 crores earned during the year on account of "unexplained cash receipts, unexplained work-in-progress as well as share capital and share premium received." The CIT (A) noted in the course of the appellate proceedings that the authorised representative ('AR') of the Assessee had filed detailed written submissions dated 7th February, 2012 and his arguments were, thus, summarised as under:

i) The appellant company has placed on record entire evidence and material to discharge the burden which lay upon it u/s 68 of I.T. Act. Ne emphasized that following evidences were filed in support of genuineness of share capital.

a) PAN of shareholder.

b) Name, address and confirmation of shareholder.

c) Each shareholder is a corporate entity, i.e. identity of shareholder is not doubtful.

d) Payment is through banking channels.

ii) As a result of search and seizure operation u/s 132 no cash or loose papers were even found to allege, assume or conclude that, share capital received represented undisclosed income of the appellant company.

iii) In the paper book, the Ld. AR has filed copy of form no. 2 filed by the appellant company before the registrar of company showing allotment of shares.

iv) Ld. AR has relied upon the following judicial

pronouncement that under these circumstances, section 68 cannot be invoked.

- a) *CIT v. Stellar Investment Ltd.* 192 ITR 287.
- b) *Sophia Finance Ltd.* 205 ITR 98 (FB) (Del).
- c) *CIT v. Divine Leasing and Finance Ltd* 299 ITR 268(Del.)
- d) *CIT v. Lovely Exports (P) Ltd.* 319 ITR5 (ST)

19. The Assessee also raised the point that the statement of Mr. Tarun Goyal had been recorded behind the back of the Assessee and in the absence of cross-examination such evidence was of no evidentiary value. It was further specifically pointed out that “statement of Shri Tarun Goyal has not been provided to the Appellant company.” Further, the Director of the Appellant company denied that Mr. Goyal was brought before them, face to face, for the purpose of his cross-examination. It was denied that any entry had been received from Mr. Goyal or Mr. Mahesh Garg and merely because the share holders had a common addresses, it does not become a ground to hold that share capital was unexplained under Section 68 of the Act. In support of this proposition, reliance was placed on the decision of this Court in ***CIT v. Victor Electrodes Ltd. (2012) 329 ITR 271 (Del).***

20. A request was made by the Assessee during the appellate proceedings before the CIT (A) for admission of additional evidence in the form of bank statements of the share holders. This application was forwarded by the CIT (A) to the AO who by his letter dated 25th October, 2012 opposed to the admission of the additional evidence. Even then, the CIT (A) admitted the additional evidence and directed the AO to conduct an enquiry. In pursuance to which, the AO by letters dated 10th July and 19th August, 2013, submitted the remand report. The AO stated that the summons under Section 131 were

issued to Mr. Goyal but he did not appear. Then the AO requested Mr. Harjeet Singh and Mr. Anu Aggarwal to produce Mr. Tarun Goyal to which they replied that they “do not presently know the whereabouts of Mr. Tarun Goyal.” The AO maintained that during the entire course of the assessment proceedings, the Directors of the Best Group had never demanded to cross-examine Mr. Goyal.

21. The CIT (A) had further noted the submission of learned counsel for the Assessee that Mr. Tarun Goyal had later retracted his statement made under Section 132 (4) of the Act on 10th October and 4th November, 2008 and stating that they had been taken under coercion. The CIT (A) relied on the disclosure of Mr. Anu Aggarwal offering Rs. 8 crores to tax during the search proceedings. Reference was made to Annexure A-1 and A-11 which contained details of “unaccounted cash received and expenses” which had not been entered in the books of accounts. Reference was also made to the statements of Mr. Harjeet Singh and Mr. Tarun Goyal. The version of the AO that till 15th October, 2008 Mr. Anu Aggarwal kept quiet and did not ask for a copy of the statement of Mr. Goyal or seek his cross-examination was accepted by the CIT (A). Consequently, the additions made by the AO were sustained.

Appeals before the ITAT

22. As already noted that separate assessment orders and separate corresponding orders were passed in appeal by the CIT (A) in respect of each of the Assesseees forming part of the Best Group. The further appeals

filed by the Assesseees before the ITAT against the orders of the CIT (A) for the AYs 2005-06 to 2009-10 were consolidated, heard together and disposed of by way of a common impugned order by the ITAT on 31st May, 2016.

23. Two issues were raised by the Assesseees, in all these appeals, for the consideration of the ITAT.

24. In three of these appeals, the first issue was raised before the ITAT regarding the addition made under Section 68 of the Act, wherein, the ITAT on merits found the additions made to be unjustified. Against the judgment concerning these three matters, the Revenue has filed ITA Nos. 11, 12 and 21 of 2017.

25. The other issue that arose before the ITAT was whether the assumption of jurisdiction under Section 153A of the Act, qua each of the Assesseees, was justified in law. The ITAT held this issue in favour of the Assessee, therefore, the Revenue has challenged the same by filing the remaining appeals, i.e., ITA Nos.13 to 20 and 22 of 2017. Here, the ITAT had held that there was no incriminating material for each of the AYs other than the year of search, i.e., AY 2008-09 to justify the assumption of jurisdiction under Section 153A of the Act.

Submissions of counsel for the Revenue

26. Mr. Rahul Kaushik, learned Senior Standing counsel for the Revenue, has submitted that the statement of Mr. Tarun Goyal remained unrebutted as the Assesseees never sought to cross-examine him. Secondly, the statement of Mr. Anu Aggarwal surrendering Rs.8 crore in the course of search and

also his admission of receiving accommodation entries was itself incriminating material for the purposes of assumption of jurisdiction under Section 153A of the Act. In support of his contention, learned counsel for the Revenue placed considerable reliance on the decision of this Court in ***Smt. Dayawanti Gupta v. CIT (2016) 390 ITR 496 (Del)*** and sought to distinguish the judgment of this Court in ***Commissioner of Income Tax (Central-III) v. Kabul Chawla (2016) 380 ITR 573 (Del)***. He submitted that apart from the above, the documents A-1, A-4 and A-11 that were seized during the search, also constituted incriminating material. According to him, there was no requirement that incriminating material qua each of the AYs, for which the addition was made, needed to exist. He relied upon the observations of this Court in the decision in ***CIT v. Anil Kumar Bhatia (supra)***. He also sought to distinguish the recent decision of this Court in ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia 2017 (295) CTR 466 (Del)***.

27. As regards additions made on merits under Section 68 of the Act, Mr. Kaushik again took this Court through the materials and submitted that the deletion made by the ITAT, of the additions which had been made by the AO which were further confirmed by the CIT (A), was not called for in the facts and circumstances of the case.

Submissions of counsel for the Assessee

28. Supporting the order under appeal, Mr. Ved Kumar Jain, learned counsel appearing for the Assessee, submitted that the surrender of Rs. 8 crores made by Mr. Anu Aggarwal was only vis-a-vis the year of search and not

other years. Even for the year of search, the additions under Section 68 of the Act were found to be unjustified by the ITAT. He pointed out that the ITAT had examined thoroughly the entire evidence and returned a factual finding which has not been assailed on the ground of perversity.

29. Mr. Jain submitted that as far as the assumption of jurisdiction was concerned, the so-called documents seized were only loose sheets. These were confronted to Mr Anu Aggarwal who categorically stated:

I am unable to explain these documents. We have received cash as advance for sale of property in certain instances which has not been reflected in our books of accounts. Part of the cash received which has not been accounted by us in regular books of accounts has been utilized for making expenses in our construction business. This reflects our unexplained, unaccounted work in progress.

30. Mr. Jain placed reliance on the decision of this Court in ***Commissioner of Income Tax v. Harjeev Aggarwal (2016) 290 CTR 263*** and submitted that mere statements made during the course of the search, under Section 132 (4) of the Act, cannot be considered to be incriminating material. He submitted that the decision in ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia (supra)*** has considered the legal position after analysing the entire case law and, therefore, the decision in ***Smt. Dayawanti Gupta v. CIT (supra)*** would not come to the aid of the Revenue in the present case. He pointed out that apart from the fact that Mr. Tarun Goyal had later retracted his statement, it was plain that even a copy of the statement of Mr. Tarun Goyal was not provided. Further, Mr. Tarun Goyal could not be produced for cross-examination, therefore, no reliance could be placed on his statement.

Analysis and reasons

31. In ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia*** (*supra*), this Court had considered the entire gamut of case law on the assumption of jurisdiction under Section 153A of the Act. In ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia*** (*supra*) this Court had the occasion to extensively discuss the decision in ***Smt. Dayawanti Gupta v. CIT*** (*supra*) to point out why the said decision was distinguishable in its application to the facts of the former case. However, since the same arguments have been advanced by the Revenue in the present case, the said decision in ***Smt. Dayawanti Gupta v. CIT*** (*supra*) is being again discussed herein.

32. In ***Smt. Dayawanti Gupta v. CIT*** (*supra*) the Assesseees were dealing in the business of pan masala, gutkha, etc. Firstly, the Assesseees therein were, by their own admission not maintaining regular books of accounts. Secondly, they also admitted that the papers recovered during the search contained “details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside books of accounts” and they were “actually unaccounted transactions made” by two of the firms of the Assesseees. Thirdly, the Court found as a matter of fact that the Assesseees were “habitually concealing income” and that they were “indulging in clandestine operations” and that such persons “can hardly be expected to maintain meticulous books or records for long.” As pointed out by this Court in ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia*** (*supra*) the

decision in *Smt. Dayawanti Gupta v. CIT* (*supra*), therefore, turned on its own facts and did not dilute the law explained in *Commissioner of Income Tax (Central-III) v. Kabul Chawla* (*supra*).

33. At this stage, it requires to be noticed that the decision of this Court in *Commissioner of Income Tax (Central-III) v. Kabul Chawla* (*supra*) took note *inter alia* of the decision of the Bombay High Court in *Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd.* [2015] 58 taxmann.com 78 (Bom), wherein it was held that if no incriminating material was found during the course of search, in respect of each issue, then no addition in respect of any such issue can be made to the assessment under Sections 153A and 153C of the Act. The decisions of this Court in *CIT v. Anil Kumar Bhatia* (*supra*) and *CIT v. Chetan Das Lachman Das* [2012] 254 CTR 392 (Del) were extensively discussed in *Commissioner of Income Tax (Central-III) v. Kabul Chawla* (*supra*). The Court in *Commissioner of Income Tax (Central-III) v. Kabul Chawla* (*supra*) had also discussed and concurred with the decision of the Rajasthan High Court in *Jai Steel (India), Jodhpur v. ACIT* (2013) 36 Taxman 523 (Raj) which had held that the assessment in respect of each of the six assessment years, preceding the year of search “is a separate and distinct assessment.” It was further held in the said decision that “If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated.”

34. In *Commissioner of Income Tax (Central-III) v. Kabul Chawla* (supra) the legal position was summarised thus:

37. On a conspectus of Section 153A (1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the. aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or

reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

35. As noted in ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia*** (*supra*), several other High Courts have also come to a similar conclusion either by following ***Commissioner of Income Tax (Central-III) v. Kabul Chawla*** (*supra*) or otherwise. This includes the decisions of the Gujarat High Court in ***Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd.*** (2016) 387 ITR 529 (Guj); ***Principal Commissioner of Income Tax-1 v. Devangi alias Rupa*** 2017-TIOL-319-HC-AHM-IT; the Karnataka High Court in ***CIT v. IBC Knowledge Park Pvt. Ltd.*** (2016) 385 ITR 346 (Kar); the Kolkata High Court in ***Pr. CIT-2 v. Salasar Stock Broking Ltd.*** 2016-TIOL-2099-HC-KOL-IT and the Bombay High Court in ***CIT v. Gurinder Singh Bawa*** (2016) 386 ITR 483 (Bom). In ***Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta***

Gutgutia (*supra*) the entire gamut of the case law had been analysed and the legal position was reiterated that unless there is incriminating material qua each of the AYs in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law. This is one more occasion for the Court to reiterate that legal position.

36. Turning to the facts of the present case, it requires to be noted that the statements of Mr. Anu Aggarwal, portions of which have been extracted hereinbefore, make it plain that the surrender of the sum of Rs. 8 crores was only for the AY in question and not for each of the six AYs preceding the year of search. Secondly, when Mr. Anu Aggarwal was confronted with A-1, A-4 and A-11 he explained that these documents did not pertain to any undisclosed income and had, in fact been accounted for. Even these, therefore, could not be said to be incriminating material qua each of the preceding AYs.

37. Fourthly, a copy of the statement of Mr. Tarun Goyal, recorded under Section 132 (4) of the Act, was not provided to the Assessees. Mr. Tarun Goyal was also not offered for the cross-examination. The remand report of the AO before the CIT(A) unmistakably showed that the attempts by the AO, in ensuring the presence of Mr. Tarun Goyal for cross-examination by the Assessees, did not succeed. The onus of ensuring the presence of Mr. Tarun Goyal, whom the Assessees clearly stated that they did not know, could not have been shifted to the Assessees. The onus was on the Revenue to ensure his presence. Apart from the fact that Mr. Tarun Goyal has

retracted his statement, the fact that he was not produced for cross-examination is sufficient to discard his statement.

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in *Commissioner of Income Tax v. Harjeev Aggarwal* (*supra*). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in *Smt. Dayawanti Gupta v. CIT* (*supra*) where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

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

40. Turning to the additions under Section 68 of the Act made on merits for three of the AYs. A perusal of the common impugned order of the ITAT reveals that a very detailed discussion has been undertaken after analysing the seized material. Para 38 of the impugned order is relevant in this context which reads as under:

“38. Before the learned CIT (A), the assessee has produced the copy of bank account of all the share applicant companies. The CIT (A) has admitted the same as, additional evidence and has called for the remand report from the Assessing Officer. There is no cash deposit in the bank account of any of the share applicant before the issue of cheque for share application money to the group companies of the assessee. On the other hand, the credit is by way of transaction. During remand proceedings, the Assessing Officer has made necessary verification from the bank of the share applicant and no adverse finding is recorded by him in the remand report. Therefore, the facts on record are contrary to the allegation of the Revenue that the assessee gave cash to Shri Tarun Goyal and he, after depositing the same in the bank account of various companies, issued cheques for share application money. On these facts, the decision of Hon'ble Jurisdictional High Court in the case of *Harjeev Aggarwal* (supra) would be squarely applicable. Therefore, we hold that the statement of Shri Tarun Goyal cannot be used against the assessee because:

(i) His statement was recorded behind the back of the assessee and the assessee was not allowed any opportunity to cross-examine him.

(ii) There is no corroborative evidence in support of the statement of Shri Tarun Goyal. On the other hand, the material found during the course of search and other evidences placed on record by the assessee are contrary to the allegation made by Shri Tarun Goyal in his statement.”

41. The Court has not been persuaded to hold that the above finding of the ITAT on the legal position regarding the Revenue being disabled from relying on the statement of Mr. Tarun Goyal suffers from any perversity. Further the ITAT has in the impugned order in paras 45 and 46 observed as under:

“45. Now, we come back to the facts of the assessee's case in respect of the share application money received. The assessee has furnished the affidavit of the director of share applicant company, share application form, confirmation from share applicant, certificate of incorporation of the shareholder company and copy, of income tax return of share applicant company. The Assessing Officer has disputed the validity of the affidavit on the ground that affidavit is not certified by the notary and the stamp paper for purchase of affidavit is dated prior to the application made for share application money. On verification of the copy of the affidavit which is placed at pages 48 & 49 of the assessee's paper book, we find that the affidavit is not made in the presence of notary public and, therefore, it cannot be considered as affidavit in legal sense. Nevertheless, it remains a self-declaration by the director of share applicant company in which he has confirmed that the company has applied to M/s Best City Developers (India) Private Limited for 15 lakhs equity shares for which payment of Rs.1,50,00,000/- has been made by cheque. The detail of cheque number and the name of the bank have also been provided. In paragraph 3, the permanent account number of the share applicant company has also been provided. In paragraph 2, it is mentioned that the share applicant company is registered with Registrar of Companies and registration number along with date of registration is also given. The assessee has furnished share application form for which also the address of the share applicant company, number of shares applied for, amount paid by cheque, details of cheque number as well as permanent account number of the company has been given. The confirmation has been filed by the share applicant company giving all necessary particulars and, for ready reference, we reproduce the same herein below:

Aries Crafts Private Limited
13/34, W.F.A., IVth Floor, Main Arya Samaj Road, Karol Bagh,
New Delhi-110005
To whom it may concern

Name of the Company: Best City Developers (India) Pvt. Ltd.
Number of shares: 15000000 Equity Shares of Rs.1 each at a premium of Rs.9 per share.
Amount invested: Rs.150,00,000/-
Rupee One Crore Fifty Lac Only.
Details of Payment as under:

<i>Chq. No.</i>	<i>Date</i>	<i>Amount (Rs.)</i>	<i>Bank</i>	<i>Branch</i>
474604	15.03.2008	100,00,000	HDFC Bank Ltd.	New Delhi
474615	25.03.2008	50,00,000	HDFC Bank Ltd.	New Delhi
Total		150,00,000		

Bank Account No.: 003142340000152
Bank Particulars: HDFC Bank Limited
Ansari Road, Darya Ganj,
New Delhi - 110 002

Source of funds: Out of sale of shares
Occupation: Business
Income Tax PAN Number: AADCA5439P Ward 1(3), New Delhi.
Share Certificates Received: Yes
We do hereby confirm that the information furnished above is correct.
For Aries Crafts Private Limited
Sd/-
Authorised Signatory

46. From the above, it is evident that the share applicant company has given the confirmation on its letter head which gives the complete address of the said company. In the confirmation, number of shares applied and the amount invested has been given. Details of payments i.e., cheque number, date of cheque and name of the bank on whom cheque is drawn is given. Address of the bank and bank account number has also been given, source of fund is given as well as permanent account number of the company is also given.”

42. Thereafter the ITAT held in para 48 as under:

“48.In the case under consideration before us, the assessee has duly furnished the declaration of the director of the share applicant company, share application form, confirmation and certificate of incorporation from Registrar of Companies as well as income tax return of the share applicant company. The Assessing Officer did not make any verification from those documents. In this case, he even did not issue any summons to the director of the share applicant company neither made any cross verification from the income tax record of the share applicant company whose permanent account number was furnished before him. The Assessing Officer simply rejected the evidences furnished by the assessee. Hon'ble Jurisdictional High Court in the case of *Gangeshwari Metal Pvt. Ltd.* (supra) has disapproved the action of the Assessing Officer wherein the Assessing Officer sits back with folded hands till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The facts in the assessee's case are identical to the facts before the Hon'ble Jurisdictional High Court in the case of *Gangeshwari Metal Pvt. Ltd.* (supra). In the case under appeal before us also, the Assessing Officer simply sits back till the assessee submitted all the evidences and thereafter rejected those evidences on the basis of presumption and suspicion. He did not make any enquiry, he did not issue any summons to the share applicant company, he did not try to verify from the record of the share applicant company who are all assessed to income tax. In view of the above, respectfully following the decision of Hon'ble Apex Court in the case of *Orissa Corporation P. Ltd.* (supra) and of Hon'ble Jurisdictional High Court in the case of *Rakam Money Matters Pvt. Ltd.* (supra), *Victor Electrodes Ltd.* (supra), *Fair Finvest Ltd.* (supra) and *Gangeshwari Metal Pvt. Ltd.* (supra), we hold that the assessee has duly discharged the onus which lay upon it to prove the credit in the form of share capital. Accordingly, the addition made for unexplained share capital is deleted.”

43. With the Assessee discharging the burden placed on them to explain the credit appearing in the books of accounts, the Court is satisfied that even on this aspect the impugned order of the ITAT suffers from no legal infirmity warranting interference.

Conclusion

44. Accordingly the question framed by the Court in ITA Nos. 11, 12 and 21 of 2017 by the order dated 21st March, 2017 is answered in the negative i.e. in favour of the Assessee and against the Revenue by holding that the additions made under Section 68 of the Act on account of the statements made by the Assessee's Directors in the course of search under Section 132 of the Act were rightly deleted by the ITAT.

45. The question framed in ITA Nos. 13 to 20 and 22 of 2017 by the order dated 21st March, 2017 is answered in the affirmative i.e. in favour of the Assessee and against the Revenue by holding that having regard to the materials seized in the course of search under Section 132 and the statements made on behalf of the Assessee, the assumption of jurisdiction under Section 153 A of the Act and the consequent additions made by the AO were not justified.

46. Consequently, the appeals of the Revenue are dismissed but in the circumstances, with no orders as to costs.

CM 831/2017 in ITA 11/2017; CM 834/2017 in ITA 12/2017
CM 836/2017 in ITA 13/2017; CM 839/2017 in ITA 14/2017
CM 842/2017 in ITA 15/2017; CM 845/2017 in ITA 16/2017

CM 848/2017 in ITA 17/2017; CM 851/2017 in ITA 18/2017
CM 854/2017 in ITA 19/2017; CM 857/2017 in ITA 20/2017
CM 865/2017 in ITA 21/2017; CM 862/2017 in ITA 22/2017

47. For the reasons stated in the applications, the delay in filing the appeals is condoned. The applications are, accordingly, disposed of.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 01, 2017

dn/b'nesh