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

% *Judgment reserved on 09.08.2021*
Judgment pronounced on 19.01.2022

\+ **ITA 68/2021 & CM No. 9319/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI ......Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 69/2021 & CM No. 9322/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI ......Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 70/2021 & CM No. 9346/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI ......Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **<u>ITA 71/2021 & CM No. 9352/2021</u>**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI ......Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **<u>ITA 72/2021 & CM No. 9355/2021</u>**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI ......Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh

Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

+ **ITA 73/2021 & CM No. 9356/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI ......Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr B.B Gupta, Senior Adv. with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Sameer Rohatgi, Mr. Karan Luthra, and Mr. Ankit Banati, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J.:

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Preface:-

1. These appeals, which are six in number, are preferred under Section 260A of the Income Tax Act, 1961 [hereafter referred to as "the Act"] and are directed against a common order dated 31.10.2019, passed by the

Income Tax Appellate Tribunal [in short "the Tribunal"].

1.1 The Tribunal, *via* the impugned order, rendered a decision in twelve appeals out of which six were preferred by the respondent i.e., Agson Global Pvt. Ltd. [hereafter referred to as "assessee"], while the remaining six appeals were preferred by the appellant [hereafter referred to as "revenue"].

1.2. The impugned order concerned six assessment years [in short "AYs"] i.e., 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017 and 2017-2018.

2. The record shows that the Tribunal was, principally, grappling with three broad issues. These issues concerned additions/deletions made to the declared/returned income of the assessee under the following broad heads:

(i) Additions *qua* amounts received by the assessee in the form of share capital/share premium under Sections 68 of the Act.

(ii) Deletions made on account of alleged bogus purchase transactions. Under this head, the Assessing Officer ruled that 25% of the bogus purchases in value should be added to the assessee's declared/returned income.

(iii) Addition made, under Section 68 of the Act, in respect of monies deposited by the assessee with its banker during the demonetization period.

2.1. Insofar as issue nos. (i) and (ii) are concerned, they were common to all six AYs, referred to hereinabove. However, insofar as issue no. (iii) is concerned, it arises only in AY 2017-2018. In this regard, it requires to be noticed that demonetization was brought about on 08.11.2016 and the period of demonetization spanned between 09.11.2016 and 30.12.2016.

2.2. Therefore, we would be dealing with submissions and counter-submissions of parties bearing in mind the aforesaid issues and the fact as to whether or not substantial questions of law have arisen which require consideration and/or adjudication.

Background:-

3. Before we proceed further, certain facts and circumstances, in the backdrop of which the above-captioned appeals have been lodged, are required to be noticed.

3.1. The assessee had filed its return of income *qua* AY 2012-2013 under Section 139 (1) of the Act on 31.10.2013. In this return, the assessee had declared its income as Rs.6,02,85,750/-. The Assessing Officer [in short "A.O."] passed an assessment order under Section 143(3) of the Act, on 24.03.2015. *Via* the said assessment order, the A.O. made an addition of Rs.18,50,00,000/- to the declared/returned income of the assessee on account of "unexplained share capital and share premium". Resultantly, the assessed income shot up to Rs.24,52,85,750/-. Being aggrieved, the assessee preferred an appeal. The CIT(A), vide order dated 31.03.2016, deleted the aforesaid addition. Pertinently, the revenue did not carry the matter further. Consequently, the assessment proceedings vis-à-vis AY 2012-2013, stood concluded.

3.2. Likewise, for AYs 2013-2014 and 2014-2015, the A.O. passed assessment orders under Section 143(3) of the Act, whereby the income declared/returned by the assessee was accepted. The assessment order *qua* AY 2013-2014 was passed on 31.03.2016. The assessed income, which was also the declared/returned income, was pegged at Rs.7,22,89,816/-. Similarly, for AY 2014-2015, the assessment order was passed on 28.12.2016 and the assessed income, which was also the declared/returned income, was pegged at Rs.3,16,41,113/-.

3.3. Insofar as the remaining three AYs are concerned i.e., 2015-2016, 2016-2017 and 2017-2018, even while the returns filed by the assessee were pending assessment, a search and seizure operation was carried out *qua* the assessee on 21.03.2017. For ease of reference, as regards these three AYs, the details as to when returns were filed and the amount which was declared as income by the assessee is set forth hereafter:

AY	**Date of return of income**	**Amount Declared/Returned as Income**
2015-2016	30.03.2017	Rs.15,87,75,950/-
2016-2017	29.12.2017	Rs.35,50,09,894/-
2017-2018	29.12.2017	Rs.68,18,55,980/-

3.4. Thus the position which emerged *qua* each of the six AYs, once additions/deletions were made by the AO, and thereafter, when some of these were deleted/scaled down by CIT(A), is set forth hereafter:

Particulars	Assessment Years					
	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
ITA No.	69/2021	71/2021	72/2021	73/2021	70/2021	68/2021
Date of filing of return of income	31.10.2013	11.03.2015	01.04.2015	31.03.2017	29.12.2017	29.12.2017
Addition u/s 68 on a/c of share capital/premium:						
(i) Unrelated parties	48,19,87,000	NA	NA	NA	NA	NA
(ii) From alleged associated parties: - M/s. Mahalaxmi	14,92,00,000	NA	NA	NA	NA	NA

Traders - M/s. Sri Balaji Enterprise	NA	15,20,00,000	NA	NA	NA	NA
- M/s. Vishal Traders	NA	34,79,50,000	65,30,99,000	24,81,49,800	17,86,74,750	NA
- Rustagi Exim P. Ltd	NA	NA	09,55,55,000	11,60,00,100	37,60,99,650	52,23,87,900
- M/s. Vikas International	NA	NA	06,48,90,000	NA	NA	NA
(iii) From alleged unknown parties	02,31,66,700	NA	NA	NA	NA	NA
Total addition	65,43,53,700	49,99,50,000	81,35,44,000	36,41,49,900	55,47,74,400	52,23,87,900
Alleged commission expenses @ 2% on the above	01,30,87,074	99,99,000	1,62,70,880	72,82,998	01,10,95,488	01,04,47,758
Total addition u/s 68 on account of share capital/ premium (1)	66,74,40,774	50,99,49,000	82,98,14,880	37,14,32,898	56,58,69,888	53,28,35,658
Disallowance of alleged bogus purchases (being 25% of purchases from alleged related parties) (2)	88,31,23,282	65,25,24,882	179,46,43,207	2,67,93,04,397	2,99,56,36,930	1,21,763
Addition u/s 68 on a/c of cash deposited in bank a/c post demonetisation (3)	NA	NA	NA	NA	NA	150,53,24,000
Total Additions (1+2+3)	1,55,05,64,056	1,16,24,73,882	2,62,44,58,087	3,05,07,37,295	3,56,15,06,818	2,03,82,81,421
Income as per Return (4)	6,02,85,750	7,22,89,816	13,16,41,113	15,87,75,950	35,50,09,894	68,18,55,980
Assessed Income	1,61,08,49,806	123,47,63,69	275,60,99,20	3,20,95,13,24	3,91,65,16,	2,72,01,37,4

(1+2+3+4)		8	0	5	712	01

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

4. The record shows that, during the search and seizure operations, the statement of the Managing Director, Mr Arpesh Garg was recorded under Section 132(4) of the Act. The assessment was made under Section 153A of the Act.

4.1. It is also relevant to note that the statement made by Mr Arpesh Garg i.e., the Managing Director of the assessee on 22.03.2017 (which is referred to above) was retracted by him on 24.03.2017, that is, within two days.

4.2. What is of some significance is that a deviation report dated 20.12.2018 was prepared by the AO, which was, markedly different from the assessment orders passed by him. This aspect of the matter has been adverted to at great length by the Tribunal in the impugned order and shall also be alluded to by us in the latter part of the judgment.

4.3 Suffice it to state that the Deputy Director of Investigation Wing had submitted a written appraisal report on 04.01.2018. Despite the stand taken by the Deputy Director (Investigation) in the appraisal report and the communication dated 24.12.2018, at the meeting held on 28.12.2018, the AO and the Assistant Commissioner of Income Tax (ACIT) reiterated the position taken in the deviation report.

4.4 Briefly, in the deviation report, the AO concluded that since the source of the cash movement concerning receipt of money by the assessee in the form of share capital/share premium amounting to Rs.365.28 crores was traceable directly to the assessee's bank accounts, the addition of the said sum was not justified.

4.5 Likewise, insofar as the issue concerning addition of Rs.941.86 crores *qua* bogus purchases was concerned, the AO in the deviation report made the following significant observations:

(i) Contrary to what the appraisal report had held, all purchases made by the assessee were not bogus.

(ii) 50% of the purchases were verified by issuing notices under Section 133(6) of the Act. Qua them, confirmatory letters, as well as copies of the ledger accounts, were presented by the assessee. In respect of these, no variation was found.

(iii) If the value of such purported bogus purchases, as noticed in the appraisal report, was taken into account and juxtaposed against sales booked against the very same persons- it would show that the assessee has, in fact, declared a profit. In other words, if transactions with such parties are treated as bogus purchases, the profit reflected in the books will have to be reduced. The rationale given was that one cannot disallow bogus purchases and at the same time treat the sales with the same parties as genuine and bring the same to tax. Therefore, the suggestion made in the appraisal report that an *ad hoc* addition of 25% should be made to the income on account of such bogus purchases, may ultimately be detrimental to the interest of the revenue, if the sale is also to be treated as bogus.

(iv) Reference was made to the transactions arrived at with three entities by the assessee in the financial year 2016-2017. It was noticed that similar transactions made with the same or different parties that were bogus transactions, is something which obtained strength from the fact that stock worth Rs.450 crores, was found short, although the same stood recorded in the books of accounts. In sum, the conclusion reached was that the books of accounts were not genuine and were liable to be rejected under Section 145(3) of the Act and thereafter a gross profit rate had to be estimated on a reasonable basis keeping in mind the prevailing market trend.

4.6 As regards cash deposits made by the assessee during the demonetization period; against a proposal to add Rs.180.53 crores, as suggested by the Investigation Wing, for the reasons given in the deviation report, the amount was pared down to Rs.99.04 crores. Thus, the suggested addition on this score to the total income of the assessee concerning AY 2017-2018 was restricted to Rs. 99.04 crores.

5. At this juncture, it would be relevant to note that the revenue, upon queries being raised by the Tribunal concerning various issues including the basis on which the deviation report had been prepared in the instant matter, was told in no uncertain terms that preparation of a "deviation note" is part of the assessment proceedings as per the guidelines envisaged in the Income Tax Manual of Office Procedure: Vol.-II (Technical, Chapter-3, paragraph 4 at page 44) (see paragraph 51 of the impugned order passed by the Tribunal).

5.1. Furthermore, the Tribunal, in paragraph 92 of the impugned order, after perusal of the appraisal report prepared by the Investigation Wing, has made the following observations :

"Appraisal report was produced before the bench and it was found that in para no.4.3.7, the Investigation Wing has mentioned that the above addition[1] is required to be made in order to protect the interest of the revenue...."

5.2. The Tribunal, however, *via* the impugned order, even deleted the scaled-down addition made by the CIT(A) of Rs.73.13 crores concerning AY 2017-2018 in respect of cash deposits made with the bank during the demonetization period. Consequently, the Tribunal partially allowed the six appeals filed by the assessee while dismissing the six appeals preferred by the revenue.

6. It is in these circumstances that the revenue has preferred the instant appeals.

7. Submissions on behalf of the revenue were advanced by Mr Ajit Sharma, learned senior standing counsel, while insofar as the assessee is concerned, arguments were advanced by Mr Mukul Rohtagi, learned senior counsel, instructed by Mr Mahesh Agarwal.

Submissions on behalf of the revenue:-

8. Insofar as Mr Sharma is concerned, the arguments advanced by him can be, broadly, paraphrased as follows :

(i) That the assessment orders passed in each of the aforementioned assessment years ought to have been sustained by the Tribunal.

(ii) The Tribunal lost sight of the fact that most of the entities which had invested amounts in the form of share capital/share premium in the assessee had no resources of their own. All told about 50 entities had invested a huge

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[1] made with respect to bogus purchases

amount in the form of share premium at the rate of Rs.9,990/-, while they were sold at an appreciably low premium ranging between Rs.70 to Rs.80 per share.

(iii) The Tribunal also failed to take into account the true import and effect of the statement made by an accommodation entry provider i.e., one, Shri Praveen Aggarwal who had denied having made any investment in the assessee. This statement pointed in the direction that the monies which ostensibly had been invested in the assessee in the form of share capital/share premium were unaccounted funds of the assessee routed through accommodation entry providers.

(iv) The Tribunal erred in not taking into account the fact that the CIT(A) had concluded that incriminating material had been recovered during the search carried out by the revenue. Therefore, the Tribunal had erred in applying the ratio of the judgment of the Division Bench of this Court rendered in ***Commissioner of Income Tax (Central)-III v. Kabul Chawla***, 2015 SCC OnLine Del 11555, and, thus, wrongly concluded that insofar as AYs 2012-2013 to 2014-2015 was concerned, those assessments could not be disturbed.

(v) The Tribunal also erred in ignoring concurrent findings returned by, both, the A.O. and the CIT(A) that the investor entities had not been able to establish their creditworthiness, and, thus, the ostensible investment made in the assessee was a sham transaction. The fact that the investor entities had returned borrowed funds, as claimed by the assessee, did not add to their creditworthiness.

(vi) Although the Tribunal relied upon certain parts of the deviation report to set aside the conclusions reached by the A.O. and the CIT(A), it erroneously chose to ignore the conclusion arrived at in the deviation report that the assessee had not been able to account for Rs.99.04 crores which had been deposited by it, in the wake of demonetization.

(vii) Likewise, the Tribunal also failed to take note of the observations made in the deviation report that instead of adding the entire share premium received by the assessee, only that share premium ought to be added under Section 68 of the Act where money was not sourced from the assessee. In support of this plea, reliance was placed on paragraph 3(ix) of the deviation report.

(viii) The deviation report categorically rejected the assessee's books of accounts while considering the issue regarding bogus purchases. In this context, the deviation report also emphasized the fact that stock worth Rs.450 crores, was short, as against that which was recorded in the assessee's books of accounts.

(ix) The Tribunal failed to consider that the CIT(A), while discussing the issue concerning bogus sales had reached the following conclusions (even while reducing the addition made by the A.O. in this respect) : (a) that the assessee had booked a loss when it traded with related parties, however, when it was trading with non-related parties, the assessee had reported a profit of approximately 9% per annum. (b) the assessee had entered into artificial transactions to suppress profit; this conclusion was reached by CIT(A) after considering the remand report and the statement of Mr Arpesh Garg i.e., the Managing Director of the assessee.

(x) The Tribunal also failed to appreciate that cash deposits made to the tune of approximately Rs.180 crores post Diwali and/or after demonetization, were unexplained and excessive, as compared to the earlier years. In this context, reliance was placed on the following information culled out from the record :

Month	FY 2014-15		FY 2015-16		FY 2016-17	
	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits
November	16.49	14.46	45.18	47.12	47.73	113.52
December	22.26	28.08	97.35	94.36	69.83	89.75

<u>Submissions on behalf of the assessee:-</u>

9. Insofar as Mr Rohtagi was concerned, his submissions were broadly the following :

(i) This court had jurisdiction to entertain the instant appeals only if a substantial question of law, and not just any question of law, arises for consideration. The Tribunal was the final fact-finding authority. The Tribunal, having examined the material on record, has correctly concluded that the orders passed by the A.O., which were partially modified by the CIT(A), deserved to be set aside.

(ii) A careful perusal of the deviation report and the assessment orders would show that the A.O. has acted under the dictate of the investigation wing, as noted by the Tribunal in paragraphs 91 and 92 of the impugned order. The additions [qua bogus purchases] were made to the assessee's declared/returned income only to protect the interest of the revenue, as directed by the investigation wing. On this short ground alone, the assessment orders deserved to be set aside. The A.O. performs a quasi-judicial function, which could not have been interfered with by the revenue i.e., in this case, the investigation wing. [See ***P. Palaniswami v. Shri Ram Popular Service (P) Ltd. & Anr.,*** (1974) 1 SCC 197.]

(iii) In this context, it is important to note that the A.O. had prepared the deviation report dated 20.12.2018, after perusing the appraisal report generated by the investigation wing pursuant to the search and seizure operation carried out *vis-a*-vis the assessee on 21.03.2017. The deviation report prepared by the A.O. had received the approval of the ACIT, despite which the A.O. reversed its position while passing the assessment orders, as alluded to above, at the say-so of his superiors who were part of the investigation wing. In this context, reliance was placed on the letter dated 24.12.2018 addressed by the Deputy Director of Income Tax (Investigation) to the ACIT.

(iv) Insofar as the merits of the matter are concerned, it was submitted that the addition made by the A.O. on account of share capital/share premium (along with supposed commissions paid by the assessee), was rightly deleted by the Tribunal as it concluded that the monies invested in the assessee were its own money, which had been advanced to the investor entities, who, in turn, had invested the same in the assessee in the form of share capital/share premium. A finding of fact has been returned by the Tribunal that these transactions were carried out, via banking channel, and involved money which was accounted for in the assessee's books of accounts and, therefore, it need not be disturbed.

(v) Insofar as deletion of disallowance on account of bogus purchases was concerned, the Tribunal has once again reached a correct conclusion. The Tribunal, after considering the material on record, reached a finding that no evidence of bogus purchases could be found during the search and seizure action. The Tribunal noted that the statement made by the Managing Director of the assessee had been retracted within 48 hours, and, therefore, could not form the basis of addition in respect of "abated years". Furthermore, the Tribunal correctly concluded that, while disallowing the purported bogus purchases, it had ignored the sales made against such purchases. According to the Tribunal, if sales were taken into account, it would be seen that the assessee had returned a profit on these transactions. Besides this, it needs to be appreciated (as noted by the Tribunal) that the purported bogus purchases were backed by bills and vouchers and details entered in the assessee's stock register. The assessee's books of accounts, which were duly audited, reflected these transactions. The assessee had proved the validity of these transactions by relying upon the balance sheet(s) and profit and loss account(s) of third parties. Importantly, as noted by the Tribunal, the revenue had failed to take into account—stock worth nearly Rs.450 crores, which was lying at the assessee's Sonipat godown.

(vi) As regards deletion of addition made on account of cash deposited by the assessee with its banker post demonetization, the Tribunal, on carrying out an analysis of the transactions made during the relevant period, came to the conclusion that the cash deposited aligned with the cash sales effected by the assessee during the said period. As noted by the Tribunal, there was no evidence available on record which would persuade it to hold that the assessee had booked non-existent sales. Furthermore, as noted by the Tribunal, the A.O., while making the addition under this head, erroneously added Rs.63.41 crores, which included new currency notes of denomination of Rs.2,000 and Rs.500 and old currency notes bearing the denomination of Rs.100/-, Rs.50/-, Rs.20/- and Rs.10/-; which had not been demonetized. The Tribunal also noted, in this context, that the A.O. had failed to take into account that the period in issue spanned between 9.11.2016 and 30.12.2016, and, therefore, the total amount worked out to Rs.175.57 crores and not 180.53 crores, which was the sum that the A.O. sought to add to the assessee's declared/returned income. Thus, in effect, the Tribunal concluded that no addition could be made even under this head.

Analysis and Reasons:-

10. We have heard the learned counsel for the parties and perused the record.

10.1. According to us (as noted at the very outset), there are three heads under which the authorities below have dealt with the assessee's case concerning the six AYs, in issue. But before we move further, as noted by us right at the beginning of our discussion, amongst the six AYs, in three AYs i.e., 2012-2013, 2013-2014 and 2014-2015, assessment orders were passed under Section 143(3) of the Act. Insofar as AY 2012-2013 was concerned, the A.O. had sought to add Rs.18.50 crores towards unexplained share capital/share premium; an addition which was set aside by the CIT(A), vide order dated 31.03.2016. Therefore, insofar as these AYs are concerned, the assessed income of the assessee could be disturbed only if incriminating material had been found by the revenue during the search.

10.2. As noted hereinabove, the search and seizure operation was carried on 21.03.2017. During the search and seizure operation, the statement of the

Managing Director of the assessee i.e., one Mr Arpesh Garg was recorded, under Section 132(4) of the Act. This statement was recorded on 22.03.2017. Mr Arpesh Garg retracted his statement on 24.03.2017.

10.3. It is, therefore, relevant to note, at this juncture, as to what exactly Mr Arpesh Garg stated in his statement recorded under Section 132(4) of the Act, and in the letter dated 24.03.2017, whereby he retracted his statement. A careful perusal of the extract of the statement made by Mr Arpesh Garg, Managing Director of the assessee (as recorded in the assessment orders in-issue) would show that all that he had stated was that it was the assessee's own money, given in the form of loan and/or bogus sales or purchases, that had been routed back to the assessee in the form of share capital/share premium, *albeit*, through banking channels.

10.4. The Tribunal, in this context, records a finding of fact that "no unaccounted income of the assessee" had been introduced in its books of accounts in the form of share capital. Based on this, the Tribunal concluded that there was "no confession" made by Mr Arpesh Garg that unaccounted income had been introduced by the assessee in the form of share capital. Therefore, according to the Tribunal, the statement made under Section 132(4) of the Act did not constitute incriminating material.

10.5. Likewise, insofar as the retraction (as noted above) was concerned, the Tribunal noted that in the letter dated 24.03.2017, it had only been indicated that to avail benefits under the Pradhan Mantri Garib Kalyan Yojna (PMGKY) Scheme, it had offered to pay tax on Rs.50 crores, which was later modified to Rs.30 crores. The Tribunal notes that there was no disclosure concerning share capital, and, hence, the aforementioned statement, which formed part of the letter dated 24.03.2017, could not be treated as incriminating material.

10.6. Insofar as the revenue sought to argue that photocopies of (blank) share transfer forms, (blank) signed receipts, (blank) signed power of attorney and other documents necessary for the transfer of shares was concerned- that the said documents constituted incriminating material, the Tribunal noted the following :

(i) Firstly, out of the 36 shareholders, photocopies were found only *qua* 12 shareholders.

(ii) Secondly, that such transfer forms and documents even when recovered in original, as per its [i.e., the Tribunal] own precedents[2], had not been considered as incriminating material to unravel a concluded assessment.

(iii) Thirdly, photocopies do not constitute primary evidence and, in the absence of any other material, it could not be treated as secondary evidence as well. Importantly, it was not the stand of the revenue that the photocopy had been made from an original document.

(iv) Lastly, the revenue ought to have summoned all those investors who ostensibly had executed the documents, whose photocopies were produced, to substantiate its stand that they constituted incriminating material.

10.7 Based on the aforesaid, the Tribunal concluded that since for AYs 2012-2013, 2013-2014 and 2014-2015, no incriminating material concerning

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[2] See ***ACIT, Central Circle-5, New Delhi vs M/s Gee Ispat Pvt. Ltd.***, A-28, Sector 19, Rohini, Delhi-110085, passed in ITA Nos. 4256-59/Del/2014, dated 31/5/2018; ***M/s Brahmaputra Realtors (P) Ltd. vs Dy. Commissioner Of Income-Tax*** 2018 (3) TMI 1598 - ITAT Delhi; ***M/s M.L. Singhi & Associates (P) Ltd. vs Deputy Commissioner Of Income Tax, Central Circle-7, New Delhi***, 2018 (10) TMI 50 - ITAT Delhi; ***M/s Galaxy Rice Industries Pvt. Ltd. vs. D.C.I.T., Central Circle, Karnal,*** passed in ITA Nos.1451-53/Del/2013, dated 1/3/2018

the share capital was found, no additions could have been made by the revenue.

10.8 As noted above, a coordinate bench of this court in the ***Kabul Chawla*** case on the aspect concerning the jurisdiction tax authorities to disturb the concluded assessments has made the following observations:

> *"37.....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."*

<u>First Issue</u>

11. Therefore, having regard to the aforesaid observations made in ***the Kabul Chawla*** case, the only aspect that the Tribunal had to examine was whether the statement made by Mr Arpesh Garg, Managing Director of the assessee under Section 132(4) of the Act and the photocopies of the documents found during the search and seizure action constituted incriminating material.

11.1. The Tribunal, in our view, has correctly analysed the statement of Mr Arpesh Garg. The statement does not allude to the fact that the assessee had introduced "unaccounted money" in the form of share capital/share premium through investor entities. The retraction letter, as noted by the Tribunal, also did not advert to the introduction of investment of money in the assessee in the form of share capital/share premium.

11.2. Furthermore, as noticed above, based on past precedents, the Tribunal noted that the photocopies of documents such as blank share transfer forms, blank receipts and blank power of attorney did not constitute incriminating material. Mr Sharma was not able to draw our attention to any authority, which has taken a contrary view. According to the Tribunal, even in those cases where originals of such documents were found, they were not construed as incriminating material, based on which assessment could be made under Section 153(A) read with Section 143(3) of the Act. Significantly, the revenue chose not to examine those, who had ostensibly executed these documents. It was not argued before us that the finding returned by the Tribunal on this aspect of the matter was perverse.

11.3. Thus, having regard to the aforesaid, we concur with the view of the Tribunal that assessments concluded in respect of AYs 2012-2013, 2013-2014 and 2014-2015 under Section 143(3) of the Act could not be disturbed, as no incriminating material was found.

11.4. Besides this, on merits, the Tribunal, after detailing out in paragraph 76 of the impugned order the trail of the money received from various entities in the form of share capital/share application money, concluded that the assessee had been able to place before the A.O. sufficient documentary evidence which established that the money which the assessee had paid to the investor entities was routed back to it in the form of share capital/share premium.

11.5. That being the position, the Tribunal concluded that the assessee had been able to prove the identity of the investors, their creditworthiness and genuineness, which are the ingredients of Section 68 of the Act. The relevant observations made in paragraph 86 by the Tribunal read as follows :

> *"86. Considering the facts of the case in the light of material on record in voluminous paper books and confirmations of the parties*

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

11.6. The moot point which the Tribunal, thus, dealt with, as noted by us hereinabove, was- that as long as there was no material on record which established that unaccounted money (i.e., income generated which was not recorded in the books of accounts) had been funnelled in the form of investment by way of share capital/share premium, it could not be made the basis for making addition under Section 68 of the Act.

11.7. It is important to bear in mind that Section 68 empowers the AO (provided all others ingredients are met) to tax credits found in the books of accounts maintained by the assessee for any previous year, for which he offers no explanation about its nature and source. The first proviso, which was inserted by Finance Act, 2012 in the context of share application money, share capital, share premium or any other amount by whatever name called, engrafted a deeming section as to when the explanation would be considered satisfactory. Pertinently, motivation of the assessee in routing its own money (which was given to the investor entities in the form of loan, etcetera) as an investment in share capital/share premium has not been adverted to therein. That motivation is not the basis for attracting the provisions of the Income Tax Act, if otherwise, an assessee does not fall within its net, is a well-established principle. This principle, in our view, should also apply to Section 68 of the Act. [See ***Aruna Group of Estates, Bodinayakanur v. State of Madras***, 1961 SCC OnLine Mad 252[3];

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[3] "......The Tribunal seems to have been considerably obsessed by the supposed motive of Subbaraj and his sons of lessening the incidence of taxation in holding that there was no partition between them. A partition cannot be vitiated by a bad motive or a *mala fide* object. It may be an obstacle to a creditor seeking remedies in the execution of a decree or to a taxing authority levying a tax but nonetheless it is effective and cannot be put aside. Let us assume that Subbaraj and his sons desired to lighten their tax burden by exercising their undoubted right to disrupt the joint family, and let us also assume that the giving effect to the partition will reduce their tax liability. But there is nothing wrong or illegal about it. Avoidance of tax is not tax evasion and it carries no ignominy with it for it is sound law and, certainly, not bad morality for anybody to so arrange his affairs as to reduce the brunt of taxation to a minimum......

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The next question for consideration is whether registration can be refused on the ground that Suppan Chettiar's sons have not validly derived their respective shares by any transfer of title from Suppan Chettiar. It is true that the only evidence on record which enables the sons of Suppan Chettiar to claim his share is the letter already referred to. It is always open to any partner to retire from the firm yielding his place to his nominee or nominees. If all the other partners of the firm agree to this retirement and substitution of the new partner or partners, a new partnership springs into existence. The absence of any valid document of transfer from Suppan Chettiar to his sons, we do not say that the letter of Suppan Chettiar is not enough, cannot really affect the question whether the sons of

Commissioner of Income-tax v. A. Raman & Co. [1968] 67ITR11 (SC)[4]; ***Commissioner of Income-Tax v. T.K.E. Ibrahimsa Routher***, 1928 SCC OnLine Mad 21[5]; ***S. Raghbir Singh Sandhawalia v. Commissioner of Income-tax*** [1958] 34 ITR 719 (Punjab & Haryana)[6].]

Suppan Chettiar became partners of the new partnership each holding 1/48 share. The terms of the partnership deed dated 23rd November, 1955, do not indicate that the sons of Suppan Chettiar were mere dummies either for the other partners or for Suppan Chettiar, who was not *eo nomine* a partner.

The formation and constitution of a partnership can in no way be affected by the fact that one of the partners is a benamidar for a stranger or that a partner holds his share as a manager of his joint family, or that a partner has agreed to give a portion of his share to another by constituting a sub-partnership with him. These are Incidents which are outside the scope of partnership arrangement and have no bearing on the truth or reality of the partnership as such…"

[4] "….Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented….."

[5] "......There can be no question also in this case of the motives of the assessee in bringing about a particular arrangement, because as has been pointed out by the House of Lords in more than one case it is not proper to take such motives or objects into consideration, and a subject is entitled, if he can in any legal manner, to circumvent the incidents of a particular taxing or financing Act.

…..No doubt as indicated in the question itself the land subject to the mortgage is leased back again by the mortgagee to the mortgagor and therefore even reading both the instrument of mortgage and the instrument of lease together as indicated by the Judicial Committee in *Abdullah Khan* v. *Basharat Husain*[(1)] it must appear that the amount sought to be assessed is legally only rent. If it be rent and in this case these is nothing to show that it is anything else, then on the considerations set out already it follows that it is not assessable."

[6] "….A taxpayer has full liberty to decrease what otherwise would be his taxes, or altogether to avoid them, by means which the law allows. The fact that a certain transaction has been entered into with the ulterior object of enabling the taxpayer to avoid payment of income-tax would not render the transaction void, for motive alone cannot make unlawful what the law allows. In such a case the transaction should be

11.8. It may well be that the assessee, by wrongly padding his accounts, has violated other Statutes but that by itself cannot be the reason to make addition under section 68 of the Act. Mr Sharma was not able to demonstrate as to how such a transaction, though rather curious, would come within the ambit of Section 68 of the Act.

12. The other argument of the revenue that once photocopies of documents such as blank share transfer forms, blank receipts and blank power of attorney were found, the onus shifted on to the assessee, in our view, does not have weight, as onus is a relevant factor only till such time the entire evidence is not placed before the adjudicating authority. Since, in this case, according to the Tribunal, the assessee had given its explanation about the nature and source of money; it was incumbent upon the revenue to carry out further investigation to bring it within the ambit of Section 68 of the Act. [See ***Koppula Koteshwara Rao and Anr. v. Dr Koppula Hemantha Rao,*** 2002 AIHC 4950, cited with approval in ***Rangammal v. Kuppuswami*** (2011) 12 SCC 220]

12.1. In this case, insofar as the assessee is concerned, it placed the evidence on record, which established the trail of the money, the mode through which the money had travelled from the assessee to the investor entities and back to the assessee, and the fact that each of the investor

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examined with the object of seeing whether it is in reality what it appears to be in form. As pointed out by an American jurist, purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation. If therefore a taxpayer alters the basic facts affecting his liability to taxation by legal means available to him but for the purpose of avoiding taxation, the court will uphold the changes unless it is satisfied that the changes are not actual, but merely simulated. The question is not whether the motive for the transaction was proper or otherwise but whether what the taxpayer has done actually accomplishes the result anticipated…."

entities was in existence. Therefore, once the assessee claimed (and it was found as a fact) that it was its own money which was routed back to it in the form of share capital/share premium, the traditional test which is sought to be applied by the revenue, for triggering the provisions of Section 68 of the Act, which is, that the assessee had to establish the creditworthiness, genuineness and identity of the transactions would have to adapt to the circumstances obtaining in the present case.

13. Although the judgement of the Bombay High Court in ***Royal Rich Developers Pvt. Ltd. vs. PCIT*** [MANU/MH/3859/2019] was not cited by the revenue before us, it is referred to in the appeal. A perusal of the facts obtaining in that case, whereby addition under Section 68 of the Act was sustained, would show that they are distinguishable from the facts which obtain in the instant matter. In that case, the assessee-company had claimed that it had received money in the form of share capital/share premium from certain investors; however, the assessee was unable to produce before the AO the concerned investors; who had made the investment. Furthermore, during the search action, one of the directors of the assessee had made a categorical statement that the entire investment was bogus and that blank receipts were obtained from shareholders as also signatures were obtained on blank share transfer forms. Pertinently, this statement made by the director of the assessee was not retracted.

13.1. As noticed in the instant matter, the Tribunal found that it was the assessee's money which was routed back to it, albeit, through banking channels. The director of the assessee i.e., Mr Arpesh Garg retracted his statement, within 48 hours. More importantly, the AO in the deviation report, inter alia, made the following observations :

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

13.2. In the backdrop of this, the Tribunal made the following observations:

> *"86. Considering the facts of the case in the light of material on record in voluminous paper books and confirmations of the parties and the summary of transfer of funds reproduced above, it is clear that assessee produced sufficient documentary evidences before the A.O. to prove that money routed from the assessee itself which came back to the assessee in the form of share capital/premium, therefore, assessee proved identity of the Investors, their creditworthiness and genuineness of the transaction in the matter and as such have been able to prove ingredients of Section 68 of the I.T. Act. The A.O. however did not make any further enquiry on the documentary evidences filed by the assessee. The A.O. did not verify the trail of the source of funds received by assessee through various entities…."*

13.3. Therefore, this judgment would have no applicability in the present matter.

14. At this point, it may be relevant to note that, in order to make addition under section 68 of the Act, the following broad principles would have to be borne in mind :

(i) Amounts should be found credited in the books of the assessee.

(ii) The assessee should be unable to offer a satisfactory explanation about the nature and source of the sum so credited.

(iii) The assessee is not able to explain the source of the source.

(iv) The crucial aspect of this exercise is that the initial onus is on the assessee, after the assesse is able to: identify the creditor, show how the creditor acquired the capacity to advance the money and the genuineness of the transaction, which, in this case, would have to viewed from the angle as to how the money circulated from the assessee back to the assessee.

14.1. As noted by us above, there is no finding by the Tribunal that the money which was received by the assessee in form of share capital/share premium constituted the assessee's unaccounted income. [See observations made in ***Principal Commissioner of Income Tax-1 vs. Ami Industries (India) (P.) Ltd.*** [2020] 116 taxmann.com 34 (Bombay)[7]]

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[7] "**13.** Section 68 of the Act deals with cash credits. As per Section 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. Simply put, the section provides that if there is any cash credit disclosed by the assessee in his return of income for the previous year under consideration and the assessee offers no explanation for the same or if the assessee offers explanation which the Assessing Officer finds to be not satisfactory, then the said amount is to be added to the income of the assessee to be charged to income tax for the corresponding assessment year.

14. Section 68 of the Act has received considerable judicial attention through various pronouncements of the Courts. It is now well settled that under section 68 of the Act, the assessee is required to prove identity of the creditor; genuineness of the transaction; and credit worthiness of the creditor. In fact, in *NRA Iron & Steel (P.) Ltd.* (*supra*), Supreme Court surveyed the relevant judgments and culled out the following principles:-

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

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ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the inquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

15. It is also a settled proposition that assessee is not required to prove source of source. In fact, this position has been clarified by us in the recent decision in *Gaurav Triyugi Singh* v. *ITO* [IT Appeal No. 1750 of 2017, dated 22-1-2020].

16. Having noted the above, we may now advert to the orders passed by the authorities below.

17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds…….

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21……… Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In *NRA Iron & Steel (P.) Ltd.* (*supra*), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case."

14.2. Therefore, on facts, what is crucial is the observations that the AO made in his deviation report, with respect to the share premium/share capital. For the sake of convenience, the same are extracted hereafter :

> *"……i) On verification from records as well as details and evidences filed by the assessee, it is seen that assessment proceeding u/s.143(3) of the Income-tax Act, 1961 was conducted for the Assessment Years 2012-13, 2013-14 and 2014-15 wherein the issues of Share Capital were examined and verified in detail by the Assessing Officer and were partly accepted at that stage.*
> *ii) It has been noticed that the AO had added an amount of Rs.18.50 Crs to the total income of Assessee Company for AY 2012-13 on account of share application & premium. The above addition of Rs. 18.50 Crs was later on deleted by the Ld. CIT (A) after examination of the details filed by the assessee. Since the Ld. CIT (A) being a higher authority had duly examined the amount of Share Capital of Rs.18.50 Crs and allowed relief thereof against which no appeal was preferred by the department before the Income Tax Appellate Tribunal. Therefore, the addition of this amount on the grounds of bogus share capital/premium can only be made in the light of incriminating seized material.*
> *iii) On verification from the balance sheet, the chart prepared is factually incorrect since it has been prepared on the basis of Share Capital allotted in each year in respect of the share capital received for such allotment. After verification the corrected Share application details and share capital received covered during the period are as under:*

Assessment Year	*Amount*
2012-13	*63,12,00,000*
2013-14	*49,99,50,000*

2014-15	*81,35,44,000*
2015-16	*32,36,88,800*
2016-17	*55,47,74,400*
2017-18	*52,23,87,900*

iii) Out of the total sum for the Assessment Year 2012-13 an amount of Rs.14,92,00,000/- was received from M/s. Mahalakshmi Traders being the proprietorship concern of Shri Manoj Gupta. The assessee has filed details during the course of assessment to show that this amount of Rs.14,92,00,000/- was initially paid by the assessee itself to M/s. Mahalakshmi Traders as advance which was returned back by M/s. Mahalakshmi Traders as Share Capital to the assessee company.

In view of the above fact, the source of fund for Share Capital made by M/s. Mahalakshmi Traders was the assessee itself. As such, it cannot be alleged that the said share capital was unexplained/undisclosed income of the assessee to be added u/s. 68 of the Income-tax Act, 1961. These transactions were duly reflected both in the bank account of the assessee and M/s. Mahalakshmi Traders.

iv) Similarly, for the Assessment Year 2013-14, the assessee received Share Capital from Shri Vishal Traders (Prop. Shri Vishal Bhatia) of Rs. 34,79,50,000/- and Shri Balaji Enterprises (Prop. Shri Himanshu Garg) of Rs. 15,12,000/-. As per the details filed by the assessee alongwith books of accounts, the entire sum of Rs. 19,99,50,000 was received by these concerns either directly or indirectly from the assessee-company itself as advances or payments for purchase.

v) As per documents and bank accounts relevant to FY-2016-17, during the year M/s Rustagi Exim Pvt. Ltd. has taken introduced Rs. 52.23 Crs. On examination of the transactions, the assessee company has transferred Rs. 54.56 Crs to M/s Rustagi Exim which has been routed back to the assessee company in the form share application money / premium which *also suggests that sources of funds introduced in the shares is assessee itself.*

vi) Similar is the case in the Assessment Years 2014-15, 2015-16, 2016-17 and 2017-18 wherein from the details filed by the assessee it is seen that the ultimate sources of the share application money received by the assessee was from the disclosed sources of the assessee itself. The transactions are verifiable from the bank accounts of the both the parties.

vii) In some cases Assessee Company has routed its own fund directly through the share application money transactions; in those cases sources are apparently proved.

viii) It has also been observed that the assessee company has routed its funds through different intermediaries persons who are closely associated and under the control of the assessee company, therefore, the commission payments @2% of the transaction value is not likely. However the assessee may make some payment to oblige them. Commission payment @2% is to be restricted only to cases where share capital/premium is held to be bogus.

ix) As the source of share capital/premium can be traced directly to the bank account of the assessee company and there is no cash movement, addition of entire share capital/premium of Rs. 365.28 Crs is not justifiable and may lead to allegation of high pitch assessment. Only where there is no direct trail of money being sourced from the bank account of the assessee, the introduced share capital/premium needs to be added to the income of the assessee."

14.3. As noted by the AO in the deviation report, in AY 2012-13, the revenue attempted to make an addition on account of share capital/share premium which was reversed by the CIT(A). The revenue did not carry the matter further, and, therefore, what is important to underscore in this case is the finding of fact returned by the Tribunal that it was the assessee's own money which was routed back to it, and not that these were paper entries, where there was no banking trail.

14.4. In the context of M/s Mahalaxmi Traders, the submission advanced on behalf of the revenue that because Mr Manoj Gupta had, in his statement, said that he had not made any investment, and, therefore the addition made under Section 68 of the Act needed to be sustained is untenable, in view of the following finding recorded by the Tribunal, in this behalf. None of these findings have been assailed in the appeal preferred by the revenue.

> *"……The A.O. in A.Y. 2012-2013 has referred to statement of Shri Manoj Gupta, Proprietor of M/s. Mahalaxmi Traders whose statement was recorded during the course of search in which he has stated that he has not made any investment in assessee company. However, it is not clear from the Orders of the authorities below whether copy of such statement was supplied to assessee for rebuttal or whether he was produced before A.O. for cross-examination on behalf of the assessee. Since nothing is clear from the assessment order, therefore, any statement recorded at the back of the assessee, cannot be read in evidence against the assessee unless it is confronted to assessee and right of cross-examination have been provided by the A.O. to assessee to cross-examine that statement…."*

Second Issue

15. This brings us to the second issue that concerns bogus purchases. Insofar as this issue is concerned, it requires to be noticed that the A.O. had disallowed, for the six AYs, a cumulative amount of Rs.900,53,54,641/-. The CIT(A), *via* the appellate order dated 25.04.2019 (albeit, passed separately qua the AYs in issue), reduced the disallowance to Rs.313,16,21,562/-.

15.1. In the context of this aspect, the Tribunal returned the following findings of fact :

(i) The CIT(A), during proceedings before him, had called for a remand report from A.O. The A.O., accordingly, had submitted the remand report dated 22.03.2019.

(ii) In the remand report, the A.O. had adverted to the fact that 50% of the purchases had been sourced by the assessee from third parties i.e., non-related parties. These transactions were verified, and in furtherance thereto notices under Section 133(6) of the Act were issued to the concerned persons. The assessee had filed confirmation letters of the third parties. The reply received from the third parties, in response to the notice issued under Section 133(6) of the Act, did not reveal any variation.

(iii) Since no variation was found between the responses received from the third parties and purchases, as recorded in the assessee's books, the addition made on account of bogus purchases was not sustainable.

(iv) In the remand report, the A.O. had dropped the issue concerning the purported shortage of the stock of the assessee amounting to Rs.450 crores.

(v) Because there was dissonance in the AO's views, as recorded in the deviation report and the remand report when compared to the additions/disallowance made in the assessment orders, the appraisal report generated pursuant to the search and seizure action was called for by the Tribunal and perused. A perusal of the report by the Tribunal revealed that addition/disallowance concerning bogus purchase was made only to protect the interest of the revenue.

(vi) The Tribunal also found the following: the entire purchase and sales had been duly recorded in the regular books of accounts of all parties; the transactions were routed through regular banking channels; the purchase and sales were duly supported by quantitative details; copies of bank statements showing sales and purchases were placed before the A.O., and no incriminating documents concerning sales and purchases were found in the course of search and seizure actions.

(vii) The Tribunal also found that in respect of AYs 2012-2013, 2013-2014 and 2014-2015, sale and purchase transactions were verified and assessment orders were framed under Section 143(3) of the Act. The books of accounts were duly audited, both, under the Companies Act, 2013 and the Act in-issue [i.e. Income Tax Act, 1961]; no defects concerning books were found either by the A.O. or the CIT(A). Thus, according to it, for the concluded AYs i.e., 2012-2013, 2013-2014 and 2014-2015, no incriminating evidence was found.

(viii) Insofar as the abated AYs were concerned i.e., AYs 2015-2016, 2016-2017 and 2017-2018, it was, as per the Tribunal, apparent that the assessee had purchased goods, which were in value less than the sum for which they were sold. Therefore, as held by the A.O. in the deviation report, if the purported bogus purchases were to be disallowed then necessarily the sales shown in the assessee's regular books of accounts would also have to be excluded which would result in the assessee's income falling below the returned/declared income. In this regard, the Tribunal recorded that for the AYs 2012-2013 to 2017-2018, the total sales recorded by the assessee was Rs.36,20,60,89,783/-, as against purchases made from the same very parties amounting to Rs.36,02,14,17,848/-. Resultantly, for the said period, the assessee had shown a profit of Rs.18,46,71,935/-.

15.2. Thus, according to the Tribunal, if as portrayed by the revenue, the purchases were bogus then it was unlikely that the assessee would have recorded a profit against the same in its books of accounts. The Tribunal notes that the revenue cannot blow hot and cold i.e., cannot portray the purchases as bogus, even while holding that the sales made to those very parties were genuine.

15.3. Furthermore, according to the Tribunal, the A.O. had not placed on record any material to justify the disallowance of 25% of the purchases on the ground that they were bogus without carrying out any inquiry or investigation. In particular, the Tribunal also flagged the issue that the purported shortage of stock amounting to Rs.450 crores was based on a reference made qua that aspect in the appraisal report which, as noted above, did not find mention in the remand report, as during the search it was found that the stock worth the aforementioned value was lying at the assessee's warehouse in Sonipat; something which was completely ignored. This position, according to the Tribunal, was fortified by the fact that no addition in respect of any excess or shortage of stock had been made in the assessment orders of any of the years. In effect, according to the Tribunal, the stock found in the books reconciled with the stock which was found physically.

15.4. Insofar as the CIT(A)'s approach with regard to bogus purchases was concerned, the Tribunal noted that it had concentrated on related parties and attempted to quantify the disallowance by applying the gross profit ratio in respect of transactions entered by the assessee with unrelated parties. The Tribunal, however, returned a finding of fact that the approach adopted by the CIT(A) was not consistent. In this context, the Tribunal made the following observations :

> *"99. When the matter reached before the learned CIT – A, he rejected the action of the learned assessing officer so far as addition with respect to the alleged bogus purchases are concerned. He applied the provisions of section 145 (3) of the income tax act. He segregated the transactions of purchase and sales from the alleged bogus parties and*

applied the gross profit ratio, which is earned by the assessee from transactions with other parties. He applied such ratio for making an addition for assessment year 2012-13, 2013 – 14 2015 – 16 and 2016 – 17. For assessment year 2014 – 15, the gross profit ratio of the assessee from other parties (other than the alleged parties) was only 4.13 percentages. However, the learned CIT – A did not apply this percentage but took average gross profit ratio for assessment year 2012 – 13 and 2013 – 14 of 16.20 percentage and 9.41 percentage. He applied the average, which is 12.80 percentages to the sales for that year for making an addition. For assessment year 2017 – 18 the gross profit on transactions other than alleged related parties were found to be 6.02 percentage however the learned CIT – A did not apply that ratio but made an addition of INR 4 87053/– as there was loss. Therefore, wherever it was beneficial to the revenue, the learned CIT – A applied higher percentages and made the addition. Wherever it was against the revenue, he applied average gross profit of last 2 years or made on ad hoc addition. Thus, it is apparent that the learned CIT – A was not at all consistent in his approach."

15.5. Although, the Tribunal concluded that CIT(A) could take recourse to the provisions of Section 145(3) of the Act he/she finds that the A.O. had failed to apply his/her mind to the said provision—however, before embarking on that course, the CIT(A) would have to form a view, after examining the books of accounts, that he/she is not satisfied with the correctness or completeness of the accounts of the assessee. The Tribunal was of the view that the CIT(A) was also required to examine the method of accounting followed by the assessee.

15.6. It appears, as has been recorded by the Tribunal, that the CIT(A) did not call for the books of accounts i.e., to examine the same. Furthermore, the Tribunal records that the A.O., in the remand report, did not advert to the fact that the books of accounts were either incorrect or incomplete. According to the Tribunal, the books of accounts could not have been rejected till such time the revenue found “patent, latent and glaring defects in the books of accounts”. The revenue, according to the Tribunal, made no such attempt and simply relied upon the statement of the Managing Director, which was retracted and in any event, did not relate to the booking of “bogus expenditure”. Therefore, insofar as the Tribunal was concerned, the rejection of books of accounts by the CIT(A) did not meet the legal standards.

15.7. Given this background, thus, in effect, the Tribunal held that the books of accounts were rejected without crystalizing the defect in the books of accounts, which could have been done only after examining the same. Furthermore, according to the Tribunal, even if it is assumed that the books of accounts could be rejected, the profit had to be estimated based on proper material. As noted above, the Tribunal recorded the inconsistent approach adopted by the CIT(A) in applying the gross profit ratio concerning non-related parties to purported bogus transactions i.e., those involving related parties, resulting in unsustainable conclusions.

15.8. According to us, the observations made by the Tribunal are pure findings of fact, which cannot be interdicted by us in appeal. The inconsistency in the approach adopted by the A.O., while preparing the deviation report and framing the assessment order with regard to purported bogus purchases is an aspect, which cannot be ignored and has been correctly highlighted by the Tribunal.

15.9. If the revenue chooses to disallow bogus purchases, it would necessarily have to, in our view, ignore the corresponding sales recorded against the very same parties. As pointed out by the Tribunal, the CIT(A) could have rejected the books of accounts only, after it had examined and come to the conclusion that he was not satisfied as regards their correctness or completeness. The finding of fact returned by the Tribunal is that books of accounts were not examined by the CIT(A). If that be so, then, Section 145(3) of the Act could not have been triggered by the CIT(A), based on the mere statement of the Managing Director of the assessee. Besides this, as noted by the Tribunal, the CIT(A) had attempted to quantify the profit by resorting to a methodology, which was incomprehensible. The relevant observations made by the Tribunal read as :

> *"105. ……Nevertheless, they are not entitled to make a pure guess in making assessment with reference to any evidence or material at all. There must be more than a mere suspicion to support an assessment u/s 143 (3) of the act. Against this, the assessee has supported his books of accounts with adequate evidences of his own business as well as also supported it with the balance sheet and profit and loss account of comparable 3rd parties. The assessee has demonstrated that gross profits earned by those parties in the similar line of business are less than the gross profit declared by the assessee.*
>
> *106. Further, the quantification of the profit by the learned CIT – A, has been made on in comprehensible assumptions. He applied the gross profit rate of other parties to the sales of allegedly bogus parties. He has application of the gross profit rate also changed from the year to year. In 1 of the years, he adopted the gross profit rate being average of gross profit of 2 preceding years on by the assessee from other parties and applied the same rate to the sales from allegedly bogus parties. We fail to understand that how the gross profit ratio of one year can be applied to another year for determining the profit of some of the transactions of another year.*
> *107. In view of the above discussion, we are of the opinion that the learned assessing officer has incorrectly disallowed 25% of the purchases from the alleged bogus parties without finding any evidence and ignoring the sales paid by them to the assessee. Further, the learned CIT – A applied the provisions of section 145 (3) of the income tax act by rejecting the books of accounts of the assessee partially, without even looking at the books of accounts is also incorrect……."*

Third Issue

16. Insofar as the third issue is concerned, the revenue's stand has been that the cash deposits made post demonetization represented unaccounted income of the assessee qua AY 2017-2018.

16.1. According to the revenue, the average cash deposited by the assessee with its bankers before demonetization was, approximately, Rs.42.35 crores, whereas the actual sum deposited during the demonetization period was Rs.180.53 crores. The assessee's explanation was, broadly, that deposits were made out of cash sales and, during Diwali, cash sales increase; especially in the business in which the assessee is i.e., dry fruits.

16.2. Thus, according to the assessee, in October 2016, there was an increase in cash sales, which resulted in increased cash deposits. The revenue, however, appears to have taken the position that the assessee increased the cash sales to manipulate its gross profits so that it could adjust, in the process, its unaccounted cash income. This was vigorously countered by the assessee, and, in support of its plea that cash deposits were made by the assessee in respect of sales which were duly accounted for, reliance was placed on the following material:- audited books of accounts; bank-wise summary of cash deposits; copies of bank statements; and details of monthly cash sales and cash deposits made in earlier financial years.

16.3. Despite this, the A.O. qua AY 2017-2018 (relevant FY 2016-2017) added Rs.150.53 crores to the returned income of the assessee, after adjusting Rs.30 crores deposited by the assessee under the PMGKY Scheme from Rs.180.53 crores; which was, according to the A.O., the actual amount deposited in cash by the assessee with its bankers during the demonetization period.

16.4 The CIT(A), on the other hand, concluded that even though the assessee had, as of 08.11.2016, cash amounting to Rs.113.03 crores in its hand, it had chosen to deposit only Rs.13.99 crores. Thus, according to CIT(A), Rs.13.99 crores, which was deposited immediately after demonetization was ordered, represented genuine cash sales. Therefore, according to CIT(A), the balance amount i.e., Rs.99.04 crores represented the unaccounted income of the assessee. In other words, the said sum did not, according to the CIT(A), represent cash sales. Pertinently, the CIT(A) observed that cash deposited in new currency notes amounting to Rs.63.41 crores, represented cash sales made by the assessee. Thus, in sum, the CIT(A) scaled down the addition made under Section 68 of the Act from Rs.150.53 crores to Rs.73.13 crores. The figure of Rs.73.13 crores was arrived at by adjusting from Rs.150.53 crores, Rs.13.99 crores and Rs.63.41 crores [i.e., (180.53 crores – 30 crores) i.e., 150.53 crores-13.99 crores-63.41 crores].

16.5. It is in this background that the Tribunal examined the merits of the case put up by both sides. In this context, the Tribunal analysed the data pertaining to cash sales and cash deposits made in the financial year in issue i.e., FY 2016-2017 (relevant AY 2017-2018), as against FYs 2014-2015 and 2015-2016. The analysis made by the Tribunal showed that, in the three financial years, the total cash deposits more or less corresponded with the cash sales. A relevant part of the table extracted in paragraph 126 of the impugned order is set forth hereafter :

	F.Y.2014-2015	F.Y.2015-2016	F.Y.2016-2017

	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits
Total Rs.(Cr.)	237.44	242.65	412.52	428.19	633.86	633.74

16.6. Besides this, the Tribunal also noted the increase in sales between FYs 2014-2015, 2015-2016 and 2016-2017, both in absolute and percentage terms. Insofar as the increase in sales between FYs 2014-2015 and 2015-2016 was concerned, it was found that in absolute terms, sales had increased by Rs.175.08 crores, which, in percentage terms amounted to an increase of 73.74%. Likewise, the cash sales between FYs 2015-2016 and 2016-2017 had increased in absolute terms by Rs.221.34 crores, but, in percentage terms, the increase was only 53.66 %. Based on these figures, the Tribunal concluded that, in the year in which demonetization kicked in i.e., F.Y. 2016-2017, the increase in sales in percentage terms was less than the earlier year. The Tribunal, thus, held that it could not be said that the assessee had booked non-existing sales in its books post demonetization.

16.7. Similarly, the Tribunal examined the cash sales figures for November of the following three years to see if there were any anomalies. The Tribunal noticed that the cash sales made in November 2014, was Rs.16.49 crores; whereas in November 2015, cash sales made was Rs. 45.18 crores, while in November 2016, cash sales recorded a slight increase i.e. was Rs. 47.43 crores. The Tribunal noticed that there was a substantial jump in sales in November 2015 over November 2014. In absolute terms, the increase was Rs. 28.69 crores, which, in percentage terms, amounted to 173.98%, whereas when November 2015 cash sales figure was compared with November 2016 cash sales figure, the increase was merely Rs. 2.55 crores, which, in percentage terms, amounted to an increase of 5.64%. According to the Tribunal, this again was an indicator that the assessee had not booked non-existing sales in November 2016 by showing cash deposits against them.

16.8. In the same vein, the Tribunal picked up the figures of cash sales made in December 2014, which was Rs.22.26 crores, December 2015, which was Rs.97.35 crores and December 2016, which was Rs. 69.83 crores. The comparison made showed that the cash sales in December 2015, as compared to December 2014, in absolute terms, increased by Rs.75.09 crores, whereas when figures of cash sales of December 2015 was compared with December 2016, it showed a dip of Rs.27.52 crores. In percentage terms, the increase in sales between December 2014 and December 2015 was 337.33%, whereas, in December 2016, cash sales decreased by 28.27%. This again demonstrated, according to the Tribunal, that assessee had not attempted to book cash sales that had not taken place, as alleged by the revenue.

16.9. In sum, it was the Tribunal's assessment of the material placed on record that cash deposits made by the assessee with its bankers, as noticed above, more or less compared with the cash sale transactions entered into by it with its customers. The Tribunal's view was that given the fact that there was no allegation made by the revenue that the assessee had backdated its entries to enhance its cash sale figures, one could only conclude that there was a growth in the assessee's business.

17. The Tribunal also took note of the fact that one of the reasons furnished by the A.O., in support of the impugned addition, was that physical stock was short by Rs.450 crores. In other words, the stock register represented a higher figure, as against that which was found physically. This

conclusion arrived at by the A.O. was found by the Tribunal to be erroneous, inasmuch as the A.O. had failed to notice the fact that part of the stock was available at the assessee's godown at Sonipat, Haryana, which had not been covered during the search action. In this context, the following observations made by the Tribunal are relevant and the same are extracted hereafter :

> **"…………**.*The stock lying at the said premises was not taken into consideration while arriving at the physical stock as on the date of search, thus resulting in the alleged difference of Rs. 450 crores. Though originally at the time of recording of the statement of the managing director on the date of such there were certain discrepancies in the stock however later on it is stated by the learned authorised representative that they were reconciled after inclusion of the stock at Sonipat and ultimately there was no discrepancy in the physical stock found during the course of search as well as stock at Gurgaon at Sonipat with the book stock. There was thus actually no difference in the stock physically lying with the Assessee vis-à-vis the stock as per books of accounts as on the date of search. This submission of the assessee is not controverted by the learned assessing officer as well as the learned CIT DR. It was not also shown to us that there was any discrepancy in the physical stock found during the course of search and stock as per the books of account if the stock at the Sonipat go down was taken into consideration. There is no whisper about the alleged shortage of stock during the assessment proceedings, deviation proceedings and also in remand proceedings. During assessment proceedings, we also directed AO to show the shortage of stock of Rs 450 Crore, which is also the basis of addition along with the panchanama and response to explanation of assessee about stock lying at godown at Sonipat as stated by the assessee. There is no reference in any of the statements recorded by the investigation wing with respect to such shortage of stock. Even in the appraisal report produced before us there is no such finding about shortage of stock. Even in the submissions made by the learned CIT DR there is no reference made to such shortage of stock during the course of search proceedings. There is no addition in any of the assessment year including the search year with respect to any such shortage of stock. No quantitative details of stock physically verified*

as well as the book stock found by the search party were shown to us, which suggested that there is a shortage of stock after considering stock lying at Sonipat.”

17.1. The Tribunal also seems to have accepted the explanation that the gross profit ratio for the AY in issue i.e., AY 2017-2018 (relevant F.Y.2016-2017) was in line with the earlier years. In this context, the Tribunal took note of the fact that, at the time when the search and seizure action had taken place, the data had not been finalized as adjustments towards depreciation, interest and provisions for expenses could be made only after the end of the relevant financial year.

17.2. Besides this, the Tribunal also appears to have accepted the explanation given by the assessee that the purported misalignment of the gross profit ratio occurred, as unaudited data of the year in issue was compared with the audited data of the previous years. It is in this context that the Tribunal took note of the gross profit percentage of AYs 2015-2016 (6.14%), 2016-2017 (4.19%) and 2017-2018 (5.85%), as also the respective net profit ratio for the very same years, which, according to the assessee, were 0.72% 0.81% and 1.35% respectively. The sense that the Tribunal derived from the data presented to it, which was based on documentary evidence, was that there was no substantial variation in either the gross profit or net profit in the relevant year i.e., A.Y. 2017-2018, as compared to the previous years.

17.3. Furthermore, based on details furnished by the assessee for the AY 2017-2018 concerning its closing stock, list of debtors, details of purchases and sales made, list of creditors, copies of bank statements and books of accounts—the Tribunal concluded that it was not a case where it could be said that the assessee had purchased or sold goods to unidentified parties.

17.4. The CIT(A)'s emphasis on the fact that, although the assessee had undertaken liabilities in the form of loans, it chose to keep a large amount as cash in hand was repelled by the Tribunal, while, broadly, accepting the explanation given by the assessee that the long-term loans taken by it had to be repaid at regular intervals, which obliged the assessee had to bear commitment charges, and, thus, repayment of loans, as suggested by the revenue, was not a viable option.

17.5. Insofar as short-term borrowings was concerned, the Tribunal appears to have accepted the assessee's explanation that most of these were liabilities that were outstanding against bills payable under the letter of undertaking and cash credit, which were secured by closing stock maintained by the assessee. According to the assessee, these were available at a lesser rate of interest. Besides this, certain funds were secured by a hundred per cent margin, supported by fixed deposits. These funds bore a small rate of interest. In addition, thereto, certain advances were received also in the form of packing credit, which again bore a small rate of interest. In a nutshell, the explanation of the assessee, which found favour with the Tribunal, was that outstanding loan liabilities had no relationship with the cash held in hand by the assessee.

17.6. Having regard to the extensive material which has been examined by the Tribunal, in particular, the trend of cash sales and corresponding cash deposited by the assessee with earlier years, we are of the view that there was nothing placed on record—which could have persuaded the Tribunal to conclude that the assessee had, in fact, earned unaccounted income i.e., made cash deposits which were not represented by cash sales. Therefore, in our opinion, the Tribunal correctly found in favour of the assessee and deleted the addition made by CIT(A) of Rs.73.13 crores, under Section 68 of the Act.

18. Before we conclude let us deal with the submissions advanced by Mr Sharma in the context of the three issues discussed The submission made by Mr Sharma that because there was a huge variation in the share premium i.e., the rate at which share premium was paid by the investor entities and the rate at which it was sold, and therefore addition concerning amount received as share capital/ share premium, should be sustained, is not tenable. The answer, to our minds, lies in what has been held by the Tribunal, which is, that at the end of the day it was found that it was the assessee's own money, which had been routed through the investor entities. As indicated above, as a matter of fact, in AY 2012-2013, addition on this account was sought to be made by the A.O., which was deleted by CIT(A) in appeal. The revenue, for reasons best known, did not carry the matter in appeal.

18.1. We agree with the Tribunal, as observed above, that since no incriminating material was found qua AYs 2012-2013 to 2014-2015 vis-à-vis share capital/share premium, the addition under Section 68 could not have been made, apart from the fact that the revenue was unable to dislodge the conclusion arrived by the Tribunal that the money invested in the assessee was the assessee's own money.

18.2. Insofar as the submission made by Mr Sharma that, one Mr Praveen Agarwal i.e., the purported accommodation entry provider had denied making any investment in the assessee, and, therefore, it was a factor that the Tribunal ought to have taken into account, is a submission which fails to appreciate the following facts:

(i) That Mr Praveen Aggarwal's statement was recorded in a separate search action on 12.11.2012; which, as is obvious from the record, occurred before the search action that was carried out vis-à-vis the assessee on 21.03.2017.

(ii) Share capital was received from three companies controlled by Mr Praveen Agarwal i.e., Abhilasha Exports Pvt. Ltd., Subhshree Hirise Pvt. Ltd. and Pushpanjali Commotrade Pvt. Ltd. in AY 2012-2013.

(iii) The total amount, which the assessee received, as share capital/share premium in AY 2012-2013 amounted to Rs.48.20 crores, which included monies received from the aforementioned three companies controlled by Mr Praveen Agarwal.

(iv) These transactions were examined by the A.O. in A.Y.2012-2013, and an assessment order dated 24.03.2015 was passed under Section 143(3) of the Act whereby, the addition of Rs.18.50 crores was made by the A.O. under Section 68 of the Act, as unexplained credits. As indicated above, in appeal, the CIT(A), by an order dated 31.03.2016, set aside the deletion and, while doing so, observed that due confirmations were received from investor entities against notices issued to them under Section 133(6) of the Act.

(v) The revenue did not point to any part of the record which would show that the statement made by Mr Praveen Agarwal was furnished to the assessee and was allowed to cross-examine or rebut the statement. Since the assessee was not allowed to cross-examine or rebut the statement made by Mr Praveen Agarwal, the said statement could not be used against the assessee. Furthermore, there is no ground taken in the appeal which makes any such assertion.

(vi) The failure on the part of the revenue to demonstrate from the record that the aforesaid person i.e., Mr Praveen Agarwal was examined by the A.O. in the assessment proceedings concerning the assessee. Nothing was shown to us, which could establish that the A.O. conducted an independent enquiry to test the veracity of the statement made by Mr Praveen Agarwal.

18.3. Therefore, given the aforesaid circumstances, we are of the view that no cognizance can be taken of the statement made by Mr Praveen Agarwal.

18.4. As regards Mr Sharmas's contention that although the Tribunal has relied upon the deviation report in support of certain conclusions arrived at by it, it has ignored certain other parts of the deviation report. For instance, reference is made to the fact that the deviation report prepared by the A.O. concluded that the assessee had introduced unaccounted cash to the extent of Rs.99.04 crores, which is liable to be added to its total income for AY 2017-2018. We have already discussed this aspect at length in the earlier part of the judgment. Suffice it to reiterate that the assessee's explanation that the banks had advised deposit of money in tranches, does not appear to be unreasonable.

18.5. Besides this, as noticed above, the Tribunal, after a detailed analysis, has concluded that the cash deposits made post demonetization were in line with the cash deposits made in the earlier years, against corresponding cash sales.

18.6. As regards the other observations made in the deviation report on which Mr Sharma has placed reliance i.e., that addition on account of share premium should be made under Section 68 of the Act, in cases where money was not sourced from the assessee is answered by the Tribunal after noticing the fact that investments from unrelated parties were received only in AY 2012-2013. The addition made by the A.O. for AY 2012-2013, as observed above, was deleted by CIT(A) in the assessee's appeal. It would be relevant to note that, insofar as related parties were concerned, the deviation report clearly stated in paragraphs 3(iii) to (ix) that the ultimate source of money was the assessee itself. As a matter of fact, the observation made by the A.O., in paragraph 3(ix) of the deviation report, was different from what was understood by the revenue:

> *"ix) As the source of share capital/premium can be traced directly to the bank account of the assessee company and there is no cash movement, addition of entire share capital/premium of Rs, 365.28 Crs is not justifiable and may lead to allegation of high pitch assessment. Only where there is no direct trail of money being sourced from the bank account of the assessee, the introduced share capital/premium needs to be added to the income of the assessee."*

18.7. Concededly, the Tribunal, in its analysis, has adverted to the trail of money (which is something we have noticed above), and, therefore, its conclusion that it was not unexplained credit, and thus, not liable to be added under Section 68 of the Act to the income of the assessee, cannot be disturbed.

18.8. Insofar as the submission of Mr Sharma that the deviation report adverts to rejection of books of accounts and refers to the shortage of stock amounting to Rs.450 crores, is concerned, the same has already been alluded to by us, and, therefore, needs no further elaboration.

18.9. Likewise, the aspect concerning cash deposits made post demonetization and bogus purchases/sales have also been discussed hereinabove at length.

<u>Conclusion:-</u>

19. Thus, for the foregoing reasons, we are of the opinion that the revenue

has not been able to persuade us that a substantial question(s) of law arose for our consideration.

19.1. The result of the appeals filed before the Tribunal was turned on appreciation of evidence placed before the Tribunal. The Tribunal is the final fact-finding authority. We have not been able to conclude that the findings returned by the Tribunal are perverse. Importantly, neither in the grounds nor in the questions of law as suggested in the appeals, the revenue has averred that the findings of the Tribunal are "perverse". This fact imposes a limitation on this court while entertaining an appeal under Section 260A of the Act. In a nutshell, this court cannot revaluate the findings of fact returned by the Tribunal, except on the limited ground of perversity/complete lack of evidence. [See ***K. Ravindranathan Nair v. CIT***, (2001) 1 SCC 135[8].]

19.2. As has been, repeatedly, noted hereinabove, and as is also observed by the Tribunal, the A.O. shifted his position vis-à-vis the assessee. This is clearly evident if one were to compare the deviation report prepared by the A.O. (pursuant to the submission of the appraisal report by the investigation

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[8] "**7.** …. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it.

8. The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise."

wing) with the assessment order(s) framed by him.

19.3. It is disconcerting to note that the investigation wing directed the A.O. to frame the assessment in a manner that would protect the revenue's interest. The A.O. performs a quasi-judicial function while framing an assessment. The revenue cannot dictate the manner, in which, the A.O. frames the assessment order. In this case, the investigation wing appears to have crossed the Rubicon, when it advised the A.O. to frame the assessment to protect the interest of the revenue. [See ***CIT v. Greenworld Corpn.***, (2009) 7 SCC 69[9]; ***P. Palaniswami case***[10]]

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[9] "**53.** ……. No doubt in terms of the circular letter issued by CBDT, the Commissioner or for that matter any other higher authority may have supervisory jurisdiction but it is difficult to conceive that even the merit of the decision shall be discussed and the same shall be rendered at the instance of the higher authority who, as noticed hereinbefore, is a supervisory authority. It is one thing to say that while making the orders of assessment the assessing officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi-judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment.

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<u>**55.** When a statute provides for different hierarchies providing for forums in relation to passing of an order as also appellate or original order, by no stretch of imagination a higher authority can interfere with the independence which is the basic feature of any statutory scheme involving adjudicatory process</u>."

[10] "**5.** The respondent then filed a Letters Patent Appeal. By this time the decision of this Court in *B. Rajagopala Naidu* v. *State Transport Appellate Tribunal* [AIR 1964 SC 1573 : (1964) 7 SCR 1 : (1964) 2 SCJ 570.] had been rendered and by that decision GO No. 1298 dated April 28, 1956, which was the previous direction issued by the State Government under Section 43-A of the Motor Vehicles Act, was set aside. It was held that it was legitimate to assume that the Legislature intended to respect the basic and elementary postulate of the rule of law that in exercising their authority and discharging their quasi-judicial functions, the tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment guided only by the statutory light. It was pointed out that it was of the essence of fair and objective administration of law that the decision of judges or tribunals must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. It was true that Section 43-A empowered the State Government to issue directions

20. Accordingly, for the aforesaid reasons, the appeals are dismissed.

20.1. Pending applications shall also stand closed.

21. There shall be, however, no order as to costs.

RAJIV SHAKDHER, J

TALWANT SINGH, J

JANUARY 19, 2022/aj

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to the Regional Transport Authority and the authority was bound under that Section to give effect to all such directions. But since the Government Order purported to give directions in respect of matters which had been entrusted to the authorities constituted under the Act and which have to be dealt with in quasi-judicial manner the Government Order to that extent was outside the purview of Section 43-A. The result was that the decisions of the Transport Authorities which were based upon the Government Order and not on an independent assessment of the matters referred to in Section 47 of the Motor Vehicles Act were liable to be set aside.…..'

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8. …..When there is a Government Order in existence and parties applying for permits come to know that the authorities under the Motor Vehicles Act, were disposing of their applications for permits in accordance with the Government Order, matters not referred to in the Government Order but which may be very germane for consideration under Section 47 get automatically excluded during the hearings. The Government Order, instead of Section 47, becomes the last word on the subject. That is the real vice of such Government instructions. The authorities feel bound by these instructions and the parties before them feel equally bound by them. They, naturally exclude from the controversy other matters which though relevant under Section 47 do not find a place in the Government Order. As pointed out by this Court in *R.M. Subhraj* v. *K.M. Union* (*P*) *Ltd.* [(1973) 3 SCC 871 : AIR 1972 SC 2266] "Once it is found that a Tribunal which under the statute has to deal with applications for permits in a judicial manner is directed by the Government to adopt any specified method for assessing the merits of the applicants and the Tribunal takes into consideration such direction of the executive, the judicial determination by the Tribunal is polluted". It is polluted not merely because those instructions have a tendency to interpret Section 47 in their own way but also because considerations other than those in the instructions get automatically excluded although they are quite relevant for the purpose of Section 47. We are, therefore, of the opinion that the High Court was right in remanding the case to the Tribunal for a re-hearing without the constraint of the Government Order."