**आयकर अपीलीय अधिकरण "एक-सदस्य मामला" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, MUMBAI**

श्री शमीम याहया, लेखा सदस्य के समक्ष ।

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 5805/Mum/2017

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

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| ITO-10(1)(2),<br>Room No. 25, Aayakar Bhavan,<br>Ground Floor, M. K. Road,<br>Mumbai-400 020 | **बनाम/**<br>Vs. | IDM Agro Bio Tech Ltd.<br>A/45, Nandjyot Industrial Estate,<br>Safed Pool, Sakinaka, Andheri<br>Kurla Road, Andheri (E),<br>Mumbai-400 072 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABC 17012 C | | |
| **(Revenue)** | **:** | **(Assessee)** |

प्रत्याक्षेप सं./C.O. No. 260/Mum/2017

(Arising out of ITA No. 5805/Mum/2017)

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

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|---|---|---|
| IDM Agro Bio Tech Ltd.<br>A/45, Nandjyot Industrial Estate,<br>Safed Pool, Sakinaka, Andheri Kurla<br>Road, Andheri (E),<br>Mumbai-400 072 | **बनाम/**<br>Vs. | ITO-10(1)(2),<br>Room No. 25, Aayakar Bhavan,<br>Ground Floor, M. K. Road,<br>Mumbai-400 020 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABC 17012 C | | |
| **(Assessee)** | : | **(Revenue)** |

| | | |
|---|---|---|
| **Revenue by** | : | Shri N. Hemalatha |
| **Assessee by** | : | Dr. P. Daniel |

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|---|---|---|
| सुनवाई की तारीख / **Date of Hearing** | : | 15.11.2017 |
| घोषणा की तारीख / **Date of Pronouncement** | : | 04.12.2017 |

## आदेश / O R D E R

Per Shamim Yahya, A. M.:

This appeal by the Revenue and the cross objection by the assessee arise out of the order of ld. Commissioner of Income Tax (Appeals) dated 30.03.2016 and pertain to the assessment year 2008-09.

2. The grounds of appeal in Revenue's appeal read as under:

> 1 "On the facts and circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition made u/s.68 of the Act by solely relying on the retracted statement of Shri Pravin Kumar Jain, ignoring the fact that the same has been rebutted by DDIT Investigation)-II(2),Mumbai and also ignoring the statement of Shri Nilesh Parmar, a dummy director, having responsibility over accounts recorded u/s.131 wherein he has accepted that the lender companies were nothing but paper companies."
> 2 "On the facts and circumstances of the case and in Law, the Ld.CITA) has erred in not considering the several case laws wherein the higher courts have held that mere payment by cheque does not prove the genuineness of the transaction."
> 3 "On the facts and circumstances of the case and in Law, the Ld.CIT(A) erred in deleting interest of Rs.90,617/- ignoring the fact that the loans being non genuine were added u/s.68 of the Act, accordingly, the interest also needs to be added back to the total income".
> 4 "On the facts and circumstances of the case and in Law, the Ld.CIT(A) erred in deleting the notional commission of Rs.67,500/- computed by the Assessing Officer ignoring the fact that the same needs to be paid for obtaining the accommodation entries."

3. The grounds of appeal raised in the cross objection read as under:

> 1. The learned CIT(A) erred in dismissing the Ground of appeal regarding reopening of the assessment u/s. 147 by issue of notice u/s. 148 without any valid reason.
> 2. The learned A.O. passed an order u/s. 147 r.w.s. 143(3) which is illegal and bad in law.

4. Brief facts of the case are as under:

The assessee company is a Public Limited Company and is engaged in the business of agriculture, horticulture, bio-tech agriculture, etc. The assessee had e-filed its return of income on 13.09.2008 declaring total loss of Rs.27.981/- under normal provisions of the Act. The said return was processed u/s 143(1) of the IT Act, 1961. Subsequently, the Assessing Officer received information from Investigation wing that the assessee company has taken accommodation entries from various benami concerns operated by Shri Pravin Kumar Jain. As per the information, Shri Pravin Kumar Jain used to provide accommodation entries of different nature like unsecured loans, bogus share application money, etc. As per the assessment order, the details of unsecured loans availed from benami concerns by the assessee are as under:-

| Sr. No | Name of the Concern | Amount (Rs.) |
|---|---|---|
| 1. | M/s. Kush Hindustan Entertainment Ltd | 30,00,000 |
| 2, | Olive Overseas P Ltd (Realgold Trading Co P Ltd) | 15,00,000 |
| Total | | 45,00,000 |

Accordingly the Assessing Officer recorded his reasons to believe and issued notice u/s 148. Notice u/s 143(2) and 142(1) of the Act was issued and duly served on the assessee.

5. During the course of assessment proceedings, assessee company was asked to establish the identity, and creditworthiness of the said parties and genuineness of the transactions. To substantiate its claim, the assessee company furnished bank statement of the said parties highlighting the relevant entry. Also, ledger account and

acknowledgement of the said parties were produced. Various other documents were produced to establish the identity and creditworthiness of the said parties and genuineness of the transactions. However, Assessing Officer has not accepted the assessee's company contention, discussed all the issues at Para 3 of the assessment order and added the sum of Rs.45,00,000/- as Unexplained Cash Credit under the head "Income from Other Sources". He had further disallowed the interest and commission expense.

6. In making the disallowance, the Assessing Officer *inter alia* observed as under:

- A search and survey action was carried out in the case of Shri Praveen Kumar Jain and his group concerns on 01.10.2013 by the then DDIT(Inv.) Unit-III(2), Mumbai, which resulted into collection of evidences and other findings proving that Shri Praveen Kumar Jain, through a web of concerns run and operated by him, is engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application money and bogus sales (purchases for the beneficiaries) etc. Based on the findings of the search action and the statements of various persons covered under the search action, a report was forwarded by the DDIT(lnv.), which inter *alia* included a list of the entities controlled by Shri Praveen Kumar Jain and involved in providing bogus entries for loans, share application money and purchases, various statements stating the *modus operand],* list of beneficiaries who were involved in such transactions etc.
- It is seen from the information so received that the present assessee's name appears in the list of beneficiaries who have taken accommodation entries. Further, the details furnished by the assessee also revealed that the assessee has taken unsecured loan of Rs.45,00,000/- from M/s. Kush Hindustan Entertainment Ltd. & Olive industries Private Limited, which is one of the entities controlled by Shri Praveen Kumar Jain and is involved in providing accommodation entries.
- During the search at various premises, which were shown by the assessee group, to be the place of operation and registered office addresses as per the Income Tax records, the official website of the Ministry of Corporate Affairs and bank documents, it was found that the entities were non-

existing at these addresses and no genuine business was being carried out at any of these premises.

- Pre-search enquiries had revealed various persons shown to be the directors/proprietors of different concerns were non-existent at the given addresses. However, in certain cases, the directors' addresses were located and they were covered in the action u/s.132 of the Act. In the statements recorded u/s. 132(4)/131 of the Act, these directors/proprietors admitted that they were merely dummy directors and used to sign different papers for nominal consideration given by Shri Praveen Kumar Jain. They were unaware of the place of operations, books of accounts and the businesses being carried out by the concerns where they were directors/proprietors.

7. Thereafter, the Assessing Officer referred to the statement of directors of the so called dummy companies and the search conducted in their cases. Thereafter, the Assessing Officer referred to several case laws and concluded as under:

> After carefully going through the submissions of the assessee as well as the data / details / documents available on record, it becomes crystal clear that;
> (a) The primary onus is on the assessee to establish the genuineness of the transactions recorded by it in its books of account;
> (b) Since the primary facts are in the knowledge of the assessee, it is the duty of the assessee to provide the correct details with regard to the impugned transactions;
> (c) If the investigation done by the Department leads to doubt regarding the genuineness of the transactions, it is incumbent on the assessee to produce the parties along with the necessary documents to establish the genuineness of the transaction; and
> (d) Payment by account payee cheque is not sacrosanct.
>
> In view of the above discussion, it is evident that the identity and creditworthiness of M/s. Kush Hindustan Entertainment Ltd & Olive Overseas Private Limited, which is one of the *benami* concerns of Shri Praveen Kumar Jain, are not proved nor the genuineness of the transaction in the form of unsecured loan raised by the assessee company. The entire gamut of transactions shows that the funds of Rs.45,00,000/- have been brought in by way of 'unsecured loan' in the name of M/s. Kush Hindustan Entertainment Ltd & Olive Overseas Private Limited, whose very existence could not be established by the assessee company nor the source of these funds. Therefore, the purported unsecured loan of Rs.45.00.000/- is hereby treated as a 'cash

credit' in the books of the assessee company, whose nature and source is not explained and, therefore, deemed to be the assessee's income as envisaged in Section 68 of the Income Tax Act, 1961 and accordingly the same is added to income of the assessee company under the head "Income from other sources" and the same is hereby held to be not eligible for any deduction there against. Penalty proceedings u/s.271(1)(c) of the Act are hereby initiated for furnishing inaccurate particulars of income / concealment of income, separately.

8. Further, the Assessing Officer disallowed the interest expenditure and commission expenses in this regard by observing as under:

> Having held in the preceding paragraphs as to bogus / sham transaction of unsecured loans amounting to Rs.45,00,000/- claimed to have been obtained from M/s. Kush Hindustan Entertainment Ltd & Olive Overseas Private Limited [formerly known as Realgold Trading Co. Private Limited], which is one of the bogus entities of Shri Praveen Kumar Jain, who is admittedly an accommodation entry provider, the interest expenditure of Rs.90,617/- claimed to have been paid to the said bogus entity is also hereby held to be a sham transaction. The *modus operand!* of the business of Shri Praveen Kumar Jain, through his various entities, is that of providing accommodation entries under different forms viz. unsecured loans, share application money, purchases, sales etc. and to charge commission by Shri Praveen Kumar Jain ® 1.5% to 2% on the value of transactions. Here, in the instant case, the assessee has claimed to have obtained a sum of Rs.45,00,000/- as 'unsecured loans' from M7s. Kush Hindustan Entertainment Ltd & Olive Overseas Private Limited, one of the entities of Shri Praveen Kumar Jain, and has also claimed to have paid interest of Rs. 90,617/- and must have also paid commission of at least Rs. 67,500/- being 1.5% of t^he transaction value of Rs. 45,00,000/-. The practice of Shri Praveen Kumar Jain was to accommodate and facilitate the entries under different forms whereby he used to accept & give back cash from 7 to the parties against the payment & receipts made through banking channel. Thus, in the instant case, the purported expenditure claimed under the garb of interest & commission must have been received back by the assessee from the bogus entity of Shri Praveen Kumar Jain & as such the said expenditure cannot be allowed to the assessee. Accordingly, interest expenditure of Rs. 90.617/- and commission expenditure of *Rs. 67,500/-* are hereby disallowed and added back to income of the assessee under the head "Income from other sources" in view of the fact that the assessee must have received back the said sums in cash. Penalty proceedings u/s.271(1)(c) of the Act are hereby initiated for furnishing inaccurate particulars of income/concealment of income, separately.

9. Against the above order, the assessee appealed before the ld. Commissioner of Income Tax (Appeals) challenging both the reopening as well as merits of the addition.

10. The ld. Commissioner of Income Tax (Appeals) confirmed the reopening by observing as under:

> The issues raised in the above ground challenges the re-opening of assessment proceedings. In this case, information is received from Investigation Wing of the Income Tax Department that a search and survey action was carried out in the case of Shri Praveen kumar Jain and his group on 01.10.13. The Search action resulted into collection of evidence and other findings which conclusively proved that the Pravin Jain through a web of concerns run and operated by him, is engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application and bogus sales(purchases for beneficiaries) etc. Even during the post search enquiries, several beneficiaries have confirmed the fact that they have taken accommodation entries through concerns run by Shri Praveen Jain.
>
> Also, enquires made in this regard have revealed that the statement of Shri Praveen Kumar Jain recorded on 01.10.13 u/s 132(4) of the IT Act, 1961 is not the only statement wheie he has divulged the details of the true nature of providing accommodation entries. Rather, at least three more statement u/s 131 of the IT Act, 1961 have been recorded by different officers, on different dates and different cases, where they have admitted that he through the various concerns run and operated by him is indulged in providing accommodation entries.
>
> From all these facts and information collected in this regard, it can be seen that the AO had a reason to believe that the assessee had taken accommodation entries of Rs 45,00,000/- in the nature of unsecured loans and income had escaped assessment for AY 2008-09 within the meaning of sec. 147 of the I.T Act to this extent. Accordingly, the AO issued notice u/s 148 of the IT Act, 1961.
>
> The assessee raised objection to the re-opening of the assessment proceedings u/s 147 of the Act and validity u/s 148 of the IT Act. The AO rebutted the objections. According to the AO, with effect from 01.04.1989 financial year 1989-90 only condition before issue of notice u/s 148 is that AO should have

reason to believe that income chargeable to tax has escaped assessment, irrespective of any failure of the part of assessee. It does not require that the very outset there should be an established factum of escapement. At the stage of issue of notice only question is whether the material prima facie shows escapement. Whether the material would conclusively prove the escapement, is not the concern at this stage. The AO relied on the following cases;

- Raymond Woollen Mills Ltd. (1999) 236 ITR 34 (SC)
- Central Provinces Manganese Ore Co. Limited (1991) 191 ITR 66 (SC)
- Sri Krishna Private Limited (1996) 221 ITR 538 (SC)
- Information from enforcement directorate showing possible inflation of purchases- notice issued u/s 148 valid. (Sterlite Industries (India) Ltd vs ACIT (Mad) 302 ITR 275
- Information from Investigation Wing- notice 148 issued on the basis of such letter is valid. AGR Investment Ltd vsAddl. CIT (Del) 333 ITR 146 Shafcnar Buucon P LW Vs ITO (ITAT. Jaipur) 136 TTJ 701

It is important to point out that there was no assessment or reassessment prior to issuance of notice u/s. 148. It is a settled legal proposition that in a case where, no assessment or reassessment prior to re-opening of the assessment, even if all the material facts are disclosed in the return of income already, reopening can be initiated if the AO has 'reason to believe[1] that income has escaped assessment. The appellant in such cases, cannot assail the re-opening on the ground that the facts were already placed on record and the AO ought to have considered the facts.

Secondly, the Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 510) observed that the word "reason", in the "reason to believe" will mean cause or justification. If the AO has cause or justification to know or suppose that income-had escaped assessment, it can be said to have "reason to believe" that the income had escaped assessment, It is further observed by the Honorable Court that the word 'expression[1] cannot be read to mean that the AO should have finally ascertained the facts by legal evidence or conclusion. At this stage, what is required is reason to believe, but not the established facts of escapement of income. At the stage of issuance of notice, the only question is where there was a relevant material on which a reasonable person could have formed a requisite belief that income had escaped assessment.

In the present case, it is evident from the reasons recorded that the AO received a specific and credible information from Investigation Wing, Mumbai and according to the information, the appellant has taken accommodation entries from the Pravin Jain and Group. Based on this precise information, the AO issued notice u/s.148 of the IT. Act, as he had prima facie reasons to believe that income chargeable to tax had escaped assessment within the meaning of section 147 of the Act. Thus, there was a cause or justification for the AO to invoke provisions of section 147 and issued notice u/s.148. As already mentioned, at the initiation stage, what is required to be seen is whether there are prima facie reasons to believe not the established fact of escapement of income. The AO also recorded proper reasons of formation of belief that income had escaped assessment. It is also important to note that the statement of various persons associated with Pravin Jain were recorded relating to and therefore, the reasons for re-opening of the assessment are not based on mere suspicion. The following judicial precedents support the action of the AO -

The Supreme Court in the case of Income-Tax Officer, Cuttack and Others v. Biju Patnaik (1991) 188 ITR 247 that:

> "Thus, though ex facie the notice does not disclose the satisfaction of the requirement of section 147(a), from the record and the averments in the counter affidavit, it is clear that the Income tax Officer had applied his mind to the facts and, after prima facie satisfying himself of the existence of those two conditions precedent, reached the conclusion for reopening the assessment. <u>It is settled law that, in an administrative action, though the order does not ex facie disclose the satisfaction by the officer of the necessary facts if the record discloses the same, the notice or the order does not per se become illegal</u>."(emphasis supplied)

<u>A similar issue has been considered and rejected by the ITAT in the case of Sukh Ram v. ACIT (2007) 99 ITD 417(Del) and by the Delhi High Court in 285 ITR 256 (Del) in the sane case</u>. In the Sukh Ram case the appellant had belonged to a political party. The AO recorded a statement of the party treasurer of the political party who refuted this claim. Before the ITAT and the High Court the assessee claimed that no addition can be made in his case unless he gets to cross-examine the party treasurer. This argument of the appellant in this case was rejected and it was held that when the AO merely seeks to verify the claim of the assessee, it is not akin to taking evidence behind the back of the assessee.

The assessee also raised an objection that the sanction for the issuance of the notice was notice under section 149/151 of the IT Act 1961 was not obtained. I have called a remand report from the AO and the report so received prove that an approval has been obtained from the CIT for reopening of the assessment u/s 151(2) of the Act. Hence this contention of the assessee is not acceptable.

The AO has very elaborately recorded the reasons before issue of notice u/s 148 and clearly narrated the facts and material on which the belief that income has escaped assessment is based. The belief is based on the relevant material and reasons were formed. Accordingly at the stage of issue of notice only question is whether the material prima facie shows escapement. Whether the material would conclusively prove the escapement is not the concern at the stage of issuance of the notice. I therefore hold that the AO was justified in re-opening of the assessment u/s 147 of the Act. Therefore this ground of appeal is dismissed.

11. As regards the merits of the case, the ld. Commissioner of Income Tax (Appeals) deleted the addition by observing as under:

> The assessee had taken loan of Rs 45,00,000 in AY 2008-09 from the following two parties - Kush Hindustan Entertainment Ltd. Rs 30,00,000 and Real Gold Trading Company Pvt Ltd (now known as Olive Overseas Pvt. Ltd) Rs 15,00,000. The asseseee company has repaid these loans in AY 2009-10 and 2010-11 by account payee cheques.
> To substantiate and prove the genuineness and bonafideness of the transaction, the assessee company-submitted the following documents –
>
> (i) Copies of ledger account of the parties
> (ii) List of Directors of the parties from ROC records
> (iii) Copy of accounts of assessee appearing in the books of said parties
> (iv) Copy of bank statements of the said parties
> (v) ITR copies and audited books of account for AY 2008-09 of the said parties
> (vi) Affidavits of one of the Directors of the Companies from whom loans have been taken during the year wherein the parties have affirmed the registered office address of the company, nature of business, registration number of the company with Registrar of Companies, CIN and PAN. They also have affirmed about the filing of Return of Income and loans granted to the assessee.
>
> On a perusal of the bank statements of the parties, it is seen that both the companies have sufficient balances to advance the loans. With the above documents, the identity, genuineness of the transaction and credit worthiness of the parties have been proved by the assessee by filing the necessary documents. The important aspect to be noted here is that the loans were borrowed by the assessee in FY 2007-08 and repaid in financial year 2008-09 and 2009-10 whereas the search and survey action on Pravin Kumar Jain and his associate companies was subsequent.

The conclusion of the AO that the assessee company has not proved the genuineness of the transaction appears to be factually incorrect as all the evidencing documents were placed on record by the assessee company.
The AO discharged his onus of establishing that the loans were not genuine by heavily relying on the statement given by Shri. Pravin Kumar Jain and his associates to the Department u/s. 132 which was retracted subsequently through an affidavit. The statement of Shri Pravin Kumar Jain and his associates does not highlight the name of the assessee company. It was never an averment of Shri. Pravin Kumar Jain that he had provided accommodation loan entries to the assessee through the above lender companies.
The AO, in this case, has merely relied upon the statement of Shri Pravin Kumar Jain (which was already been retracted and does not refer the name of the appellant company as beneficiary) and did not make any inquiries with the lender companies to establish the genuineness of the transaction.
It is settled law that when there are two contradictory statement of a person, the retracting statement is to be accepted unless it is provided otherwise by bringing in corroborative evidences.
The assessee has also contended that an opportunity of cross examination was not granted to the assessee. In case of CIT v. Ashish International, High Court of Bombay (ITA NO. 4299 of 2009), the Jurisdictional the Hon'ble Bombay High Court has held that the Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the statement of the Director of M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. and admittedly the assessee was not given any opportunity to cross examine the concerned Director whose statement was relied upon by the Director.
In case of Heirs And LRs of Late Laxmanbhai S. Pate! v. CIT 22 CTR 0138 (Guj) the legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice. This is clearly stated by the Hon'ble Supreme Court in the case of Kishinchand Chellaram vs. CIT (supra) wherein it is stated that before the IT authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine.

The Jurisdictional Mumbai ITAT in the case of Smt Jyoti D. Shah (ITA No. 1843/M/2012) has held that Shri Mukesh Choksi had issued a general statement, and therefore a general statement given by Mukesh Choksi cannot by applied to each and every case. The additions made were deleted as there was no direct evidence against the assessee. Neither the statement of Mukesh Choksi was provided to the assessee nor any opportunity for cross examination of Mukesh Choksi was provided. Various courts have held and reiterated the principle that where the assessee is not granted an opportunity of cross examination of the person whose statement has been relied upon during the course of assessment, which could have held the assessee to rebut the statements, the addition made basis the statement is not correct as there is a violation of the principle of natural justice. This principle has been settled time and again by the Higher Courts. Section 68 of the Act casts the responsibility upon the assessee to prove the identity of the creditors, capacity of the creditors and genuineness of the loan. The assessee has been able to establish the identity of the cash creditors, their credit worthiness and the genuineness of transaction by furnishing evidence like their I.T. details, mode of payment, etc. Once the assessee has discharged the obligation of establishing the identity, creditworthiness of those parties as well as genuineness of the transaction, the onus now shifts on the AO. It is noted that the AO has not taken any steps to identify the creditworthiness of the lender companies as well as genuineness of the loan given. The AO has merely relied on the statements of Shri Praveen Kumar Jain ignoring the fact that the statement was later retracted by him. There is no investigation whatsoever made by the AO. No effort was made to obtain the evidence collected by the DGIT (Inv) and the conclusions drawn on such evidence if any by that authority. No material in the form of statements recorded from Shri Pravin Kumar Jain or the other evidence collected by the DGIT (Inv) Mumbai were given to the assessee or any opportunity of cross examination was granted.

In CIT vs Lovely Exports (P) Ltd. [ITA No. 953/2006], Delhi ITAT held that when the AO has failed to react to the shifting of the burden to investigate into the creditworthiness of the share applicants, the addition cannot be sustained.

In CIT v. Orissa Corporation P. Ltd. [1986] 159 ITR 78 (SC), the Hon'ble Supreme Court held that once the primary onus of establishing the genuineness of the transaction is done by the assessee by furnishing the details like name, address, PAN. confirmation, copy of tax return, etc, it was the duty of the AO to verify the genuineness of these transactions by strictly enforcing the provisions of section 131 of the Act if at all those creditors were required to be produced before him. The entire transaction has been through the banking channels only and therefore, the AO should have verified the transaction with relevant banks and should have made further inquiries in this regard, which he failed to do so. The AO has not established the case or bought any material on record to even remotely record that the money originally belonged to the assessee and it was an adjustment entry. The assessee in facts has gone to establish that the lender companies had enough bank balances before granting

the loans and no cash was deposited by the lender companies while granting the loans.
I have also perused the decisions cited by the assessee in its submissions. The AO has not discharged his onus of rebutting the documents submitted by the assessee by recoursing to the means of initiating inquires with the lender parties or issuing summons and producing the party for cross examination or proving that the transaction was an adjustment entry and that the cash had exchanged hands.
The assessee also submitted the details of confirmation of loans of all the parties with their income tax acknowledgements of the return filed and financial statements and bank statements. There was sufficient creditworthiness of the lending companies and bank balance before lending the monies to the assessee. The AO has not considered these evidences filed by the assessee and simply relied on the statements of Shri Praveen Kumar Jain, which has been subsequently retracted, without independently N verifying any facts of the matter.
The facts in the case of M/s. KomalAgrotech Pvt. Ltd. Vs ITO Ward 2(1), ITA No. 37/HYD/2016, (Hyd) were as under -
As per the Assessing Officer the entire sum was received from certain companies managed by one Mr. Praveen Kumar Jain who has admitted that this money was routed through bogus share applications. According to the Assessing Officer, the said sum of Rs.75,00,000 represented the amounts received from shell Companies.' Therefore, the Assessing Officer had added the entire sum of Rs.75,00,000 as unexplained credit u/s 68 of the Act.
The Honorable Tribunal considered various judgments and ultimately came to the following conclusion "9.1. A plain reading of the assessment order demonstrates that the A.O. merely went by the investigation done by the Office of D.G.I (Investigation), Mumbai. No enquiries or investigation was carried out. No evidence to controvert the claims of the assessee was brought on record by the A. O. Even the statement of Mr. Praveen Kumar was not supplied. Nothing is on record about the result of investigations done by DGIT (Inv.), Mumbai. The papers filed by the assessee do demonstrate the identity, credit worthiness and genuineness of the transaction. The addition is made merely on surmises end conjectures.
In view of the above discussion, The Tribunal held that the addition made under section 68 of the Act is in bad in law. Recently the Hon'ble Bombay High Court in the case of Gagandeep Infrastructure (P) Ltd (2017) 80 taxmann.com272 (Bombay)-

> The proviso to section 68 has been introduced by the Finance Act, 2012 with effect from 1.4.2013. Thus, it would be effective only from the assessment year 2013-14 onwards and not for the subject assessment

year. In fact, before the Tribunal, it was not even the case of the Revenue that section 68 as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1-4-2013 was its normal meaning. The Parliament did not introduced to proviso of section 68, with retrospective effect nor does the proviso to introduced states that it was introduced 'for removal of doubts' or that it is 'declaratory'. Therefore, it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to section 68 is immaterial and does not change the interpretation of section 68 both before and after the adding of the proviso."

The Hon'ble Mumbai ITAT in case of M/s. Enrich Enterprises Pvt. Ltd. v. 1TO Ward 4(1)(4) ITA No, 4930/MUM/2015 quashed the reopening of the assessment where the facts were similar like in the case of the assessee.

Having considered all of the above, I am of the view that the assessee has discharged his onus of establishing the genuineness of the transaction and the onus was on the department. The AO has not discharged his duties and proved otherwise except for relying on the statements of Shri Praveen Kumar Jain which does not refer the name of the appellant company as beneficiary and the loan was borrowed during financial year 2007-08 and repaid during 2008-09 and 2009-10 when Shri Praveen Jain was not associated with the investor company and also much before the search and seizure in case of Praveen Jain has taken place. The AO also failed to make any further inquiries with the lender companies to establish the genuineness of the transaction and also failed to consider the various evidences filed by the assessee to prove the identity, creditworthiness and genuineness of the loans. The AO has not pointed out any defect /deficiencies in the evidences adduced by the assessee. Addition has been made u/s. 68 the Act by simply relying of the statements of third parties which was not associated with Investor Company and has not named the appellant company as beneficiary. In light /of the same, the AO's consideration that the loan are not genuine is not correct. These grounds of appeal are allowed.

12. Against the above order, the Revenue is in appeal before us regarding the addition on merits deleted by the ld. Commissioner of Income Tax (Appeals).

13. The assessee is aggrieved regarding the ld. Commissioner of Income Tax (Appeals)’s upholding the reopening u/s. 147 of the Act. The ld. Counsel of the

assessee submitted that the reopening in this case is bad in law. He submitted that there is no application of mind by the Assessing Officer. He submitted that no enquiry whatsoever has been done by the Assessing Officer in this case. The ld. Counsel of the assessee further submitted that there is also no proper sanction/approval as per the provision of section 151(2) of the Act by the higher authority permitting the reopening. Despite assessee's objection in this regard, the same was not properly responded by the Assessing Officer. He submitted that the sanction/satisfaction of higher authority was reached on 30.3.2015 only after remand report was called from the Assessing Officer during appellate proceedings before the ld. Commissioner of Income Tax (Appeals). The ld. Counsel of the assessee further submitted that all the necessary documentary evidences were furnished by the assessee. The ld. Counsel of the assessee referred to the several case laws including one from ITAT Hyderabad Bench in the case of M/s. Komal Agrotech Pvt. Ltd. vs. ITO (in ITA No. 437/Hyd/2016 dated 25.11.2016), wherein case of loan from the same lender companies as in the present assessee's case and in which the same search and statements were involved, the ITAT Hyderabad Bench has decided the issue in favour of the assessee both with regard to the reopening as well as merits of the addition. The ld. Counsel of the assessee referred to the decision of ITAT Mumbai Bench in the case of Shri Hiranchand Kanuga vs. DCIT (in ITA Nos.4261 & 4262/Mum/2012 dated 27.02.2015), that the satisfaction granted after that commencement of assessment is not valid. He further submitted that since the assessee has not been provided with opportunity to cross examine the person whose statement is the basis of addition, the addition is not sustainable. For this proposition, he placed reliance upon the Hon'ble Apex Court decision in the case of *Andaman Timber Industries* v. *CCE* [2015] 281 CTR 241 (SC).

14. Per contra, the ld. Departmental Representative relied upon the orders of the respective authority for supporting Revenue's stand.

15. She further submitted that if there is some lacunae Assessing Officer's enquiry, the matter should be sent back to him.

16. Upon careful consideration, first I proceed to take up the issue raised by the ld. Counsel of the assessee that there is no proper sanction or approval as per the provision of section 151(2) of the I. T. Act permitting the reopening. In this connection, the submission of the ld. Counsel of the assessee in the cross objection may be gainfully referred as under:

> 2. There is no mention of approval/satisfaction of the higher authority is obtained u/s. 151(2) of the I. T. Act, 1961 in the Notice. Even though a specific objection was raised about the satisfaction of the higher authority the disposal of objection only states that sanction of issue of notice u/s. 149/151 of the I. T. Act, 1961. Whose satisfaction is obtained is not given and when obtained is nowhere mentioned, (see p. 179-182)
>
> However, when the matter reached to the CIT(A), the Learned CIT(A) called for a Remand Report. In the Remand Report, the Learned A.O. attached the letter which is now placed before the Hon'ble Bench, the letter explains the non application of mind by the Jt. C.I.T. also in recording his satisfaction.
>
> In the instant case neither in the notice nor on the Reasons recorded the action of the Higher authority is mentioned. Even though a specific objection was raised. (Para 2 of Objection at page 55) and copy of sanction was requested

to be given to the assessee vide letter dt. 09.04.2015 & 27.04.2015, he only makes a passing reference at p. 182 para (v) wherein he states that "the notice u/s. 148 was issued after considering the time limit and sanction of issue of notice u/s. 149/151 of the I. T. Act, 1961". The Letter now produced does not show any satisfaction by the Jt. CIT. Particularly when the reasons are recorded on 30.03.2015 and the same day notice is issued and served on 31.03.2015. The sanction/ approval is also dt. 30.03.2015. Hence it is presumed that no required sanction/ satisfaction is obtained from the Higher authorities and hence the assessment is vitiated.

Reliance is placed:
1. C.I.T. v. Sunian Waman Choudhary (2010) 321ITR 495 (Bom)
2. Hirachand Kanuga v. D.C.I.T.

17. From the above, it transpires that it is the submission of the ld. Counsel of the assessee that there is no mention of approval/satisfaction of higher authority obtained u/s. 151(2) in the notice for reopening. That the assessee has raised objection to this effect vide letter dated 09.04.2015 and 27.4.2015, however, while disposing off the objection of the assessee, the Assessing Officer did not properly address this aspect. Further, the assessee has contended that when the ld. Commissioner of Income Tax (Appeals) called for remand report, a letter dated 30.12.2015 has been produced. From the contents of the said letter, it has been contended that the required sanction as per the law is not obtained.

18. Before proceeding further I may gainfully refer to the provision of section 151 which reads as under:

**Sanction for issue of notice.**

**151.** (1) In a case where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint

Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice :

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

*Explanation.*—For the removal of doubts, it is hereby declared that the Joint Commissioner, the Commissioner or the Chief Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of notice under section 148, need not issue such notice himself.

19. I may also gainfully refer to the notice for reopening in this case which reads as under:

Notice under Section 148 of the Income - Tax Act, 1961

Office of the WARD 10(1) (2), MUMBAI

PAN: AA5CI7012C Dated : 30/03/2015

To
M/s IDM Agro Bio Tech Ltd,
A/45, Nandjyot Industrial Estate,
Andheri Kurla road, Sakinaka,
Speed Pool, Andheri (East),
Mumbai - 400 072.

Sir/Madam,

1. Whereas I have reasons to believe that your income chargeable to ~ax for the assessment year 2008-09 has escaped assessment within the waning of section 147 of the Income Tax Act, 1961.

2. I, therefore, propose to assess/re-assess the income for the said assessment year and I hereby require you to deliver to me within 30 days from

the service-of this notice, a return in the prescribed form of your income for the said assessment year.

3. This notice is being issued after obtaining the necessary satisfaction of the commissioner of Income Tax _____________ the Central Board of Direct Taxes.

Sd/-
Signature of Officer
Name: _____________
Seal. Designation:

Note:

1. If you feel any difficulty in the matter of filing in the return, form or desire clarification on any other matter pertaining to your Income Tax liability, you may contact the :
Public Relation Officer
Income-Tax Officer, Ward – 10(1)(2)

2. The prescribed form in the case of companies is Form No. 1. In the case of assessee other than companies the prescribed form is ordinarily form No. 2. However, if the assessee has no income to declare other than what is chargeable under one or more of the heads; Salaries" and "Income from Other Sources", confined shares from Firms, Association of Persons, or Bodies of Individual or is chargeable under the head 'Income from house property', or/and 'Capital Gains', he may furnish return in form No. 3 A blank form No.______ is enclosed herewith. If this is not suitable to your case you may exchange it for the appropriate form from the Income-Tax Officer.

20. In letter dated 09.04.2015, which was received at the Income Tax office on 13.04.2015, the assessee has while making the objection to the notice *inter alia* submitted as under:

> We further have to submit that it appears from the notice necessary sanction for the issue of notice as provided u/s. 151(2) of the Income Tax Act, 1961 has not been complied with. Section 151(2) provides "In a case other than a case falling under sub section (1), no notice shall be issued u/s. 148 by the Assessing Officer, who is below the rank of Joint Commissioner after the expiry of 4 years from the end of the relevant assessment year, unless the joint commissioner is satisfied, on the reasons recorded by such g Officer, that it is a fit case for the issue of such notice".
>
> We may mention that our assessment involved for re-opening is Assessment Year 2008-09 which is being re-opened by your notice dated 30.03.2015, the

> provisions of Section 151(2) are clearly attracted as it is a case of re-opening of the assessment after the expiry of the 4 years from the end of the relevant assessment year. From the notice it appears that necessary sanction as required u/s 151(2) has not been obtained and therefore the notice issued by your good self is not valid and bad in law and is therefore to be cancelled and withdrawn. We may mention that para 3 of the notice states "This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax —————— the Central Board of Direct Taxes" but this does not reveal that you have obtained any sanction as provided u/s. 151(2) and hence in our humble submission, the issuance of notice is not valid and void ab-initio and we object to the re-opening of the assessment. We further have to submit that incase your goodself has obtained necessary sanction as provided u/s 151(2) we request you to kindly give us the copy of the same in order to enable us to make further submission on the authority and jurisdiction for the issuance of notice u/s. 148.

21. Again in letter dated 14.07.2015 received at the Income Tax Office while submitting the objections to reopening, the assessee has *inter alia* mentioned as under:

> In this respect we humbly have to submit that as submitted by us vide our letters dated 09.04.2015 and 27.04.2015 (copies enclosed) we have requested your good self to give us the copy of the sanction obtained by you as provided u/s. 151(2) of the Act. however, we have not received the copy of such sanction obtained by you for the issuance of the notice u/s. 148 and hence it appears that necessary provisions of the law requiring prior sanction for the issue of notice as provided u/s. 151(2) of the Income Tax Act, 1961 has not been complied with, and therefore, in our humble submission the notice issued by your good self for the re-opening of the assessment is not a valid notice and therefore we object the reopening of our assessment u/s. 148.

22. While disposing off the assessee's objections, the Assessing Officer has not provided the assessee with sanction/approval letter u/s. 151(2) or the details thereof. He has only addressed the issue by observing as under:

> The notice u/s. 148 was issue after considering the time limit and sanction of issue of notice u/s. 149/151 of the I. T. Act, 1961. The reason for reopening had already been provided vide this office letter dtd. 1.7.2005.

23. Thereafter, when the assessee raised this issue before the ld. Commissioner of Income Tax (Appeals), the ld. Commissioner of Income Tax (Appeals) asked for a report in this regard. The Assessing Officer gave a lengthy remand report detailing the provisions of law and concluded as under:

> 7. In view of the above, in this case the notice u/s. 148 was correctly issued on 30.03.2015 after getting prior sanction u/s. 151(2) of the I. T. Act, 1961 from the Jt. CIT, Rg. 10(1), Mumbai. Thus, the assessee company has taken erroneous ground of appeal for reopening without obtaining prior sanction from the CIT as required u/s. 151(2). The ground of appeal taken is applicable w.e.f. 1.6.2016.

24. The satisfaction/approval letter dated 30.03.2015 has been produced which reads as under:

> No. JCIT Rg. 10(1)/approval for issue of notice/2014-15 Date:30.03.2015
>
> To,
> The Income Tax Officer-10(1)(2),
> Mumbai.
>
> Sub: Administrative approval for issue of Notice u/s. 148 in the case of M/s. IDM Agro Bio Tech Ltd., A.Y. 2008-09
>
> Ref: No. ITO-10(1)92)/148 Prop/2014-15 dated 30.03.2015
>
> With reference to the above, sanction is herbey accorded u/s. 151(2) for issue of notice u/s. 148 of the Act in the above mentioned case for A.Y. 2009-10.
>
> Sd/-
> (Ganesh Bare)
> Joint Commissioner of Income Tax,
> Range-10(1), Mumbai

25. In this regard, the ld. Counsel of the assessee placed reliance upon Hon'ble Delhi High Court decision in the case of *United Electrical Co. Pvt. Ltd. vs. CIT* 258

ITR 317 and the decision of ITAT in the case of *Shri Hirachand Kanuga vs. The DCIT* (in ITA Nos. 4261 & 4262/Mum/2002 vide order dated 27.02.2015). I may gainfully refer to the decision of Hon'ble Delhi High Court in the case of *United Electric Company P. Ltd.* (supra), which read as under:

> 12. Hon'ble Delhi High Court in the case of United Electrical Co. Pvt. Ltd. Vs CIT 258 ITR 317 has held that "the proviso to sub-section (1) of section!51of the Act provides that after the expiry of four years from the end of the relevant assessment year, notice under section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some in-builts safeguards to prevent arbitrary exercise of power by an Assessing Officer to fiddle with the completed assessment". The Hon'ble High Court further observed that "what disturbs us more is that even the Additional Commissioner has accorded his approval for action under section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of the said parties, perhaps he would not have granted his approval, which was mandatory in terms of the proviso to sub-section (1) of section 151 of the Act as the action under section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case there has been no application of mind by the Additional Commissioner before granting the approval".

26. From the above, it transpires that no notice or reopening has to be issued, under these provisions, unless the Commissioner is satisfied on the reasons recorded by the Assessing Officer, i.e., it is a fit case for the issue of notice which mentions that satisfaction of the Commissioner is paramount for which it is expected from the

Commissioner to apply his mind and exercise due diligence before according sanction to the reasons recorded by the Assessing Officer.

27. In the present case, I note that despite assessee's specific objection, the copy of the said approval and satisfaction or the details thereof was not submitted to the assessee by the Assessing Officer. The Assessing Officer blandly responded to the assessee's objection by stating that the notice u/s. 148 was issued after considering the time limit and satisfaction of issue of notice u/s. 149/151 of the Act. The Assessing Officer did not mention the date of such satisfaction or specified the authority, i.e., Joint Commissioner of Income Tax who gave the approval/satisfaction. It was only during the remand proceeding by the ld. Commissioner of Income Tax (Appeals) that the Assessing Officer came up with the aforesaid details and letter of approval was submitted. In my considered opinion, in view of the above discussion, the reopening in this case lacks jurisdiction on twin counts. Firstly, the assessee has not been properly intimated about any such satisfaction/approval despite request in the objection to reopening filed before the Assessing Officer repeatedly. Secondly, in the remand proceedings before the ld. Commissioner of Income Tax (Appeals), a sanction/approval letter dated 30.03.2015 which is of the same date as the date of notice for reopening has been submitted. This satisfaction/approval is of Joint Commissioner of Income Tax (Appeals). In reply, to assessee's objection, the Assessing Officer never gave any such detail. This gives credence to the submission

of ld. Counsel of the assessee that due approval/satisfaction was not obtained in this case before issue of notice of reopening. Hence, the sequence of events and discussion hereinabove make it clear that the satisfaction/approval has not been duly obtained as envisaged in the Act and as mandated in the case laws referred by the ld. Counsel of the assessee hereinabove. In such situation, when the reopening proceedings vis-a-viz compliance with section 151 of the I. T. Act has not been duly met with, the reopening proceedings deserve to be declared as *void-ab-initio* and the same is declared *void-ab-initio* as such.

28. Since, I have held the reopening to be bad on the aforesaid ground, the adjudication on other aspects of the challenge of reopening in the cross objection is only of academic interest. Hence, I am not engaging in the same.

29. Furthermore, since the reopening has been quashed, the adjudication on merits in the Revenue's appeal is now only of academic interest and, hence, the Revenue's appeal is dismissed as infructuous.

30. In the result, the Revenue's appeal is dismissed as infructuous and the cross objection of the assessee is allowed.

*Order pronounced in the open court on 04.12.2017*

Sd/-
(Shamim Yahya)
मुंबई Mumbai; दिनांक Dated : 04.12.2017 लेखा सदस्य / Accountant Member

व.नि.स./Roshani, Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/** BY ORDER,

**उप/सहायक पंजीकार** (Dy./Asstt. Registrar)
**आयकर अपीलीय अधिकरण,** मुंबई **/ ITAT, Mumbai**