Napar Drugs Pvt. Ltd. Vs. Dcit

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SooperKanoon Citation : sooperkanoon.com/74515

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Nov-30-2005

Reported in : (2006)98ITD285(Delhi)

Judge : B Jain, T S S.C., D Singh, J Member

Appellant : Napar Drugs Pvt. Ltd.

Respondent : Dcit

Judgement :

1. Since there is a difference of opinion between the Members of the Bench we state the following points of difference and refer the same to the Hon'ble President for further necessary action as envisaged under Section 255(4) of the I.T. Act, 1961.

Whether on the facts and findings, issue being identical and covered by various Tribunal orders arising from the same search and in the light of material on record, the ld Accountant Member is justified in dileting the addition on account of investment in share capital of Rs. 21,63,070/- made as undisclosed income of the block period of the appellant or that the Ld. Judicial Member is justified in restoring the issue back to the file of Assessing Officer for adjudication afresh.? I have received the following proposed question under Section 255(4) of the I.T. Act. 1961 in ITA No. 206/Del. /2002.

Whether on the facts and findings, issue being identical and covered by various Tribunal orders arising from the same search and in the hight of material on record. the learned Accountant Member is justified in deleting the addition on account of investment in share capital of Rs. 21,63.070/- made as undisclosed income of the block period of the appellant or that the learned Judicial Member is justified in restoring the issue back to the file of Assessing Officer for adjudication afresh? After a perusal of the same I would like to suggest that the following question would better bring out the point of difference to be referred to the Hon'ble President, which may be referred to the Third Member.

Q.1. Whether in view of the facts and material on record referred to by the D.R. in his argument, Which was not rebutted by the A.R. and admittedly has not been considered in the other orders of the Tribunal, on winch reliance has Been placed by the assessee. Is the action of J.M. justified in reasoning the issue for necessary verification to the Assessing Officer or is the ld. Accountant Member justified in not considering those facts material on record and the Arguments of the 'D.R. and deleting the addition.

Q.2. Whether the purpose of an appeal filed before the Tribunal is to dispose the issue as covered once it is so argued by the assessee or is the Tribunal required to give due deliberation and consideration to the arguments of the other side. i.e. the Revenue also? Accordingly, is the Judicial Member justified in dealing with those arguments and reaching a conclusion or is the ld. Accountant Member justified in reaching the conclusion without dealing with those arguments'? Q.3. Whether the Tribunal white reaching a conclusion is required to give a speaking order not only dealing with the facts and circumstances and evidence on record but also considering the arguments advanced by both the sides and thereafter agreeing or disagreeing with the submissions made or is the Tribunal required to only consider the arguments of the assessee and not required even to discuss the arguments advanced by the Revenue? Thus, is the ld. Accountant Member justified in deleting the addition without discussing the arguments of both sides or is the leaned Judicial Member justified in discussing the arguments of both sides? Q.4. Whether the Tribunal while coming to a conclusion can ignore the arguments of the Revenue or is the Tribunal required to deal with the arguments advanced

before it and thereafter agree or disagree with the submissions of either side? Accordingly, is the Judicial. Member justified in dealing with the arguments advanced by both the sides or is the learned Accountant Member justified in. not considering the submissions of the Revenue at all.

Q.5. Whether in view of the surrounding circumstances, relied upon by the Assessing Officer in terms of the decisions in Sumati Dayal v. CIT 214 ITR-80 and CIT v. Durga Prasad More 82 ITR-540 (S.C.), is the action of the Judicial Member justified in restoring for verification of facts to address the arguments advanced by the Revenue or is the learned Accountant Member justified, in ignoring the decision relied, upon by the Assessing Officer as well as the arguments of the Revenue and coming to a conclusion only on the basis of the arguments advanced by the assessee.

Q.6. Whether where the factum of argument based on material addressed by the Revenue, which has not been considered by other Orders should be ignored especially since this aspect was not Challenged on behalf of the assessee or should the Tribunal consider arguments of both the sides with even hand? 1. Briefly the facts are that the appellant is a private limited company having allotted share capital of Rs. 49,93,070/-. Regular books of accounts have been maintained. Statutory records as required under the Companies Act have also been maintained. Shares were allotted in different years for winch share certificates were issued and return of allotment has also been filed with the Registrar of Companies, Delhi and Haryana Return of income has also been filed from year to year and regular assessment have been framed and disclosed results stood accepted.

2. On 19.4.1996 an action under Section 132 was taken at the business premises of Shri Alok Agarwal, a Chartered Accountant in practice.

Certain documents relating to the appellant company were found and seized These documents are in respect of sale of shares by the share holders e.g. blank signed share transfer forms, sale bills, receipts, affidavits and share certificates in original. Shri Alok Agarwal renders consultancy services.

3. In block assessment framed under Section 158BC of the Act of Shri Alok Agarwal, the person searched, his assessing officer. DCIT. Special Range-3., New Delhi treated the share capital of Rs. 19.58.070/- as his undisclosed income. This assessment was framed on 31.5.1997. This assessment stood sot aside by the Tribunal and in the fresh assessment completed on 30.3.2001 of the searched person addition has again been made on protective basis.

4. Proceedings in the case of the appellant were initiated under Section 158BD read with Section 158BC of the Act on 21.5.2001 with the allegation that most of the persons in whose names the share capital has been introduced are non-existent. Return of income for block period disclosing nil income has been filed. The appellant was required to file complete list of share holders of the company The AO on his own issued summons under Section 131 to various share holders. The summons were served and replies have been received confirming their investment in purchase of shares by way of being an affidavit inter alia filing the proof of their residences with copy of ration card copies of Income tax returns and assessment orders, their personal balance sheet and bank pass book etc. The AO alter examining all such documents was fully satisfied about the identity and the capacity of the share holders and a finding to this effect has also been recorded by him in the assessment order. The AO however doubts the genuineness of the transaction as hi the normal circumstances: the share certificates should have been with the respective shareholders . As documents of side of these shares were found from Shri Alok Agarwal and the assesses did not produce them, the AO came to the conclusion that the onus cast on the assessee to prove the genuineness of the share investment has not been discharged. As the genuineness of the transaction has not been proved, he treated the share capital of Rs. 21.63.070/- as unexplained under Section 68 of the Act and added the same as bogus share capital for bringing to tax as undisclosed income of the assessee for the block period 1.4.1986 to 19.4.1996.

5. We have heard the parties with reference to written synopsis, paper book placed on record and various judicial pronouncements. Impugned order and entire material brought on record has been perused. As a consequence of the same search similar facts and documents were taken into possession of the revenue

authorities in the cases of certain other companies namely Real Overseas Pvt. Ltd. M/s Makhani & Tyagi Pvt.

Ltd., Indradhan Agro Products Ltd.. Akriti Media Pvt. Ltd. And Gary.

Polymers Pvt. Ltd. Proceeding under Section 158BD were initiated and share capital under the identical facts and circumstances was treated as non genuine by invoking provision of Section 68 of the Act and the same was also assessed as undisclosed income of the block period. These assessees preferred appeal before various benches of the Tribunal and after examining the judicial pronouncements vis-a-vis the material on record, the Tribunal came to the conclusion that the share capital is genuine, and the same cannot be treated as undisclosed income in block period. Copies of all these orders are placed on record as annexures A to E to the written synopsis filed before us. The Ld. Departmental Representative present in the proceedings and its that facts, circumstances and issue are identical and has not shown any new or distinguishing findings of the AO.6. In the appellant's case before us the raising of share capital through account payees cheques and recording of all the entries in respect of share issue stand disclosed in the regular books of account is not in dispute. The Income tax return drawn on the basis of such accounts stood accepted in the regular assessment of the appellant. The return for allotment of shares had been filed with the office of Registrar of Companies and all the persons in whose names shares were allotted had become legally the shareholders of the appellant company.

Details of such shareholding with complete particulars as to the identity capacity and genuineness of the shareholding and their confirmations /affidavits had been placed on record The AO himself had initiated enquiry by issuance of summons under Section 131 of the IT Act on all such shareholders. These were duly served and complied with by the shareholders. The shareholders in the enquiry proceedings by the AO had filed affidavits confirming investment in purchase of shares of appellant company as their own investment. This investment was duly disclosed by them in their respective Income tax returns, copies of which were also placed on record along with assessment orders wherever available. Bank pass book were also produced. Receipt of share certificates were admitted in the

confirmation/affidavits. With all this material on record genuineness of investment stood proved. These were the affidavits not of the appellant and cannot be said as self serving statements of the assessee. The application of decision of Durga Parshad 82 ITR 540 (SC) by the AO was thus misconceived. On perusal of such documents the AO was satisfied about the identity and capacity of these shareholders. In this backdrop the appellant can be said to have discharged his onus to prove that the amounts credited in his books does not represent his income but was a capital receipt.

Revenue's reliance on Sumti Dayal v. CIT 214 ITR 801 (SC) under such circumstances was also misplaced Once the appellant discharged its onus the burden goes for ever. Such it View finds support from the decision of Apex Court in Anunuugham (Deed.) by LRS v. Suuderambal and Anr.

SCC(1999) 350. Since the AO has initiated enquiry by issuing of summons it was incumbent upon him to bring the proceedings to logical conclusion. If he wanted the presence of shareholders. the same should have been enforced by virtue of powers vested in him and not merely by dosing his own enquiry and asking the assesses to produce these persons which was not under the control of the appellant. Since nothing adverse regarding investment in shares had come in possession of the AO nor did he find any contradiction or infirmity in the sworn statements in the shape of affidavits procured by the AO himself the assessee cannot be expected to perform what factually was not in the scope of his duly.

Once the initiate onus that lay upon the appellant had been discharged by the appellant the burden lay upon the revenue to verify and examine the correctness of material before making any addition. Without doing so or without bringing any positive material to controvert the correctness of such material, the addition could not be made as unexplained credit. Such a view stands fortified by the decision of Apex Court in CIT v. Orissa Corporation (P) Ltd. 7. That apart the presumption as given in Section 132(4A) of the Act is in favour of the appellant. The documents of' sale of shares along with share certificates etc. were found from Shri Alok Agarwal. Documents found and seized did not reveal any investment outside books by the appellant nor any enquiry resulted into any country finding. The

appellant was found to have received the share money through account payee cheques and shares allotted and share certificates also stood issued and found with a third party, incidentally a consultant by profession. The circumstances under which these certificates were lying with the consultants also stood explained and no infirmity is found in the explanation of the appellant. The AO did not reject the explanation of the assessee. Apparently the investment in shares was of all such persons who had become shareholders and holding the same as their own investment winch was duty disclosed and also stood accepted in their individual income tax return, the AC) without bringing any material is found to have erred in saying that the apparent is NOT real. For alleging so, the burden was on revenue. This is has not been discharged. Such a principle is found laid by the apex court in CIT v.Danlat Rant Rawal Mull 87 ITR 349 (SC); We also find that without there being any material or basis in possession of the AO. the documents; which were found in respect of sale of shares, presumption has been drawn with respect to genuineness of initial investment. This was the result of mere suspicion in the minds of the AO. A suspicion however strong cannot take the place of evidence as has also been laid down by Apex Court in Uma Charan Shaw v. CIT 37 ITR 271 (SC). In the scheme of block assessment as contained in Chapter XII-B it is outside the scope of powers of the AO to presume undisclosed income which has to be on the basis of evidence found as a result of search or information as are available with the AO. The decision of the Tribunal in Sunder Agencies v. DCIT (1997) 63 ITD 245 (Mum.) relied upon by the Ld. Counsel for the assessee also clinches the issue. As the AO did not determine the undisclosed income on the basis of any search material, it is evident that he was proceeding within the scope of regular assessment and not within the scope of exercising jurisdiction under Chapter XIV-B.Accordingly, Section 158BA of the Act had no application to the facts of the ease. This view stands fortified by the decision of the jurisdictional High Court in CIT v. Ravi Kant Jain 250 ITR (Del.).

8. The perusal of the order also reveals that the income has been treated as undisclosed of the block period without finding as to when the investment in shares had factually taken place-. It is admitted position of law that a cash credit which remains unexplained can be assessed in the year in which amount is originated . Authority on this can be read in CIT v. Om Prakash 152 ITR 583

(Del.)- The scheme of block assessment which in itself is a separate code requires separate computation of total income of each previous year comprised in the block period. This has also not been done by the AO, who appears to have been casual in his approach and making the addition without any basis or relevant material on record. When the company is incorporated with share Capital which was raised in different previous years for Rs. 49,93,70/- for which shares were also allotted and issued to the shareholders and accepted by each of the shareholders, who are in existence and whose identity and capacity also stood accepted by the AO after making a long drawn enquiry, there was no basis to say about only a part of the share capital of Rs. 21,63,070/- as bogus or genuineness of which not proved. The AO is speaking two different things in the same tongue without discharging, his burden which in law lay upon him after the genuineness of investment in shares stood admitted by each of the share holders. Having regard to the totality of facts and the findings as arrived at for the genuineness of transaction of shares having been proved by the appellant and for lack of positive material, evidence or information as envisaged under Chapter XIV-B such an addition cannot be allowed to sustain.

9. The Tribunal in IT (SS) A. No. 284/Del/2001 dated 18^th August, 2003 in the caste of Indradhan Agro Products Ltd. Supra while dealing with the addition under Section 68 of the Act as undisclosed income on the ground of genuineness has held as under: We may look' at the entire issue from another angle, namely the impact of provisions of Section 68 in the context of block assessment proceedings. The AO has taken resort to the provisions of Section 68 and held that the assessee failed to discharge the onus of proving the genuineness of share capital has been concluded by the two decisions of jurisdiction of High Court i.e. Delhi High Court in the case of Steller Investment 192, ITR 287 and Sophia Finance and Investment Limited 205 ITR 98. Steller Investment has been endorsed by the Hon'ble Supreme Court: in CIT v. Steller Investment reported in 251 ITR 263. The common thread which runs through these two decisions is the enunciation of the principle that once the identity of the share holders who have subscribed to the share capital is established the onus which lay on the company under Section 68 would stand discharged. It has been observed by Delhi High Court in Sophia Finance Limited at page 105, the Income Tax Officer would be entitled to enquire,

and it would indeed be his duty to do so. whether the alleged shareholders do in fact exist or not. If the shareholders exist then, possibly no further enquiry; need be made, But if the Income tax Officer finds that the alleged shareholders do not exist then in effect it would mean that there is no valid issuance of share capital. Shares cannot be issued in the name of non existing persons. Applying the aforesaid settled legal position to the facts of the instant case, we find that the impugned addition in axle by the AO is in any case liable to be deleted in the facts of the instant case. It is not disputed by the revenue that the identity of the shareholders is established and they have tiled confirmation letters which have in fact, been found at the premises of Shri Alok Agarwal, as mentioned by the AO in the assessment order itself. On this short ground alone, the ratio of Delhi High Court decisions clinches the issue against the revenue.

The addition of the share capital made by the AO in the block assessment is, therefore, liable to be deleted.

11. The identical issue also came up for our consideration is in the case of Real "Overseas Pvt. Ltd., in IT (SS) No. 266/Del/2001 dated 29.8.2003 where one of us the Ld JM who has authored the judgment deleted the addition by observing in paragraphs 20 & 21 of our order as under: Having heard the rival submissions and perused the material placed on our files, we are of the view that in the peculiar facts and circumstances, the identical issue has been considered by the Tribunal in the case of M/s Makhani & Tyagi Pvt. Ltd. Wherein relying upon the jurisdictional decision of the High Court in the case of CIT v. Ravi Kant Jain and Gujarat High Court in the case of N.R. Paper v. CIT amongst others has deleted the additions. The Tribunal has also considered the decision of the Delhi High Court in the case of CIT v. Steller Investment and Supreme Court in the case of CIT v. Sophia Finance Limited.

We have even taken ourselves through various pages of the paper books and observed that the assessee has regularly been filing his returns. The replies of the assesses before the AO in the block assessment proceedings and the submissions wish regard to Inspector's report, past assessments of the assessee have also been taken into consideration. After duly considering the entire plethora

of arguments and evidences, we are of the view that in the facts of the case, the AO could not have made additions in block assessment and in case he was of the view that the documents accompanying the returns of the assessee have not been considered in the regular assessments, then he could have reopened the same in 147/148 proceedings. It may be pertinent to reproduce the view taken by the jurisdictional High Court on the scope of the assessments made under Chapter XIVB. Their Lordships have held that the block assessment under Chapter-XIVB is not intended to be a substitute for regular assessment. Accordingly, in the face of the evidence that the evidence relied upon by the assessee And the case law considered by the Tribunal and taking note of the fact that no distinguishing fact, circumstances or contrary view was brought to our notice, we are of the view that the grounds challenging the addition on merit deserve to be allowed.

10. Since the Tribunal in catena of cases arising from the same search and after examination of facts and law on the subject has already deleted the addition so made as undisclosed income of the block period in the absence of any new material or basis more particularly for the sake of consistency, we are not inclined to deviate from the decision arrived at by the Tribunal. This view finds support from the decision of '"Hon'ble Madhya Pradesh High Court in the case of CIT v. Godavari Corporation Limited 11. In the result, the addition of Rs. 21,63,070/- as undisclosed is deleted.

12. The assessee did not argue specifically ground No. 1 & 2, the same are therefore dismissed.

I have gone through the proposed order and after a careful perusal of the same, I regret that I am unable to concur with the reasoning and conclusion of my esteemed colleague. Accordingly, after due discussion with my learned Brother, I propose to write my separate order for the reasons given hereinafter.

2. I would propose at the outset to refer to the specific reason discussed with my esteemed colleague for writing my separate order. The learned DR. in the course of the hearings before us confronted with the orders of the Tribunal wherein in the case of different companies additions had been made as a result of the action Under Section 132 of the Income Tax Act on 19/4/96 on the business premises of

Shri Alok Aggarwal, CA hereinafter referred to as the searched person had in sheer helplessness and misery submitted that documents have been found in the course of the search from the premises of the' searched person and admittedly amongst them are blank transfer forms where the part to whom they are to be transferred have been left as blank, however signatures of the alleged shareholders are there. The irony of deleting additions in the hands of the Chartered Accountant as well as in the hands of the companies despite a seizure of documents was questioned by the learned DR. The helplessness experienced in the situation where despite seizure of documents found in the search resulting in the end where Revenue is left standing helplessly was expressed by him. The learned DR in sheer helplessness with misery writ large on his face attempted to point out the irony that how in the case of all the Companies floated as benami or served as a professional consultant by the searched person, all the shareholders at the point of time came to be under circumstances where they were in dire need of money. This paper work and these facts in the face of documents found in the course of search it was pleaded should not be ignored. An attempt was made to persuade the Bench to look beyond the picture and to consider the entire picture.

3. In this background, a valiant attempt was made to point out that the documents were found and seized relating to the company by the search party, namely, blank but signed share transfer forms, sale bills, receipts, affidavits etc. relating to the company. He questioned the possibility as to how all the shareholders were in dire need of money and, as such, all at the same time, for identical reasons, left blank transfer forms signed by them in the custody of the searched person.

4. It was submitted by him that the surrounding circumstances and the probabilities have not been considered by the Tribunal in the said orders. It was his contention that if on account of some reason a particular company has been held to be genuine by the Tribunal, then, that finding shall not preclude the Bench from considering the specific findings given in the impugned order which is under challenge today. It was pointed out that the various pages in the paper book wherein the claim for money on account of dire need of different shareholders has been made this fact and evidence found at the time of the search should be considered and analysed by the Bench, the facts submitted deserves to be

appreciated in the light of the impugned order and the submissions made before the Bench. A prayer was made that all the parts should be seen together in the complete picture.

5. It is on account of the aforesaid background that after serious deliberation and consideration and due discussion with my esteemed colleague, my separate order has been written.

6. At the outset, it may be pertinent to refer to the order in the case of Real Overseas Pvt. Ltd. v. DCIT in IT(SS) No. 266/Del/2001 wherein vide order dated 29/8/2003, this very Bench of which I was the author, therein allowed the appeal of the assessee. It may be necessary to refer to the facts as appreciated by us by reproducing paragraphs 3 to 5 of the said order. They read as under: 3. The relevant facts of the case are that a search and seizure operation Under Section 132(1) was carried on the official and residential premises of Shri Alok Aggarwal. From the said premises bearing No. 245, 234 and 224, Anarkali Bazar, Jhandewalan, New Delhi, incriminating documents pertaining to the present assessee were seized. The AO of Shri Alok Aggarwal completed the assessment Under Section 158BC in his case. He found that undisclosed income arising out of those incriminating documents related to the assessee. As such, the seized documents/books of accounts were handed over to the AO of M/s Real Overseas Pvt. Ltd., the assessee here. Accordingly, in this background, the assessment was framed in the hands of the assessee.

4. Notice Under Section 158BD read with Section 158BC was issued to the assessee on 21/8/2000 in response to which, return for the block period 1987-88 to 1996-97 and 1997-98 (part period 1/4/96 to 19/4/96) was filed on 24/8/2001 under protest as per the statement of facts placed before us.

5. The AO was of the view that the assessee is engaged in the activities of giving accommodating entries and looking at the documents seized, he was of the view that the shareholders of the assessee company are benami and have in fact signed blank receipts, blank sale bills, blank share transfer forms and also confirmatory affidavits which form part of the seized material in Annexure A-38 and A-97 of Panchnama dated 24.4.96/25.4.96. The fact that the blank signed share

transfer forms and blank sale bills are kept with the assessee company according to the AO confirmed the belief that the same were kept so as to have control over the benami shareholders which would enable the assessee company to get these shares transferred in its name or in the name of any other person at their will. The confirmatory affidavits filed before the AO were considered to be not sufficient as he was of the view that since the distinctive numbers have not been mentioned as such it should that the shareholders are not even aware about their shares. The AO was of the view that the availability of these documents with the assessee clearly showed that the allottees were not the real shareholders and in fact merely name lenders and the total control of shares was considered to be in the hands of the company.

7. Apart from other submissions made before the Bench at that point of time, it was also stated that the said issue is covered in favour of the assessee by virtue of the order dated 21^st July 2003 of the Tribunal in IT(SS) No. 204/Del/2002 in the case of M/s Makhni & Tyagi Ltd. The said submission finds itself in page 7 para 10 of the order in the case of M/s Real Overseas: 10. Inviting attention to the said order, it was contended on behalf of the assessee that the present appeal filed by the assessee is fully covered by the said order of the Tribunal in its favour. It was pointed out that the addition in the case of M/s Makhni & Tyagi Pvt. Ltd. had been based on the same search which took place on Shri Alok Aggarwal, the CA of the assessee. Referring to the said order, it was contended that even there, the entire share capital worth Rs. 30 lakhs odd has been treated as 'income from undisclosed sources' of the assessee. Special attention was invited to paragraph 2.1 of the same so as to point out that there was a search on the business and residential premises of Shri Alok Aggarwal, practicing CA on 19/4/96 during which certain documents/incomplete statutory records of various companies including the assessee company were seized from his custody. The said paragraph was pointed out so as to contend that the issue in the present appeal is fully covered by the said order. Referring to the same, it was submitted that the block assessment order in the case of the Chartered Accountant Shri Alok Aggarwal was set aside by the Tribunal. As a result of it additions on identical lines were made in the case of M/s Makhni & Tyagi Pvt.

Ltd. It was further argued that the income added in the block assessment already stands disclosed in the regular assessments of the assessee. Inviting attention to page 123, it was stated that the assessee has been filing its return from 1989-90 which was filed on 29th December, 1989 i.e. much before the date of the search which was conducted on the official and residential premises of Shri Alok Aggarwal only on 19th April, 1996. Paper book page 120 was also referred to in support of the contention that the return for 1990-91 was filed on 31st December, 1990. Similarly, it was submitted that the returns for 1992-93, 94-95, 95-96 and 96-97 have been Bled by the assessee. In support of the above claim, our attention was invited to page 101 which is the intimation Under Section 143(1)(a) in the case of the assessee for 1994-95 which was issued on 28/2/95 i.e. much before the date of the search on Mr. Alok Aggarwal, the CA of the assessee. Page 102 was referred to in support of the said claim so as to highlight that for 1994-95 AY, the assessee had filed his return on 18/11/94 as per the signature appearing on the acknowledgement which was received on 30l November, 1994 as per the stamp on the said acknowledgement. Attention was invited to page 110 which is the 143(3) assessment in the case of the assessee for 1992-93 AY which was completed on 28/10/93 against before the date of the search. Page 111 is the 143(1)(a) intimation for the same assessment year bearing date 26/2/93. Page 120 is the acknowledgement for the return filed before the assessment year 1990-91.

8. Relying upon the same, the following submissions were also made before us: 11. The order of the Tribunal in the case of M/s Makhni & Tyagi Pvt.

Ltd. was heavily relied upon and based on the above facts, attention was again invited to page 4 of the said order so as to contend that therein the Tribunal has considered various decisions, namely, L.R. Gupta and Ors. v. Union of India and Ors. - 194 ITR 32 (Del), CIT v. Ravi Kant Jain - 250 ITR 141, N.R. Paper and Board Limited and Ors.

v. DCIT - 234 ITR 733 (Guj), Meda Ramaiah Setty v. CIT, Mysore - 63 ITR 245 (Mysore), Parakh Foods Ltd. v. DCIT - 64 ITD 396 and 242 ITR 42 (Mad). Relying upon the said order, it was further contended that in case the AO had any

suspicion or doubt about the genuineness of the share capital , he could have issued notice Under Section 147/148 of the Act but, there is no reason or basis for him to proceed in making the addition made in the block assessment in the manner made. Referring to the synopsis filed at page 127, it was contended that the assessee company was incorporated on 2/5/88 and has been maintaining its account books in the normal course of its business of financing and dealing in shares. It was argued that the position of the filing of the returns from the assessment years 1989-90 till 96-97 had already been referred to. Thus, it was contended that once the entire share capital has been disclosed to the department by the assessee in its recorded books of accounts maintained by the assessee prior to the date of search on 19/4/96 Under Section 132 against Shri Alok Aggarwal, the provisions of Chapter XIVB could not be invoked against the assessee since the fact is not in dispute that the share capital was recorded in the account books maintained by the assessee on the basis of which it stood assessed in regular assessment proceedings year after year right upto 1996-97 assessment year.

9. The submissions in response to the arguments which have been reproduced above as well as various other arguments on facts were responded to by the learned DR Shri Ujagar Singh in the following manner: 18. Learned DR, in reply, with respect to the jurisdiction placed reliance on the documents placed before the Bench and the observation in the assessment order so as to contend that the jurisdiction of the Assessing Officer was neither barred by limitation nor otherwise.

19. With respect to the additions made, reliance was placed upon the block assessment order though nothing was stated to controvert the submission of the assessee that the issue is fully covered vide order dated 21/7/2003 in IT(SS) No. 204/Del/02 in the case of M/s Makhni & Tyagi Pvt. Ltd. It was specifically put to him that whether he would like to point out any distinguishing fact or circumstance.

Learned DR did not point out any distinguishing fact or circumstances and, in fact, conceded that the facts more or less are identical. As such, the issue is covered by the said order. It was fairly conceded that the additions in identical circumstances have been made in the case of M/s Makhni & Tyagi Pvt. Ltd. but for

the record, reliance was placed upon the impugned order.

20. Having heard the rival submissions and perused the material placed on our files, we are of the view that in the peculiar facts and circumstances, the identical issue has been considered by the Tribunal in the case of M/s Makhni & Tyagi Pvt. Ltd. wherein relying upon the jurisdictional decision of the High Court in the case of N.R. Paper v. CIT amongst others has deleted the additions. The Tribunal has also considered the decision of the Delhi High Court in the case of CIT v. Steller Investment and Supreme Court in the case of CIT v. Sophia Finance Limited.

21. We have even taken ourselves through various pages of the paper book and observed that the assessee has regularly been filing his returns. The replies of the assessee before the AO in the block assessment proceedings and the submissions with regard to Inspector's report, past assessments of the assessee have also been taken into consideration. After duly considering the entire plethora of arguments and evidences, we are of the view that in the facts of the case, the Assessing Officer could not have made additions in block assessment and in case he was of the view that the documents accompanying the returns of the assessee have not been considered in the regular assessments, then he could have reopened the same in 147/148 proceedings. It may be pertinent to reproduce the view taken by the jurisdictional High Court on the scope of the assessments made under Chapter XIV-B. Their Lordships have held that the block assessment under Chapter XIV-B is not intended to be a substitute for regular assessment. Accordingly, in the face of the evidence that the evidence relied upon by the assessee and the case law considered by the Tribunal and taking note of the fact that no distinguishing fact, circumstance or contrary view was brought to our notice, we are of the view that the grounds challenging the addition on merit deserve to be allowed.

11. At this juncture, it may also be relevant to consider the order of the Tribunal in the case of Makhni & Tyagi v. DCIT in IT(SS) No.204/Del/2002 wherein the arguments advanced on behalf of the Revenue were as under: 3. The ld. DRs relied on the assessment order and submitted that the share capital appear to be bogus because none of the shareholders having appeared before the AO Under

Section 131 of the I.T. Act, the same had not been proved to be genuine. He, therefore, submitted that no interference was called for in the block assessment order as passed by the AO. 4. We have perused various documents placed before us in the form of paper book and have given our thoughtful consideration to the facts of this case. The facts stated by the ld. counsel for the assessee have neither been controverter nor disproved by the ld. DRs. Admittedly, the entire share capital stood disclosed to the Deptt.

as having been entered in the regular account books maintained by the assessee company prior to the date of search on 19.4.96 Under Section 132 against Shri Alok Aggarwal as per details given by the AO himself in para 4.1 to 4.5 of the block assessment order. It is also not in dispute that income tax cases upto the assessment year 1995-96 had been completed in the case of the assessee prior to the date of search and case for the assessment year 1996-97 was completed Under Section 143(3) of the I.T. Act after the date of search. It was held by Jurisdictional Delhi High Court in the case of CIT v. Ravi Kant Jain 250 ITR 141 that "Block assessment under Chapter XIV-B of the Income-tax Act, 1961, is not intended to be a substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer. Evidence found as a result of search is clearly relatable to Sections 132 and 132A". To the same effect is the Gujarat High Court judgment in the case of N.R. Paper & Board Ltd. and Ors. v. Dy. CIT 234 ITR 733 and also various orders of different Benches of the Tribunal as relied upon by the ld. counsel for the assessee. Therefore, we agree with the ld. counsel for the assessee that the addition of Rs. 30 Lacs on account of share capital as made was not justified.

4.1 Even on merits of the case also the assessee should succeed because in response to notices Under Section 131 of the I.T. Act, all the shareholders had confirmed in writing their investment in the share capital of the assessee and had duly given their PAN/GIR No. and other relevant particulars under which they were

assessed to tax. No adverse inference could be drawn against the assessee if in response to summons Under Section 131 of the I.T. Act, none of the shareholders had appeared before the AO though each one of them sent their confirmations to him. If the AO felt that their examination was necessary, he could have enforced their attendance as held by Allahabad High Court in 49 ITR 561 and 651. The onus that the share capital of the assessee company represented its undisclosed income under Chapter XIV-B of the I.T. Act was certainly on the AO which had not at all been discharged. On other hand, necessary documentary evidence was placed on record to prove the identity of all the shareholders including furnishing of their GIR/PAN numbers and filing of other documentary evidence in the form of ration cards etc. which had neither been controverted nor disproved by the AO. All the shareholders had subscribed share capital by account payee cheques/drafts - a fact also controverted or disproved by the AO. There was no justification on the part of the AO to ignore the confirmation letters as had been received by him directly in response to summons Under Section 131 of the I.T. Act from various shareholders. It was held by the jurisdictional Delhi High Court in the case of CIT v. Steller Investment Ltd. 192 ITR 287 that "even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstance, could the amount of share capital be regarded as undisclosed income of the appellant". This judgment was affirmed by Supreme Court in 251 ITR 263.

Jurisdictional Delhi High Court (Full Bench) in the case of CIT v. Sophia Finance Ltd. 205 ITR 98 had held that "if the shareholders are identified and it is established that they have invested money in the purchase of shares, then the amount received by the Co. would be regarded as a capital receipt". The Apex Court in the case of CIT v. Orissa Corporation (P) Ltd. in 159 ITR 78 had held that if it was in the knowledge of the Revenue that the creditors were income tax assesses and their index numbers were in the file of the Revenue, the assessee had discharged the burden that lay on it to prove the cash credits". ...On the facts of this case, we hold that the AO was not at all justified in treating the entire share capital of Rs. 30 Lacs as income from undisclosed sources both legally and factually because we find that the identity of the shareholders who had also confirmed their investment in the share capital in response to summons Under

Section 131 of the I.T. Act also stood proved.

Consequently, the addition of Rs. 30 Lacs is deleted.

13. In the said facts and circumstances, coming back to the impugned order and taking note of the serious submissions of the learned DR in an attempt to shake the judicial consciousness, the overwhelming impact of serious allegations made, documents found and identical ingenuous explanation that everyone needed money direly calls for a moment to pause and seriously reconsider, it is a little surprising that in the case of almost 5-6 companies allegedly floated by the searched person or taken care of professionally as per the assessee's version by the searched person, blank but signed share transfer forms, bills, receipts, etc. had been found from the premises of the searched person and the shareholders no doubt identifiable give the same reason. When each and every individual case has been considered by different benches, then, necessarily, they have confined themselves to the facts of that case and had not the ld. DR made his impassioned submissions then probably the present appeal would have followed the same course.

However, once in an attempt to shake the judicial consciousness, the facts vis-a-vis the impugned order are addressed, then we are faced with a scenario entirely different from the one appreciated by this very Bench in the case of M/s Real Estates. In the circumstances, the facts as argued need due consideration and the alarm sounded by the learned DR cannot be wished away.

14. Being of the view that the issue cannot be decided by wearing blinkers, the full scape of the picture which emerges has to be taken cognizance of and dealt with and merely blindly disposing the issue holding it as covered in the peculiar facts as are emerging from the impugned order will to my mind in the circumstances be not appropriate as once a judicial consciousness has been stirred, then it must be taken to its logical conclusion. Accordingly, in the circumstances, reference may be made to page 2 of the assessment order which is under challenge. Since this is a period in which a direct appeal was coming to the Tribunal wherein in para 2 of the said page, the AO observes as under: During the course of the search proceedings incriminating documents in the form of blank but signed share

transfer forms, sale bills, receipts, affidavits and share certificates relating to M/s NPAR Drugs (P) Ltd. were seized from 245, Anarkali Bazar, Delhi, which is the office of Sh. Alok Aggarwal. These documents are signed by the shareholders of the company. The very presence of these documents at the premises of Sh. Alok Aggarwal raised serious doubts regarding the genuineness of the share application money.

15. In response to this, it is seen, the assessee has stated that the directors of the company are inexperienced and the searched person had offered consultancy services. However, once each and every company floated by the searched person or to which the searched person offers consultancy services, the shareholders therein come up with identical facts and circumstances with identical need of funds at the same point of time, then, alarm bells are likely to ring and to hold otherwise would require the stretching of credulity and naively a little too far.

The blank sale-bills are in respect of sale of equity shares and blank cash receipts is in respect of cash received for the sale of equity shares which have been signed by different persons named above. The blank but signed affidavits are in the name of the above mentioned persons mentioning their Income Tax Particulars and that they have applied for equity shares and allotted shares bearing no distinctive numbers.

The affidavit also mentions that such persons has received the original share certificates from the company whereas the original share certificates have been found and seized from the premises of Sh. Alok Aggarwal at 245, Anarkali Bazar, Delhi.

18. With regard to the seizure made of these documents, the response of the assessee which has been reproduced in the impugned order may be referred to again: Some of the shareholders' who were in dire need of money were getting restless due to company's failure to pay any dividend, approached the directors for assistance in selling shares in the assessee company, advance receipts and blank transfer forms were given by them to Shri. Alok Aggarwal, C.A. for using them as and when he could find any prospective buyer for shares. As and when the transaction materialized, the payment had to be received only through crossed

cheques/draft and the relevant number of cheque and other particulars would have been filled in the blank receipts.

There was no question of any cash having been received or paid at any time. It may further be stated that the documents were lying with Shri. Alok Aggarwal, C.A. as he is professional consultant to the company and his opinion is normally taken in all such matters so as to maintain strict compliance with the provisions of the Companies Act. It may also be brought to your kind notice that this mode of signing of advance receipts and return of original documents is a prevalent practice followed for claiming refund of deposit or receipts of any payment from Central or State Governments, DDA and other Housing Corporations etc. The advance receipts are not valid till cheques/drafts nos. are entered in them at the time of actual payment.

19. As though this was not enough, the AO observes that in each of these cases on a perusal of the blank passbook of the shareholder, it revealed that "funds had been deposited of an equivalent amount just before the date of withdrawal of the share money from the respective bank accounts in a majority of the shareholders". He fairly observes that although the identity and capacity for investment has been furnished by all the shareholders, however, the genuineness of the transaction is not proved: I have considered the submission made by the assessee and examined the confirmation submitted by the shareholders. Examination of the bank pass books of shareholders who have invested in the shares of the assessee company reveals that there is deposit of an equivalent amount just before the date of withdrawal of share money from the respective bank accounts in majority of the cases of shareholders.

Although, the identity and capacity for investment of share application has been furnished by all the shareholders by giving their Income Tax Particulars and Bank account details, the genuineness of the transaction has not been proved, as is in normal circumstances the share certificates should have been with the respective shareholders. Moreover, the fact that signed but blank sale bills, share transfer deeds, cash receipts and affidavits from the above named shareholders of the company were also found and seized from premises of Sh. Alok Aggarwal shows

that investment by such persons in the shares of the company were not genuine investments. The assessee's submission that these blank but signed documents were in possession of Sh. Alok Aggarwal for finding prospective buyers is not acceptable, as this is not done in normal practice of share buying and selling. The assessee has also not produced any evidence to show that shares have been sold even till date.

20. A perusal of the impugned order further bears out that the assessee was required to produce the shareholders in respect of whom share certificates etc. blank but signed documents were seized to examine the genuineness and after considering the explanation, he observed at page 8: There is no dispute that the amounts were purportedly received by the assessee from different shareholders. What is disputed is that were they really genuine investment of shareholders or just entries which in fact represent the income of the assessee company routed through shareholders. This raises the question whether the apparent can be considered as the real. As laid down by the Hon'ble Supreme Court, the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and matter has to be considered by applying the test of Human Probabilities (214 ITR 801, Sumati Dayal v. CIT SC and 82 ITR 540 CIT v. Durga Prasad More SC).

In the case of the assessee, the surrounding circumstances discussed above leads one to the conclusion that the share application money in respect of the persons mentioned above is not genuine investment.

21. On account of these facts, an amount of Rs. 21,63,000/- was added as bogus share capital in the hands of the assessee company.

22. It may be pertinent to briefly observe that their Lordships in the cases of Steller Investment - 192 ITR 287 and Sophia Investments Ltd. - 205 ITR 98 have considered the aspect of genuineness in the context of the identity of the shareholder. The Hon'ble Supreme Court has endorsed the judgment of Delhi High Court in the case of Steller Investment- 251 ITR 263.

23. Accordingly, after having considered the entire peculiar facts and circumstances which have not been addressed or considered by us in the case of M/s Real Overseas and also in the other identical cases, namely, M/s Makhni & Tyagi which had been relied upon before us and others, the submissions of the learned DR pointing to specific observations in the assessment order, I am of the view that the credulous arguments advanced after seeing the entire picture cannot be swallowed. It is too big a coincidence that in the case of all the companies floated by the searched person, all the shareholders at the same point of time were in need of dire funds and, as such, left signed blank transfer forms in possession of the searched person. Ultimately, whether these shares were sold or not and to whom these shares were sold, may bring out the entire picture. However, since nothing on this aspect is before us although the learned DR made a reference in passing that these shares have been ultimately sold to the searched person whose money has been laundered. However, in the present case, he confined himself to the argument that the addition in the hands of the company on account of bogus share capital should be confirmed.

24. In these circumstances, I am of the view that in the facts of the present case as appreciated hereinabove, the matter requires to be addressed by the Assessing Officer. In the present facts of the case, the aspect of the shares being bogus can be borne out from an appraisal of the assessment order itself However, simply to say that an enquiry should stop on the date the documents were found and facts subsequently should not be considered, in the peculiar facts of the case, would be rendering injustice to the assessee. If the assessee is able to establish by a subsequent conduct that the said company did not have a bogus share capital, then, another chance should be given to it. Before parting, it may also be pertinent to state that from a perusal of the proposed order, it is seen that in the fresh assessment completed on 30th March, 2001, in the case of the searched person the addition again had been made on a protective basis. Accordingly, I am of the view that in the circumstances, it would be appropriate to restore the issue back to the file of the Assessing officer with the direction to decide the same in accordance with law by way of a speaking order after giving the assessee an opportunity of being heard.

25. In the result, the appeal filed by the assessee is allowed for statistical purposes.

In this case the appeal filed by the assessee on 19.6.2002 against the order Under Section 158BD dated 31.5.2002 for the block period 1.4.1986 to 19.4.1996 made by Dy. CIT, Circle 4(1), New Delhi was heard by Income-tax Appellate Tribunal, Delhi Bench "B" on 7^th January, 2004.

As there has been a difference in opinion between the Members of the aforesaid Bench, Hon'ble President, ITAT has nominated me as a Third Member for hearing points of difference between the Hon'ble Accountant Member and the Hon'ble Judicial Member of the earlier bench. Thereafter I have heard both the assessee and respondent department from time to time.

2. Facts of the case may be stated first. A search Under Section 132(1) of the Act was conducted at the premises of one Shri Alok Aggarwal, Chartered Accountant on 19^th April, 1996. During the course of search proceedings, among other things, a large number of documents relating to the assessee M/s NPAR Drugs Pvt. Ltd. were found and seized. These documents comprised of 2,16,307/- shares of the assessee company registered in the names of 50 shareholders as detailed elaborately in the assessment order. In addition, documents seized by way of annexures A30, A61, A66 and A67 comprised of signed blank share transfer forms, sale bills, cash receipts and affidavits from 49 of the aforesaid 50 shareholders. The share transfer forms, sale bills, cash receipts and affidavits were duly signed but were otherwise mostly blank as respects of material information. The blank sale bills were in respect of sale of equity shares; blank cash receipts were in respect of cash received for the sale of equity shares and blank signed affidavits were in the name of aforesaid shareholders mentioning their income-tax particulars and that they had applied for equity shares and been allotted shares but no distinctive numbers were mentioned. The affidavits also mentioned receipt of the original share certificates from the company, whereas those share certificates were found and seized from the premises of Shri Alok Aggarwal, Chartered Accountant, 245, Anarkali Bazar, Delhi.

3. The assessee explained presence of these documents at the premises of Shri Alok Aggarwal in the following words: Some of the shareholders who were m dire need of money were getting restless due to company's failure to pay any dividend, approached the directors for assistance in selling shares in the assessee company. advance receipts and blank transfer forms were given by them to Shri Alok Aggarwal, C.A. for using them as and when the transaction materialized, the payment had to be received only through crossed cheques/draft and the relevant number of cheque and other particulars would have been filled in the blank receipts.

There was no question of any cash having been received or paid at any time. It may further be stated that the documents were lying with Shri Alok Aggarwal, C.A. as he is professional consultant to the company and his opinion is normally taken in all such matters so as to maintain strict compliance with the provisions of the Companies Act. It may also be brought to your kind notice that this mode of signing of advance receipts and return of original documents is a prevalent practice followed for claiming refund of deposits or receipts of any payment from Central or State Governments, DDA and other Housing Corporations etc. The advance receipts are not valid till cheques/drafts nos. are entered in them at the time of actual payment.

The Assessing Officer considered the submissions made by the assessee and the confirmations submitted by the shareholders. Examination of the bank pass books of shareholders revealed that in every case there was a deposit of an equivalent amount just before the date of withdrawal of share money from the bank account for application of shares of the assessee company. The learned Assessing Officer, therefore, held that though the identity and capacity of the shareholders indicating their Income-tax particulars and bank account details had been furnished, the genuineness of the transaction was not proved. In the normal circumstances the share certificates should have been with the respective shareholders. Moreover the fact that signed but blank sale bills, share transfer deeds, cash receipts and affidavits were found and seized from the premises of Shri Alok Aggarwal showed that investments by such persons in the shares of the assessee company were not genuine investments. The learned Assessing Officer reasoned that it was not a

normal practice of share buying and selling to hand over share certificates along with signed blank supporting documents. The assessee did not furnish any information that any of these shares had actually been sold. He asked the assessee to produce the shareholders but the assessee did not produce any of them. He held that the onus cast on the assessee to prove the genuineness of the share investments was not discharged. During the course of proceedings before the learned Assessing Officer, the assessee relied upon the judgment of Hon'ble Supreme Court in the case of Stellar Investment Ltd. 251 ITR 263 (SC) and the judgment of Hon'ble Delhi High Court m the case of Sophia Finance Ltd. 205 ITR 98 (Del). The learned Assessing Officer held that the facts of the case of the assessee were distinguishable. In the case of the instant assessee share certificates were found and seized from the office of a third party and apart from the blank signed transfer deeds, sale bills, cash receipts, affidavits of the shareholders were also found. In majority of the cases of the shareholders there was deposit of an equivalent amount in the bank accounts of the shareholders shortly before withdrawal of money which was advanced to the assessee company towards share capital. These facts distinguished the case of the assessee from the judgments relied upon by the assessee. In the instant case the genuineness of the transaction was questionable. The law laid down by the Hon'ble Supreme Court m such circumstances was to look into the surrounding circumstances to find out the reality by applying the test of human probability. In support of this proposition, the learned Assessing Officer relied upon the judgments reported m 82 ITR 540 (SC) and 214 ITR 801(SC). He held that the surrounding circumstances in the case of the assessee led to the conclusion that the share application money in respect of documents found and seized did not represent genuine investments. He, therefore, made an addition of Rs. 21,63,070/- on account of bogus share capital under the provisions of Section 68 as per the details given in the impugned order Under Section 158BD.4. Aggrieved by the aforesaid order Under Section 158BD, the assessee filed appeal before the Tribunal that was heard in Bench "B" on 7^th January, 2004. Thereafter Hon'ble Accountant Member made an order of the Bench in writing and forwarded the same to Hon'ble Judicial Member for counter signature. He noted that as a consequence of the same search similar facts and documents were taken into possession of the revenue authorities in the cases of

certain other companies, viz., Real Overseas Pvt. Ltd., M/s Makhani & Tyagi Pvt. Ltd., Indradhan Agro Products Ltd., Akriti Media Pvt. Ltd. and Garg Polymers Pvt. Ltd. Proceedings Under Section 158BD were similarly initiated in their cases and under the identical facts and circumstances share capital was treated as non-genuine by invoking provisions of Section 68 of the Act and the same was also assessed as undisclosed income of the block period in the cases of those companies. Those assessees preferred appeals before various Benches of the Tribunal and after examining the judicial pronouncements, vis-is material on record, the Tribunal came to the conclusion that the share capital was genuine and the same could not be treated as undisclosed income in block assessments.

According to the Hon'ble Accountant Member, the learned D.R. admitted that facts, circumstances and issue in the cases of those companies were identical and he did not show any new or distinguishing findings of the Assessing Officer.

5. The Hon'ble Accountant Member noted that in the case of the assessee share capital was raised through account payee cheques and relevant entries were made disclosing share issue in the regular books of accounts. The income-tax returns drawn on the basis of such books of accounts stood accepted in the regular assessments of the assessee company. The return for allotment of shares had been filed with the office of Registrar of Companies. Details of such share holding along with confirmations/affidavits of the shareholders had been placed on record. In response to summons Under Section 131 issued by the Assessing Officer, the shareholders had filed affidavits confirming investment in purchase of shares of assessee company as their own investments. That investment was duly disclosed by them in their respective income-tax returns. Bank pass books were also produced. With all that material on record genuineness of investments stood proved.

The affidavits were from the shareholders and not from the assessee and, therefore, could not be said as self-serving statements of the assessee. For that reason the reliance placed by the Assessing Officer on the judgment of Hon'ble Supreme Court in the case of Durga Prasad More, 82 ITR 540 (SC) was misconceived. Reliance placed on the judgment of Hon'ble Supreme Court: in the

case of Sumati Dayal v. CIT 214 ITR 801 (SC) was also misconceived because once the assessee had discharged its onus, the burden went away for ever, as held by Hon'ble Supreme Court in the case of Arumungham (Deed.) by LRs v. Sunderambal and Anr.

. The learned Accountant Member also held that after having issued summons, if the Assessing Officer wanted the presence of the shareholders, he should have enforced their attendance by virtue of powers vested in Assessing Officer. He could not require the assessee to produce those persons who were not under the control of the assessee company. Once the initial onus that lay upon the assessee had been discharged, the burden lay upon the revenue to verify and examine the correctness of material. The Hon'ble Accountant Member found that stand fortified by the decision of the Hon'ble Supreme Court in CIT v. Orissa Corporation (P) Ltd. 6. The learned Accountant Member found that presumption Under Section 132(4A) of the Act was in favour of the assessee. The circumstances under which the share certificates were lying with Shri Alok Aggarwal also stood explained and no infirmity was found in the explanation of the assessee. Apparently, the investment in shares was of all such persons who had become shareholders and the Assessing Officer without bringing any material erred in saying that the apparent was not real.

That burden was on revenue as held by the apex court in CIT v. Daulat Ram Rawal Mull 87 ITR 349 (SC). The assessment was made by the learned Assessing Officer on the basis of suspicion. A suspicion howsoever strong could not take the place of evidence, as laid down by the apex court m Uma Charan Shaw v. CIT 37 ITR 271 (SC).

7. The Hon'ble Accountant Member also held the view that the presumption of undisclosed income was outside the scope of block assessment in Chapter XIV B. The Assessing Officer was required to determine undisclosed income on the basis of any material found during the course of the search. For this view reliance was placed on the decision of Tribunal in Sunder Agencies v. Dy. CIT 63 ITD 245 (Mum.) and the judgment of Hon'ble Delhi High Court in the case of CIT v. Ravi Kant Jain 250 ITR 141 (Del). There were other procedural irregularities also, in as

much as the learned Assessing Officer did not specify the assessment year (s) to which the undisclosed income pertained. The assessee company was incorporated with share capital aggregating to Rs. 49,93,070/- raised in different previous years, That had been accepted in regular assessment proceedings after long drawn enquiries. It was not open to the Assessing Officer to say that only a part of the share capital of Rs. 21,63,070/- was bogus and, thus, the Assessing Officer was speaking two different things in the same tongue.

8. The Hon'ble Accountant Member found that identical issue arose in the case of some other companies and the Tribunal after having examined the matter allowed the appeals filed by those companies against identical block assessment orders. He referred to the decision of the ITAT in IT(SS) A. No. 284(Del)/2001 dated 18^th August, 2003 in the case of Indradhan Agro Products Ltd. He also referred to the decision of the Tribunal, comprising of the same Hon'ble Judicial Member and Hon'ble Accountant Member as in the present case before me; in the case of Real Overseas (P) Ltd. in IT(SS)A. No. 266(Del)/2001 dated 29^th August, 2003. Since the Tribunal in catena of cases arising from the same search and after examination of facts and law on the subject had already deleted the addition so made as undisclosed income of the block period, in the absence of any new material or basis, more particularly for the sake of consistency, the Hon'ble Accountant Member was not inclined to deviate from the decision arrived at by the Tribunal. For that purpose reference was made to the judgment of Hon'ble Madhya Pradesh High Court in the case of CIT v. Godawari Corporation Ltd. 156 ITR 835 (M.P).

9. The Hon'ble Judicial Member found herself unable to concur with the reasoning and conclusion of Hon'ble Accountant Member. She made her separate order dated 26.3.2004. She pointed out that during the course of hearing of the appeal in the present instant case, the learned DR was confronted with the orders of the Tribunal in the case of different companies where similar additions made had been deleted. The learned D.R. in sheer helplessness with misery writ large on his face, attempted to point out how in the case of all the companies floated or served as a professional consultant by the searched person, all the shareholders at the same point of time came to be under circumstances where they were in dire need of

money. The valiant attempt was made by him to point out as to how all the shareholders who were in dire need of money could sign blank share transfer forms, sale bills, cash receipts, affidavits etc. at the same time in identical manner. The learned DR pointed out that the surrounding circumstances and the probabilities had not been considered by the Tribunal in the earlier orders. A prayer was made that all the parts should be seen together in the complete picture.

10. The Hon'ble Judicial Member referred to the order in the case of Real Overseas Pvt. Ltd. decided by the same Members, of which she was the author, allowing the appeal of the assessee. She pointed out that apart from other submissions made before the Bench at that point of time, it was also stated that the issue stood covered in favour of the assessee by virtue of the order dated 21.7.2003 of the Tribunal m the case of M/s Maldiani & Tyagi Ltd. (supra). It was argued that the income added in the block assessment already stood disclosed in the regular assessments of that assessee. The reliance was placed on assessment orders completed before the date of search. Apart from the order of the Tribunal in the case of M/s Makhani& Tyagi Ltd., reliance was placed on various judgments, viz., 194 ITR 32 (Del); 250 ITR 141 (Del); 234 ITR 733 (Guj.); 63 ITR 245 (Mysore); 64 ITD 396 and 242 ITR 42 (Mad.). It was argued that if the Assessing Officer had any suspicion or doubt about the genuineness of the share capital, he could have issued notice Under Section 148 but there was no reason or basis for him to proceed for making the addition made in the block assessment in the manner made. Once the entire share capital had been disclosed to the department by the assessee in its recorded books of accounts maintained prior to the date of search Under Section 132, the provisions of Chapter XIVB could not be invoked against the assessee since the fact was not in dispute that the share capital was recorded in the account books maintained by the assessee. Hon'ble Judicial Member thereafter reproduced the submissions of the learned DR during the course of hearing in the case of M/s Real Overseas (P) Ltd. as recorded in paragraphs 18 and 19 in the Tribunal order, in the following manner: 19. With respect to the additions made, reliance was placed upon the block assessment order though nothing was stated to controvert the submission of the assessee that the issue is fully covered vide order dated 21.7.2003 in IT(SS) No. 204/Del/02 in

the case of Makhni & Tyagi Pvt. Ltd. It was specifically put to him that whether he would like to point out any distinguishing fact or circumstance. The learned PR did not point out any distinguishing fact or circumstances and, in fact, conceded that the facts more or less are identical As such, the issue is covered by the said order. It was fairly conceded that the additions in identical circumstances have been made in the case of M/s Makhni & Tyagi Pvt. Ltd. but for the record, reliance was placed upon the impugned order The Hon'ble Judicial Member pointed out that on the basis of these submissions and material placed on record, the Tribunal found that identical issue had been considered by M/s Makhni & Tyagi Pvt. Ltd., wherein reliance had been placed on the judgment of junsdictional High Court in the case of CIT v. Ravi Kant Jain (supra); CIT v. Stellar Investments and CIT v. Sophia Finance Ltd. On that basis it was held that the Assessing Officer could not have made addition in the block assessment order and if he was of the view that the documents had not been considered in the regular assessments, he could have reopened the same Under Section 147/148 proceedings.

11. Hon'ble Judicial Member pointed out that in the case of Makhni & Tyagi Pvt. Ltd. v. DCIT also the revenue had raised only the following arguments:.

The learned DRs relied on the assessment order and submitted that the share capital appear to be bogus because none of the shareholders having appeared before the Assessing Officer Under Section 131 of the IT. Act, the same had not been proved to be genuine. He, therefore, submitted that no interference was called for in the block assessment order as passed by the Assessing Officer.

In the case of M/s Makhni & Tyagi emphasis was on the nature and scope of block assessment proceedings as distinguished from regular assessment proceedings. Besides considerable reliance was placed on the judgments in the case of Sophia Finance Ltd. and Stellar Investments Ltd. and the fact that the shareholders .in that case had duly given their PAN/GIR Number, the Assessing Officer issued summons Under Section 131 but did not enforce their compliance. The assessee had relied upon a plethora of documents in support of share capital contributions received. Reference was also made to the judgment of Hon'ble Supreme Court in the case of CIT v. Orissa Corporation (P) Ltd. 159 ITR 78 (SC) that once it was in

the knowledge of the revenue that shareholders were regular income-tax assessees, the assessee had discharged the burden that lay on it and it was for the revenue to enquire into the matter further. After tracing at length the basis of Tribunal orders in the case of M/s Real Overseas Pvt. Ltd. and M/s Makhani & Tyagi, the Hon'ble Judicial Member noted that in none of those cases notice was taken of the serious submissions of the learned DR in an attempt to shake the judicial consciousness, the overwhelming impact of serious allegations made, documents found and identical ingenuous explanation that everyone needed money direly called for a moment to pause and seriously reconsider that in the case of almost half a dozen companies allegedly floated by the searched person or taken care of professionally by the searched person, blank but signed share transfer forms, sale bills, cash receipts had been found from the premises of the searched person and the shareholders no doubt identifiably gave the same reason. When each and every individual case had been considered by different Benches, they had necessarily confined themselves to the facts of that case and had not the learned DR made his impassioned submissions then probably the appeal in the case of the present assessee would have followed the same course. However, in the present appeal the Hon'ble Judicial Member found herself faced with a scenario entirely different from the one appreciated by that very Bench in the case of M/s Real Overseas. The learned Judicial Member thereafter observed: In the circumstances, the facts as argued need due consideration and the alarm sounded by the learned DR cannot be wished away.

14. Being of the view that the issue cannot be decided by wearing blinkers, the full scape of the picture which emerges has to be taken cognizance of and dealt with and merely blindly disposing the issue holding it as covered in the peculiar facts as are emerging from the impugned order will to my mind in the circumstances be not appropriate as once a judicial consciousness has been stirred, then it must be taken to its logical conclusion.

12. The learned Judicial Member also took note of the observations of the Assessing Officer that in the shareholders' bank pass books, it was found that funds had been deposited of an equivalent amount just before the date of withdrawal of the share money from the respective bank accounts, in a majority of

the shareholders. For that reason and that signed blank documents and share certificates found and seized from premises of Shri Alok Aggarwal and the fact that none of the shares had been sold at all the learned Assessing Officer found that it was in dispute as to whether share application money purportedly received by the assessee from different shareholders was real genuine investment of shareholders or just entries, which in fact, represented the income of the assessee company routed through shareholders. The learned Assessing Officer, therefore, held that it was necessary to look into the surrounding circumstances to find out the reality and matter had to be considered by applying the test of human probability (214 ITR 801, Sumati Dayal v. CIT (SC) and 82 ITR 540- CIT v. Durga Prasad More (SC)).

13. The learned Judicial Member held the view that after seeing the entire picture the credulous arguments advanced on behalf of the assessee could not be swallowed. It was too big a coincidence that in the case of all the companies floated by the searched person, all the shareholders at the same point of time were in need of dire funds and all of them approached the searched person and left signed blank documents. Ultimately whether these shares were sold or not and to whom they were sold could bring out the entire picture. Those facts were, however, not known. The learned Judicial Member, therefore, held the view that the matter required to be addressed by the Assessing Officer.

It was not necessary that the enquiry should stop on the date the documents were found and subsequent fact could not be considered. If the assessee was able to establish by a subsequent conduct that the assessee company did not have a bogus share capital, another chance should be given to the assessee. The course of proceedings in the case of the searched person was also required to be looked into. Hon'ble Judicial Member, therefore, held that it would be appropriate to restore the issue back to the file of the Assessing Officer with the direction to decide the same in accordance with law by way of a speaking order after giving the assessee an opportunity of being heard.

14. On perusal of the orders prepared by the Hon'ble Judicial Member, the learned Accountant Member proposed on 25.5.2004 the following point of difference for

reference to the Hon'ble President for further necessary action as envisaged Under Section 255(4) of the Income-tax Act, 1961: Whether on the facts and findings, issue being identical and covered by various Tribunal orders arising from the same search and in the light of material on record, the Ld. Accountant Member is justified in deleting the addition on account of investment in share capital of Rs. 21,63,070/- made as undisclosed income of the block period of the appellant or that the Ld. Judicial Member is justified in restoring the issue back to the file of Assessing Officer for adjudication afresh? On receipt of the aforesaid proposed question from the Hon'ble Accountant Member, the Hon'ble Judicial Member suggested the following question to bring out the point of difference to be referred to the Hon'ble President for further action: Q.1. Whether in view of the facts and material on record referred to by the DR in his arguments, which was not rebutted by the A.R. and admittedly has not been considered in the other orders of the Tribunal, on which reliance has been placed by the assessee, is the action of J.M. justified in restoring the issue for necessary verification to the Assessing Officer or is the ld. Accountant Member justified in not considering those facts, material on record and the arguments of the DR and deleting the addition.

Q.2. Whether the purpose of an appeal filed before the Tribunal is to dispose the issue as covered once it is so argued by the assessee or is the Tribunal required to give due deliberation and consideration to the arguments of the other side, i.e., the Revenue also? Accordingly, is the Judicial Member justified in dealing with those arguments and reaching a conclusion or is the Ld. Accountant Member justified in reaching the conclusion without dealing with those arguments? Q.3 Whether the Tribunal while reaching a conclusion is required to give a speaking order not only dealing with the facts and circumstances and evidence on record but also considering the arguments advanced by both the sides and thereafter agreeing or disagreeing with the submissions made or is the Tribunal required to only consider the arguments of the assessee and not required even to discuss the arguments advanced by the Revenue? Thus, is the Ld.

Accountant Member justified in deleting the addition without discussing the arguments of both sides or is the learned Judicial Member justified in discussing the arguments of both sides? Q.4 Whether the Tribunal while coming to a

conclusion can ignore the arguments of the Revenue or is the Tribunal required to deal with the arguments advanced before it and thereafter agree or disagree with the submissions of either side? Accordingly, is the Judicial Member justified in dealing with the arguments advanced by both the sides or is the learned Accountant Member justified in not considering the submissions of the Revenue at all.

Q.5. Whether in view of the surrounding circumstances, relied upon by the Assessing Officer in terms of the decisions in Sumati Dayal v. CIT, 214 ITR 80 and CIT v. Durga Prasad More, 82 ITR 540 (SC), is the action of the Judicial Member justified in restoring for verification of facts to address the arguments advanced by the Revenue or is the learned Accountant Member justified in ignoring the decision relied upon by the Assessing Officer as well as the arguments of the Revenue and coming to a conclusion only on the basis of the arguments advanced by the assessee? Q.6. Whether where the factum of arguments based on material addressed by the Revenue, which has not been considered by other orders should be ignored especially since this aspect was not challenged on behalf of the assessee or should the Tribunal consider arguments of both the sides with even hand? 15. Hon'ble President has nominated me to consider and express my opinion on the points of difference in opinion, as stated by the Hon'ble Accountant Member and by the Hon'ble Judicial Member in relation to the present appeal.

16. During the course of hearing before me Shri O.P. Sapra, the learned counsel for the assessee argued that the dispute in this appeal stands concluded by the judgment of Hon'ble Delhi High Court in the case of CIT v. Makhni & Tyagi Pvt. Ltd. 267 ITR 433 (Del). He pointed out that that judgment relates to the very search in relation to which the order Under Section 158BD was made in the case of the assessee before me. The learned Counsel pointed out that earlier there was judgment of Hon'ble Delhi High Court in the case of CIT v. Stellar Investments Ltd. 192 ITR 287 (Del). According to that judgment under no circumstances the amount of share capital may be regarded as undisclosed income of the company.

That judgment of Hon'ble Delhi High Court has also been affirmed by Hon'ble Supreme Court by their judgment reported in 251 ITR 263 (SC).

Besides, the Full Bench of the Hon'ble Delhi High Court had held in the case of CIT v. Sophia Finance 205 ITR 98 (Del) that in any case where the shareholders are identified then possibly no further enquiry is required. Hence looked from any angle, the addition in the present case was not sustainable and, therefore, there was no force in various arguments raised in the various questions framed by the Hon'ble Judicial Member. In the case of the assessee the income-tax returns had already been filed prior to the date of the search and during the course of the assessment proceedings the genuineness of shareholders had been examined. The Assessing Officer had initiated enquiry by issue of summons Under Section 131 of the Act on all the shareholders. Those summons were duly served and complied with by the shareholders. The shareholders in the enquiry proceedings by the Assessing Officer had filed their affidavits and confirmation letters. Thus, they had confirmed money invested in purchase of shares as their own investments. There was no doubt about the identity of the shareholders.

Therefore, following various judgments of Hon'ble High Courts and Supreme Court there was no further burden on the assessee company and in any case no undisclosed income in that behalf could be assessed in the hands of the assessee company.

17. Secondly, the learned Counsel for the assessee argued that m the order of Hon'ble Accountant Member there were two vital findings on which the Hon'ble Judicial Member had not expressed any deliverance of opinion. One, the finding related to presumption Under Section 132(4A) being in favour of the assessee. The documents found and seized did not reveal any investments outside the books of accounts of the assessee.

The circumstances under which those certificates were lying with the consultant also stood explained and no infirmity was found in the explanation of the assessee. That being so the presumption as given in Section 132(4A) was in favour of the assessee and in the absence of any material evidence advanced by the revenue, the issue was required to be determined on such presumption. The order of the Hon'ble Judicial Member was silent on that aspect. Two, in the order of the Hon'ble Accountant Member considerable reliance was placed on the

judgment of jurisdictional High Court in the case of CIT v. Ravi Kant Jain 250 ITR 141 (Del) and the decision of ITAT, Mumbai in the case of Sunder Agencies v. DCIT 63 ITD 245 (Mum). According to those judgments the material for arriving at the finding of undisclosed income was required to be found during the course of search itself. If the search did not yield any evidence as to undisclosed income, the Assessing Officer was precluded from assessment of undisclosed income in the block assessment proceedings . Under Section 158BC/158BD. On that aspect also there was no difference of opinion and, therefore, the matter stood concluded by the findings recorded by the Hon'ble Accountant Member.

18. The learned Counsel argued that there was lot of overlapping in the questions framed by the Hon'ble Judicial Member. Those questions were more of academic interest than any real controversy arising on the facts and in the circumstances of the case. The allegations contained in those questions that the arguments of the learned DR had not been considered m the order made by the Hon'ble Accountant Member were not correct. In the order written by Hon'ble Accountant Member there were references to the arguments of the learned DR at various places. The Accountant Member had recorded, "The learned DR present in the proceedings admits that facts, circumstances and issues are identical and has not shown any new or distinguishing findings of the Assessing Officer." In other words the learned DR himself accepted that the facts of the case in the present appeal wee identical to appeals in various other cases already decided by the Tribunal and that there were no distinguishable facts. Thus, the assumption of the Hon'ble Accountant Member that this appeal was already covered by the earlier orders of the Tribunal was not rebutted by the learned DR. It was also not correct to say that the decisions relied upon by the Assessing Officer and the learned D.R., viz, CIT v. Durga Prasad More 82 ITR 540 (SC) and Sumati Dayal v. CIT 214 ITR 801 (SC) had not been considered by the Hon'ble Accountant Member. There was considerable discussion in relation to the reliance placed by the revenue on these two judgments.

The Accountant Member rightly concluded that the assessee had discharged his initial onus and, therefore, it was revenue's burden to prove that the apparent state of affairs was not true. Reliance in this behalf was placed on the judgment of

Hon'ble Supreme Court in the case of Daulat Ram Rawat Mull 87 ITR 349 (SC). That burden of revenue could not be discharged by merely citing the judgments in 82 ITR 540(SC) and 214 ITR 801(SC) where the facts were different. The Hon'ble Accountant Member had himself recorded that facts of those cases were distinguishable. The learned Counsel argued that in the present case there was no material to hold against the assessee. The revenue had made the assessment order entirely on suspicion. It was settled law that suspicion howsoever strong, cannot take place of evidence, 224 ITR 180 (P & H). The learned Counsel relied upon the judgment of Hon'ble Gujarat High Court in the case of Saurashtra Packaging (P) Ltd. v. CIT 204 ITR 443 (Guj.) and argued that IT AT cannot remand the case when all the facts are on record.

19. The learned DR argued that the facts found during the course of search proceedings at the premises of Shri Alok Aggarwal were no ordinary facts. Share, certificates in original. blank signed transfer deeds, blank signed cash receipts and even blank signed affidavits were found en mass in respect of most of the shareholders and not in respect of one company alone but about half a dozen companies. It was not correct to say that the department was acting on inadequate material.

The inferences drawn by the revenue were based on strong facts that spoke for themselves. The inferences drawn by the learned Assessing Officer were self evident on the basis of discovery of material as a result of the search. The burden cast upon the assessee was very heavy as to why all the shareholders should en mass sign these blank documents and deposit them with the Chartered Accountant? The learned DR referred to the letter of the assessee dated 28.5.2002 addressed to the Assessing Officer and placed at pages 6 to 12 of the assessee's paper book. According to the assessee, the papers found were advance receipts for sale of shares. This explanation was not substantiated by pointing at even a single prospective buyer of those shares. How could every shareholder of several companies comprehensively sign all the blank documents even when there was no prospective buyer in sight.

Those facts pointed out that there was no genuine shareholders and mere name lender who had already signed blank documents for the safety of the assessee to whom the money actually belonged. The learned DR argued that the distinguishing feature noticed by the Hon'ble Judicial Member in the instant case was that while in the case of each of the assessee company the Tribunal viewed facts of the case in isolation, in the case of the assessee on account of perseverance of the learned DR the total picture emerged. That was the reason as to why the Hon'ble Judicial Member, who had herself decided in favour of the assessee on similar facts in the case of M/s Real Overseas (P) Ltd., found herself entirely disinclined to accept the story being circulated by this assessees.

20. The learned DR argued that the reliance placed on the judgments in the case of Stellar Investments Ltd. and Sophia Finance was misplaced.

In those cases Hon'ble courts held on the facts and circumstances where public participates in the public offer of equity shares at a large scale. In the appeals before us the assessee was a private limited company with small capital and small number of shareholders. In such cases shares are generally issued to or subscribed by the relatives, friends and acquaintances of the promoters. The facts of such private limited companies were entire distinguishable from the facts of a company where public offer of equity shares is made at large scale and subscriptions are received from all over India.

21. The learned DR emphasized that in the order of the Hon'ble Judicial Member it was considered that for arriving at truth of the matter further enquiries were needed. Hon'ble Judicial Member had not decided the appeal in favour of the department or against the assessee. The matter was sent back and the assessee was at liberty to fully substantiate his explanation. The assessee had not pointed out any single instance of sale of shares which was the principal component of his explanation. If the Hon'ble Judicial Member thought that the matter should be looked into once again, that was no earth shaking decision.

The time should not be a constraint for arriving at the truth of the matter. The principles of natural justice applied not only to the assessee but to revenue also. Hon'ble Judicial Member approached the matter equalizing both the assessee and

the revenue. The learned DR argued that apart from some documentation which could as well be part of a design, the assessee had not brought on record full facts. In this case the alleged shareholders filed returns of income only to get the elevated status of being an assessee, The fact of the matter was that most of them had filed the returns of income below taxable limit.

Returns of income filed, PAN numbers applied and all those things were mere exercise of make believe than anything m substance. In many cases the balance-sheet of the shareholders did not reflect the shares of the assessee company. The learned DR referred to assessee's paper book page 31 as an illustration of that point.

22. The learned DR argued that the abundant facts found during the course of search constituted the focal point of the order of the Hon'ble Judicial Member and, therefore, it cannot be said that she had disregarded the judgment of Hon'ble jurisdictional High Court in the case of Ravi Kant Jain or the findings of the Tribunal in the case of Sunder Agencies. As to the presumption raised in Section 132(4A), the correct legal position was that such presumption was for the purpose of conducting search proceedings only and could not be raised by either side during the course of assessment proceedings. The learned DR argued that orders of the Tribunal in the cases of other assessee companies relating to the same search, as also the judgment of Hon'ble Delhi High Court in the case of Makhni & Tyagi were distinguishable because in each of those cases facts of that assessees were viewed in isolation; whereas in the instant case the Hon'ble Judicial Member was seized of the total picture, as emerging when facts of all the six assessees were put together.

23. The learned Counsel for the assessee argued that there was no distinction drawn in the judgments of Hon'ble Delhi High Court in the case of Stellar Investments Ltd. and Sophia Finance Ltd. between a private limited company and a public limited company. The learned Counsel pointed out that the shares were found at the premises of Shri Alok Aggarwal. Huge additions made in the assessment of Shri Alok Aggarwal had already been deleted. Similarly the assessments Under Section 158BD had already been deleted by the Tribunal in all

the cases. Only the appeal of the assessee had not been decided so far in favour of the assessee. The learned Counsel argued that in the order of the Accountant Member the yardstick of Ravi Kant Jain judgment of Hon'ble Delhi High Court had not even been considered. There was no consideration in her order of the fact that facts relating to issue of share capital had already been recorded in the books of accounts maintained by the assessee and the returns of income filed by the assessee and to some extent in the assessment proceedings of the assessee. The Hon'ble Judicial Member was unmindful of the fact also that during the course of original assessment proceedings extensive enquiries had been made of the shareholders in question. She had concerned herself to mere general questions which were of academic interest without having much bearing on the facts of the case arising in the present appeal.

24. I have carefully considered the rival submissions. In this case the Hon'ble Accountant Member and Hon'ble Judicial Member have separately stated the points on which they differ and the same have been referred to me, so that they may be decided according to the opinion of the majority. The task before me is to identify the points of difference of opinion as emerging from the respective references. I find that there are two limbs of the single question referred to by Hon'ble Accountant Member, viz., (1) issue is identical and covered by various Tribunal orders in the cases arising from the same search, and (2) the material on record. From various questions referred to, Hon'ble Judicial Member has raised the issue whether the Tribunal is required to decide the matter afresh if facts and material on record and arguments based on such material not considered by the earlier orders of the Tribunal are raised before the subsequent Bench. Further, Hon'ble Judicial Member has raised the question of the significance of surrounding circumstances and human probabilities. Hon'ble Judicial Member has stated also that the arguments of revenue, not being arguments of the assessee, have not been given due consideration in the order of the Hon'ble Accountant Member.

25. On analyzing the points of reference by both Hon'ble Accountant Member and Hon'ble Judicial Member, I find that the first and foremost issue before me is the force and impact of the earlier orders of the Tribunal in the appeal before me.

26. While considering the question of the binding nature of the order of one Bench of the HAT on another Bench, it is very important to bear in mind the difference between High Courts and IT AT. IT AT is not a formal source of law in the sense Hon'ble High Courts are in accordance with Article 141 of the Constitution of India. Secondly, ITAT is not a court of record. The orders passed by various Benches of the Tribunal by and large go unpublished and only minuscule number of orders are published in journals etc. and, thus, available to public at large.

Thirdly, ITAT is the final fact finding authority. Fourthly, while before High Courts once a judgment is delivered the issue comes to an end and the question is not raised again, but, before the Tribunal the same question is raised again when a fresh assessment comes before the later Tribunal. Thus, the same question arises for adjudication once again, albeit in a different assessment. Having regard to these vital differences it would not be correct to apply the rulings of High Courts and Supreme Court regarding binding nature of the previous judgments of High Courts on subsequent Benches of the High Courts in the like manner in respect of the effect of the orders of one Bench of the Tribunal on subsequent Bench. At the same time the necessity for certainty and consistency in ITAT decisions also is of considerable significance to the public to know the consequences of transactions forming part of their daily affairs.

27. I find that there is clear authority from a series of judgments of Hon'ble Supreme Court and High Courts that the decision of a Bench of the Income tax Appellate Tribunal even in the case of the same assessee in a particular assessment year does not constitute a binding precedent on subsequent Bench of the Tribunal in relation to another assessee or another assessment year of the same assessee.

28. In the case of Raja Bahadur Visheshwar Singh v. CIT 41 ITR 685 (SC) one of the questions decided by Hon'ble Supreme Court read as under: Whether, having regard to the findings of the Appellate Tribunal in respect of 1941-42 assessment, it was open to the Appellate Tribunal in the present case to hold that the profits and the transactions of sale and purchase of shares and securities amounted to profits of business and so liable to be taxed? The Hon'ble Supreme Court has

answered the question in the following words : The second question is wholly unsubstantial. There is no such thing as res judicata in income-tax matters. The Appellate Tribunal has placed in a tabulated form the activities of the appellant showing the buying and selling and the magnitude of holdings and it cannot be said, therefore, that it was not open to the Appellate Tribunal to give the finding that it did.

29. In the case of Dwarkadas Kesardeo Morarka v. CIT 44 ITR 529(SC); the Hon'ble Supreme Court have observed as under: In the matter of assessment of income tax, each year's assessment is complete and the decision arrived at in a previous year on materials before the taxing authorities cannot be regarded as binding in the assessment for the subsequent years. The Tribunal is not shown to have omitted to consider the material facts. The decision of the Tribunal was on a question of fact and no question of law arose which could be directed to be referred Under Section 66(2) of the Income tax Act.M.M. Ipoh and Ors. v. CIT Madras 67 ITR 106 (SC), the Hon'ble Supreme Court once again reiterated: The doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment: the findings on questions of fact may be good and cogent evidence in subsequent years, when the same question falls to be determined in another year.

31. In the case of CIT v. Brij Lal Lohia Mahavir Prasad Khemka 84 ITR 273 (SC), ITAT decided for assessment years 1945-46 and 1946-47 that the gifts in question were not genuine gifts. The High Court did not interfere with the finding of the Tribunal on the basis that it was a finding of fact. When the matter was brought to Hon'ble Supreme Court, the apex court also refused to interfere with the finding of the Tribunal for the reason that the Appellate Tribunal was the final fact finding authority. However, for assessment years 1947-48 to 1951-52, the Tribunal after taking into consideration various circumstances changed its findings and held the gifts in question to be genuine. The matter once again traveled to High Court and thereafter the Hon'ble Supreme Court, this time at the instance of revenue. Hon'ble Supreme Court held as under: The fact that in the earlier proceedings the Tribunal took a different view of those deeds is not a conclusive circumstance. The

decision of the Tribunal reached during those proceedings does not operate as res judicata. As seen earlier there was a great deal more evidence before the Tribunal during the present proceedings, relating to those gift deeds.

32. In the case of Jhaverbhai Patel v. CIT 103 ITR 728 (Pat), the first question re-framed by Hon'ble High Court is as under: Whether, on the facts and in the circumstances of the case, the Tribunal was correct in coming to the conclusion that the alleged gifts were inchoate and incomplete only on the ground that this question of fact was concluded by an earlier order of the Tribunal dated April 26, 1960, for assessment year 1954-55? Hon'ble Patna High Court answered the first question in the following words: From the analysis of facts as noticed by the Tribunal which I have already recapitulated earlier, it is clear that the Tribunal has felt coerced by its earlier decision on the question regarding the nature of the gifts. There, I must say, the Tribunal was not well instructed in law, for, it is well settled that the fact that in the earlier proceedings the Tribunal took a different view of the gifts was not a conclusive circumstance, the decision of the Tribunal reached in those proceedings did not and could not, in law, operate as res judicata. Reference in this connection may be made to a decision of the Supreme Court in the case of Commissioner of Income tax v. Brij Lal Lohia. Decisions may be multiplied but the principle of law is so well settled that I do not see any necessity for it. I have thus no hesitation in answering the first question as refrained in the negative as it must be held that the Tribunal was not correct in coming to the conclusion that the gifts were inchoate and incomplete only on the ground that this question was concluded by the Tribunal's previous order in relation to the assessment year 1954-55.

33. In the case of Surjidevi Kunjilal Jaipuria Charitable Trust v. CIT 114 ITR 685 (All.), the Tribunal decided the appeal simply following the earlier decision. Hon'ble Allahabad High Court, therefore, considered it necessary to direct the Tribunal to rehear the appeal in the following words : The position is that there is no finding by the Tribunal on the merits of the matter, specially on the two objects which were the subject matter of concession on the previous occasion. learned Counsel for the trust argues that each of the objects is an object of public charity which is covered by the relevant clause in the Income tax Act of 1961, entitling the trust to

exemption. Since the Tribunal has not recorded any finding on the merits of the matter, we are unable to decide the question of law as it has been framed.

In our opinion, the Tribunal should have proceeded to record the findings on merits and not merely followed its earlier decision. We have no option but to direct the Tribunal to rehear the appeal and decide it in accordance with law. Similar directions have been made by the Supreme Court in Commissioner of Income tax v. Greaves Cotton & Co. Ltd. and followed by the Madras High Court in B. Muniappa Gounder v. Commissioner of Income tax .

34. In the case of Smt. Kamla Devi Jhawar v. CIT 115 ITR 401 (Cal.), the Hon'ble High Court considered the following question: Whether, on the facts and in the circumstances of the case, and in view of the assessment orders previously made for the assessment years 1956-57 to 1959-60, the Tribunal was right in holding, that the investment of Rs. 57,500 was income of the assessee for the instant assessment year After consideration Hon'ble High Court answered the question in the following words : The doctrine of res judicata does not apply so as to make a decision on a question of fact or law in the proceeding of an assessment of one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment. The findings on questions of fact may be good and cogent evidence in the subsequent years when the same question falls to be determined in another year but they are not binding and conclusive. (See observations of the Supreme Court in the case of M.M. Ipoh v. CIT).

The Supreme Court expressed similar views in the cases of Raja Bahadur Visheshwara Singh v. CIT ; Dwarkadas 35. The Hon'ble Madras High Court have in the case of CIT v. L.G.Ramamurthi and Ors. 110 ITR 453 (Mad.), however, took somewhat contrary view without noticing any of the aforesaid judgments of Hon'ble Supreme Court and held as under: It is worthwhile emphasising that if a Bench of a Tribunal on the identical facts is allowed to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on an earlier occasion, that will be destructive of the institutional integrity itself. Thai is the reason why in a High Court, if a single judge takes a view different from the one taken by another judge on a question of law, he does not finally pronounce his

view and the matter is referred to a Division Bench. Similarly, if a Division Bench differs from the view taken by another Division Bench, it does not express disagreement and pronounce its different views, but has the matter posted before a Fuller Bench for considering the question. If that is the position even with regard to a question of law, the position will be a fortiori with regard to a question of fact. If the Tribunal in the present case wanted to take an opinion different from the one taken by the earlier Bench, it should have placed the matter before the President of the Tribunal so that he could have referred the case to a Full Bench of the Tribunal, consisting of three or more members for which there is provision in the Act itself.

36. In the case of Namdang Tea Co. Ltd. v. CIT 138 ITR 326 (Cal.) Hon'ble Calcutta High Court distinguished the aforesaid judgments of Hon'ble Madras High Court in the case of L.G. Ramamurthi and pronounced the legal position in the following words : Much reliance has been placed on behalf of the appellant on the assessment for the subsequent year, that is to say, for the year relevant to the assessment year 1968-69. The Commissioner has pointed out certain differences between these two years. In our opinion, as the learned judge has rightly observed, the assessee has no right of revision in respect of a previous year on the basis of the finding for a subsequent year. The decision of the Madras High Court in CIT v. L.G. Ramamurthi , on which reliance has been placed by the learned counsel for the appellant, is distinguishable on facts. In that case, certain gifts made by the members of an HUF were held to be sham by the Tribunal On reference to the High Court, no specific question challenging the correctness of this finding was raised. In the subsequent assessment year, a differently constituted Tribunal came to a different conclusion. On a reference to the High Court at the instance of the department, it was held that, in the absence of any fresh material, the Tribunal was not justified in coming to an entirely different and contrary conclusion on the same set of facts. In the instant case, the Commissioner has distinguished the finding of the Tribunal for the assessment year 1968-69 on facts. Apart from that, we are of the view that on the question of principle of law, one Tribunal is not bound by the decision of another Tribunal. It is now well settled that the decision of the ITO or a Tribunal in regard to a particular year does not operate as res judicata for the subsequent year. If the appellant had

been aggrieved, it could have challenged the decision of the Tribunal on a reference to this Court. The appellant, in our opinion, cannot rely upon the decision of the Tribunal for the assessment year 1968-69 for the assessment year 1967-68.

37. The Madras judgment in the case of L.G. Ramamurti (supra) is considered by Hon'ble Rajasthan High Court also in the case of CIT v.Manaklal Porwal 160 ITR 243 (Raj.). In that case the following question of law has been referred for the opinion of the High Court Whether, in the circumstances of the case, the Income tax Appellate Tribunal, Bombay Bench 'B', Bombay, was justified in law in departing from the previous finding of the Income tax Appellate Tribunal, Delhi Bench 'C, New Delhi, dated October 14, 1963, that the firm of M/s. Manaklal Porwal of Udaipur was not a genuine firm and as such was not entitled to registration under the Indian Income tax Act, 1922 38. It was strongly contended on behalf of the revenue that it was not open to the subsequent Bench to take a different view of the matter and if different views were taken that would create chaos and uncertainty.

Strong reliance was placed on Madras High Court judgment (supra).

Reliance on behalf of the assessee was placed on the judgment reported in 67 ITR 106 (SC). Hon'ble High Court referred to the Supreme Court judgments reported in 49 ITR 137 (SC) and 84 ITR 273 (SC) and some other judgments and thereafter held : It is not useful to multiply the authorities. It may be taken as an established rule of law that the decisions rendered in earlier proceedings under the Income tax Act do not operate as res judicata in connection with the subsequent assessment years nor the question of estoppel arises. The decision rendered is a decision for that particular year. So far as the present case is concerned, we need not be guided by the broader proposition propounded, for, it may be stated that the Income tax Appellate Tribunal, Bombay Bench " B ", has not proceeded to determine the question solely on the basis of that evidence which had already been considered in connection with the assessments of previous two years up to the stage of the High Court.

39. In the case of Ambika Prasad Sonar v. CIT 168 ITR 444 (All.) Hon'ble Allahabad High Court held as under: As stated earlier, the Tribunal was largely influenced in its decision that it took by the fact that such income in the earlier years was assessed in the hands of the family. That, by itself, is no ground for sustaining the clubbing of income earned by Panna Lal and Prem Chand in the hands of the family. It is settled that the rule of res judicata or estoppel by record, which applies to the decisions of the civil courts has no application to the decisions of the income tax authorities, so as to debar determination of a question decided in the previous assessment years from being reopened in proceedings relating to the subsequent years.

40. In the case of CIT v. M. Chawla 177 ITR 299 (Del), Hon'ble Delhi High Court have also clearly recognized that each assessment year is separate and independent and held: The Revenue then moved an application Under Section 256(1) of the Income tax Act, 1961. The Tribunal rejected the application on the ground that as no reference had been asked for by the Revenue in the earlier years on the facts, it could not "be said to be aggrieved by the order. The application was consequently dismissed in order to "maintain consistency and conformity.

It is well settled that each assessment year is separate and independent and even if the Revenue does not challenge the decision of the Tribunal in an earlier year, it does not preclude it from doing so in a later year.

41. In the case of CIT v. Bharat Saw Mills 198 ITR 553 (Orrisa) the Hon'ble Orissa High Court disapproved the approach of the Tribunal of deciding the case on the basis that two interpretations being possible, the interpretation that is favourable to the assessee should be adopted and held as under: - We find from the order of the Tribunal that it did not decide the case on merits and only noticing the cleavage of judicial opinion, decided in favour of the assessee. In our view, the Tribunal should decide the case on merits taking into consideration diverse views and arrive at decision on its own. Without answering the question referred to us, we direct disposal of the appeal on merits by the Tribunal.

42. In the case of CIT v. Mohanlal Ranchhodas 203 ITR 304 (Guj), the Hon'ble High Court laid down that a subsequent Bench should consider in a subsequent appeal any new issue that was not considered while arriving at the earlier decision. The Hon'ble High Court observed: The Tribunal has, however, recorded in paragraph 7 of its judgment a finding that the surplus arising out of 'Arvind Mills and Aval Products shares should be treated as capital gains as has been rightly held by the Income tax Officer. Based on this finding of the Tribunal in the earlier appeal, it was contended before the Tribunal by the Revenue that the subsequent appeals against the order of the Appellate Assistant Commissioner were not maintainable because this ground was already concluded by the Tribunal in its earlier order in Income tax Appeals Nos. 225 and 226 (Ahd.) of' 1970-71. The Tribunal, while dealing with the said preliminary objection, rightly found that, while deciding the earlier appeals, the Tribunal has not actually gone into the question of conversion of investment shares into stock in trade for ready share business.

43. In the case of CIT v. Kalpetta Estates Ltd. 211 ITR 635 (Ker.), question No. referred for the opinion of Hon'ble High Court read as under: - 2. Whether, on the facts and in the circumstances of the case, is not the order of the Tribunal vitiated (c) for not following the decision of the Kerala High Court in the case of the very same assessee in Income tax Reference No. 111 of 1981 (CIT v. Kalpetta Estates Ltd. [1987] 167 ITR 666) for a different assessment year The Hon'ble High Court upheld the decision of the Tribunal in the following words: What the Bench did was to affirm that the principles of res judicata will not apply to income tax proceedings. Nevertheless, the Appellate Tribunal may place reliance on an earlier decision to support its conclusion. It could not therefore be said that the decision in the assessee's case before us, relating to the prior years, would operate as res judicata. The Tribunal is entitled to take a different view of the matter, if new materials were placed, or on a closer and more intelligent analysis. It is evident, from the various decisions placed before us that a different aspect of the matter has been presented for consideration, as laid down in the decisions mentioned earlier. The Tribunal was, therefore, entitled to have a fresh look at the matter based on the line of thinking disclosed by these decisions. That was what was done by the Tribunal in the instant case. We are not, therefore, inclined to accept the contention that the assessment in the earlier years operates as res judicata or

that it precludes the assessee from raising the plea as done in the instant case.CIT v. Brigadier B.D. Khurana 217 ITR 381 (All), Hon'ble Allahabad High Court specifically considered whether the Tribunal is bound to follow the decision of another bench. The following question was referred to them: Whether, on the facts and in the circumstances of the case, the learned Member of the Income tax Appellate Tribunal who decided the appeals presently under consideration, was bound to follow the decision of another Bench of the Income tax Appellate Tribunal on a similar point So questions Nos. 1 and 3 are decided in the affirmative in favour of the assessee and in respect of question No. 2 it is held that as a matter of prudence the Income tax Appellate Tribunal is to take into notice and consider the decision given by another Bench of the Income tax Appellate Tribunal though that may not be entirely binding upon the Income tax Appellate Tribunal.

45. There is unanimity in the judgments of High Courts and the apex court in India that the decision of one Bench of the Income-tax Appellate Tribunal carries no binding force on another Bench of equal strength in another appeal on similar issues or facts. Hon'ble Madras High Court too, have not said so in then-judgment in the case of L.G.Ramamurthi and Ors. (supra) and held only that if a Bench wanted to take a opinion different from the one taken by the earlier Bench, it should place the matter before the President of the Tribunal for reference to a Full Bench of the Tribunal. Tins view of Hon'ble Madras High Court has been reiterated by some other High Courts as well.

46. In the case of CIT v. Goodlass Nerolac Paints Ltd. 188 ITR 1 (Bom.), the Hon'ble Bombay High Court have given the same advice in the following words: Before parting with this question, we consider it desirable to mention that the Income tax Appellate Tribunal is a final judge of facts. The High Court, in reference, does not interfere with the findings of fact unless such a finding is perverse or is such that no reasonable person can come to such a finding. This will be so even when the High Court feels that it would have come to a different conclusion, if it was sitting in appeal In that sense, when the High Court declines to interfere with a finding of fact given by the Tribunal in an earlier year, it may not mean that the High Court had approved of such a finding. This, however, does not mean that subsequent Bench of the Tribunal should come to a conclusion totally

contradictory to the conclusion reached by the earlier Bench of the Tribunal in the same case for an earlier year on a similar set of facts. Such a thing may not be in the larger public interest as it is likely to shake the confidence of the public in the system. It is, therefore, desirable that in case subsequent Bench of the Tribunal is of the view that the finding given by the Tribunal in an earlier year requires, reappraisal either because the appreciation, in its view, was not quite correct or inequitable or some new facts have come to light justifying reappraisal or reappreciation of the evidence on record, it should have the matter placed before the President of the Tribunal so that the case can be referred to a larger Bench of the for adjudication and for which there is a provision in the Income tax Act.

47. In the case of Sayaji Iron & Engg. Co. v. CIT 253 ITR 749 (Guj.), Hon'ble Gujarat High Court expressed their respectful agreement with the view expressed by Hon'ble Madras High Court in the case of L.G.Ramamurthi (supra) that if a Bench of the Tribunal wants to take a opinion different from the one taken by an earlier Bench, the matter should be referred to the Full Bench of the Tribunal.

48. In the case of Agrawal Warehousing and Leasing Ltd. v. CIT 257 ITR 235(M.P), have also favoured the constitution of a larger Bench, following the aforesaid judgment of Hon'ble Gujarat High Court in the case of Sayaji Iron & Engg. Co. v. CIT (supra).

49. I have in the foregoing paragraphs briefly enumerated the judgments of Hon'ble High Courts and Supreme Court where they are directly concerned with the question of the nature and scope of one decision of the ITAT as a precedent on subsequent Bench of the Tribunal deciding the similar issue. There is unanimity and direct authority of Hon'ble Supreme Court in more than one judgments that in Income Tax matters the decision of one Bench of the Tribunal does not constitute a binding precedent on subsequent Bench of the Tribunal deciding upon the same or similar issues or facts. There is, however, a strong under current in judicial thinking that where there is only difference of opinion on the same facts and the same aspects, the subsequent Bench ought not to proceed to decide the matter on its own contrary to the earlier decision and should refer the matter to the President of the Tribunal for constitution of a larger Bench. At the same time there

is plethora of authority that a subsequent Bench can draw different conclusion if there is adequate justification to depart from the earlier view, e.g.

where subsequently new or more facts come to light.(41 ITR 685 (SC); 84 ITR 273 (SC); 138 ITR 326 (CaL); 160 ITR 243 (Raj.) etc.) or if the earlier bench omitted to consider certain material aspects (41 ITR 685 (SC); 44 ITR 529 (SC); 203 ITR 304 (Guj.); 211 ITR 635 (Ker.). In the case of CIT v. Kalpetta Estates Ltd. (supra), Hon'ble Kerala High Court have further stated that the Tribunal is entitled to take a different view of the matter on a closer and more intelligent analyses.

50. Thus, from the judgments enumerated in this order, I understand that the decisions of a coordinate Bench of the Tribunal do not constitute binding precedent on any subsequent Bench of the Tribunal.

At the same time if it is only a case of different opinion being held on the same facts, material and aspects already considered, the subsequent Bench should not proceed on its own to make a contrary decision and instead refer the matter for constitution of a larger Bench. At the same time, it is neither required nor practicable as a rule, to make a reference for constitution of a larger Bench for reason only of different conclusion being reached even when there is qualitative difference as respects issues, facts, evidence and material considered between the earlier Bench and the subsequent Bench. In other words the subsequent Bench is entitled to take a different view of the matter if there is ample justification. In this context, the judgment of Hon'ble Bombay High Court in the case of Shah & Co., H.A. v. CIT 30 ITR 618 (Bom.) lays down comprehensive guideline. In that case Hiralal A. Shall used to be assessed in the status of an HUF. It was claimed that there was disruption of Hindu Undivided Family on 16.4.1938 and thereafter a partnership firm was constituted. The department did not recognize the disruption and held the view that disruption took place only on 13.10.1943 when the minor son of Hiralal attained majority. The Tribunal by its order dated 29.1.1952 held that the disruption of the family took place as on 16.4.1938. For assessment year 1941-42 the department made the assessment holding that Hiralal represented the HUF in the firm. As a result of the acceptance of the disruption of the HUF on an earlier date, the Tribunal held that Mr. Hira Lal was only minor's trustee. For

assessment years 1942-43, 1943-44 and 1944-45, the Tribunal went into the question in much greater detail and held that Hira Lal was a partner in his own right. Thereafter at the instance of the assessee, the following question was referred to Hon'ble Bombay High Court for their opinion: Whether in the circumstances of the case the Tribunal was justified in law in departing from its previous finding that Hiralal was trustee of. the minor Vasantlal.

A large number of authorities were cited before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court referred to the judgment in the case of Commissioner of Inland Revenue v. Sleath 17 Tax Cases 149 at 163, "The assessment is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made. No doubt, a decision reached in one year would be a cogent factor in the determination of a similar point in a following year, but I cannot think that it is to be treated as an estoppel binding upon the same party for all years." Hon'ble High Court found that the principle that each assessment is a different assessment year is not merely helpful to the Income-tax authorities but it is equally helpful to the assessee. Shri N.A. Palkhiwala, the eminent counsel for the assessee argued that the Tribunal stood on a different footing from an income-tax authority not bound by an earlier decision. Reliance was placed by him on a large number of authorities including the statement of the law with regard to 'res judicata' appearing in Halsbury, Volume 13 page 449. Hon'ble Bombay High Court held the view that the cases mentioned in Halsbury are cases of a Tribunal dealing with a specific issue which is not likely to arise again. The principle should not have application in relation to the power of one Tribunal to revise or reopen a decision given by another Tribunal in a different assessment.

In the words of Hon'ble Court, " Income-tax Tribunals deal with different assessments, and it could not be said that when the first Tribunal gave a decision, the issue was at an end and the question could not be raised again because when a fresh assessment came before the later Tribunal, the question did arise but it arose in a different assessment." While Hon'ble Bombay High Court held that the second Tribunal was not bound by the decision given by the first Tribunal in a different assessment, the Hon'ble High Court held that it did not mean that it is

open to a Tribunal to come to a different conclusion to the one arrived at by that very Tribunal earlier without any limitation whatsoever. Hon'ble Bombay High Court thereafter indicated the limitations upon the right of in Income-tax authority or Tribunal not to be bound by the earlier decision or the right to revise the earlier decision. Hon'ble Bombay High Court have declared the legal position in this regard in the following words: ...it seems to us that the mere fact that the second Tribunal may look upon the decision of the first Tribunal as erroneous in law would not justify it in coming to a contrary conclusion or reversing the finding of the first Tribunal Nor are we satisfied that in order to enable the second Tribunal to depart from the finding of the first Tribunal it is essential that there must be some fresh facts which must be placed before the second Tribunal which were not placed before the first Tribunal. If the first Tribunal failed to take into consideration material facts, facts which had a considerable bearing upon the ultimate decision, and if the second Tribunal was satisfied that the decision was arrived at because of the failure to take into consideration those material facts and that if these material facts had been taken into consideration the decision would have been different, then the second Tribunal would be in the same position to revise the earlier decision as if fresh facts had been placed before it. On principle there is not much difference between fresh facts being placed before the second and the second Tribunal taking into consideration certain material facts which the first Tribunal failed to take into consideration. It may be said that even though the first Tribunal may take into consideration all the facts, still its decision may be so erroneous as to justify the subsequent Tribunal in not adhering to that decision. In a case like this, which indeed must be an extreme case, it could be said that the decision of the first Tribunal was a perverse, decision, and if the decision of the first Tribunal was either arbitrary or perverse it would justify the second Tribunal in departing from the decision arrived at by the first Tribunal Therefore, in our opinion, an earlier decision on the same question cannot be reopened if that decision is not arbitrary or perverse, if it had been arrived at after due inquiry, if no fresh facts are placed before the Tribunal giving the later decision and if the Tribunal giving the earlier decision has taken into consideration all material evidence. We should also like to sound a note of warning, especially with regard to a Tribunal like the Appellate Tribunal, that it should be extremely slow to depart

from a finding given by an earlier Tribunal. Even though the principle of res judicata may not apply, even though there may be no estoppel by record, it is very) desirable that there should be finality and certainty in all litigations including litigations arising out of the Income-tax Act. It is not a very satisfactory thing that an assessee should feel a grievance that one Tribunal came to one conclusion and another Tribunal came to a different conclusion and that the two conclusions are entirely inconsistent with one another.

Therefore, the second Tribunal must be satisfied that the circumstances are such as to justify it in departing from the ordinary principles which apply to all Tribunals to try and give as far as possible a finality and a collusiveness to the decision arrived at. We should also like to lay down a further limitation upon the power of the Tribunal to revise the decision given earlier by that very Tribunal. The effect of revising this decision should not lead to injustice and the court must always be anxious to avoid injustice being done to the assessee.

51. It, therefore, follows that if while deciding a case the first Tribunal did not have a particular material before it or did not take into consideration particular facts and if the second Tribunal is satisfied that if those material facts had been taken into consideration, the decision of the first Tribunal would have been different, it would justify the second Tribunal in not adhering to the decision of the first Tribunal. On applying this legal principle I find that Hon'ble Judicial Member came to the conclusion that the facts of the case of the assessee could not be viewed in isolation when it became known that there were a large number of companies similarly placed. She found that it was too much of a coincidence that in the case of all the companies floated by the searched person, all the shareholders at the same point of time were in need of dire funds and all of them approached the searched person and left signed blank documents. In other words according to the Hon'ble Judicial Member once it was realized that in the peculiar facts and circumstances of the case the assessee was not alone but was one of many, the whole complexion of the facts and circumstances of the case became altogether different. I see considerable force in this reasoning. The Tribunal has decided the appeals on identical facts in the case of Real Overseas Pvt. Ltd.; Makhni & Tyagi Pvt. Ltd.: Indiradhan Agro products Ltd. Aknti Media Pvt. Ltd. And Garg Polymers

Pvt. Ltd., each in isolation without examine the totality of the picture that emerges once all these cases are considered as pieces of a large mosaic. In other words what the learned Accountant Member considered to be the strength of the case of the assesses precisely the same has been considered by the learned Judicial Member to be the weakness in the case of the assessee.

According to the learned Judicial Member by valiant efforts made the learned DR could change the entire complexion of the case as compared to the cases earlier decided by the Tribunal including herself. It is need less to say that in such circumstances the case before her fell in the category of exceptions carved out by the series of judgments of Hon'ble Supreme Court and of various High Courts discussed by me at length from paragraph 28 onwards. In my opinion, the learned Accountant Member was entitled to take a different view of the matter when an altogether different case was presented before her.

52. The second limb of the question framed by the Hon'ble Accountant Member relates to "material on record". The learned counsel for the assessee has raised two important preliminary issues in this context.

First, he argues mat from the judgment of Hon'ble Supreme Court in the case of Stellar Investment Ltd. (supra) and the judgment of Hon'ble Delhi High Court in the case of CIT v. Makimi & Tyagi Pvt. Ltd. 267 ITR 433 (Del), the law as declared is that under no circumstances an addition can be made in the hands of a company on account of unexplained or bogus share capital credited in the accounts of that company. Secondly, Shri Sapra has argued that the present appeal is an appeal not against a regular assessment under the normal provisions of the Act but a block assessment Under Section 158BC. The scope of later provision being restricted to evidence or material found during the course of the search, in the absence of such material, the impugned addition could not be made as undisclosed income of the assessee within the meaning of the provisions of Section 158BC. The learned counsel has also made arguments based on the presumption Under Section 132(4A).

53. As to the assessment or otherwise of income in relation to unexplained or bogus share capital, the matter was first referred to Hon'ble Delhi High Court m the

case of CIT v. Stellar Investments Ltd. 192 ITR 287 (Del). In that case the subscribed capital of the assessee had been increased. The Assessing Officer accepted the increase in the subscribed capital. Thereafter the CIT came to the conclusion that the Assessing Officer did not carry out a detailed investigation. There was prevalence of device of converting black money into white by issue of shares with the help of formation of an investment company. The CIT, therefore, set aside the assessment order and directed the Assessing Officer to make enquiries with regard to the genuineness of the subscribers of the share capital. The Tribunal reversed this decision of the CIT and on a reference being made by the revenue, the Hon'ble Delhi High Court observed as under: It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself.

In our opinion, no question of law arises and the petition is, therefore, dismissed.

54. The matter thereafter came before Full Bench of the Hon'ble Delhi High Court in the case of CIT v. Sophia Finance Ltd. 205 ITR 98 (Del) (FB). The assessee in that case was incorporated on 27.4.1983. The assessee disclosed paid up capital of Rs. 20 lakh. During the course of assessment proceedings the assessee furnished necessary details and confirmation. The Assessing Officer made an assessment order accepting the return filed by the assessee. Thereafter the CIT issued a notice Under Section 263. He held that it was the duty of the Assessing Officer to enquire into the genuineness of the shareholders because in a large number of similar cases enquiries had revealed that either the shareholders did not exist at the addresses given or they were mere name lenders. The learned CIT, therefore, set aside the assessment order and directed the Assessing Officer to make farther enquiries. On assessee's appeal the Tribunal took note of its

decision in the case of Standard Cylinders Pvt. Ltd. 24 ITD 504 (Del), in which it was held that a company cannot seek information from the shareholders regarding the sources of the investment in the shares. The Tribunal came to the conclusion that the fact that the company was incorporated and the money was received immediately on incorporation would show that even Under Section 68 no assessment could be made in the hands of the company. At the instance of revenue Hon'ble Delhi High Court called for a reference Under Section 256(2) of the Act. During the course of hearing before the Hon'ble High Court the assessee relying on the earlier judgment of the court in the case of Stellar Investment Ltd. , argued that provisions of Section 68 could not be invoked; whereas the revenue argued that in that case the Hon'ble Division Bench had not considered the provisions of Section 68 at all. On this the matter was referred to the Full Bench of the Hon'ble High Court. After hearing detailed arguments of the parties the Hon'ble Full Bench of the High Court held the following on the applicability of the provisions of Section 68: If the amount credited is a capital receipt then it cannot be taxed but it is for the Income tax Officer to be satisfied that the true nature of the receipt is that of capital. Merely because the company chooses to show the receipt of the money as capital, it does not preclude the Income tax Officer from going into the question whether this is actually so. Section 68 would clearly empower him to do so.

Wliere, therefore, the assessee represents that it has issued shares on the receipt of share application money then the amount so received would be credited in the books of account of the company.

The Income tax Officer would be entitled to enquire, and it would indeed be his duty to do so, whether the alleged shareholders do in fact exist or not. If the shareholders exist then, possibly, no further enquiry need be made. But if the Income tax Officer finds that the alleged shareholders do not exist then, in effect, it would mean that there is no valid issuance of share capital Shares cannot be issued in the name of non existing persons. The use of the words "may be charged" (emphasis added) in Section 68 clearly indicates that the Income tax Officer would then have the jurisdiction, if the facts so warrant, to treat such credit to be the income of the assessee.

It is neither necessary nor desirable to give examples to indicate under what circumstance Section 68 of the Act can or cannot be invoked. What is clear, however, is that Section 68 clearly permits an Income tax Officer to make enquiries with regard to the nature and source of any or all the sums credited in the books of account of the company irrespective of the nomenclature or the source indicated by the assessee. In other words, the truthfulness of the assertion of the assessee regarding the nature And the source of the credit in its books of account can be gone into by the Income tax Officer. In the case of Stellar Investment Ltd. , the Income tax Officer had accepted the increased subscribed share capital. Section 68 of the Act was not referred to and the observations in the said judgment cannot mean that the Income tax Officer cannot or should not go into the question as to whether the alleged shareholders actually existed or not. If the shareholders are identified and it is established that they have invested money in the purchase of shares then the amount received by the company would be regarded as a capital receipt .and to that extent the observations in the case of Stellar Investment Ltd. assessee offers no explanation at all or the explanation offered is not satisfactory then, the provisions of Section 68 may be invoked.

In the latter case Section 68, being a substantive Section, empowers the Income tax Officer to treat such a sum as income of the assessee which is liable to be taxed in the previous year in which the entry is made in the books of account of the assessee.

55. In the case of CIT v. Active Traders Pvt. Ltd. 214 ITR 583 (Cal.), Hon'ble Calcutta High Court held the view that Tribunal was not justified to decide the matter as pure question of law that there could be no enquiry from the assessee company about the source of investment of its shareholders in the shares of the company.

56. At the instance of revenue the judgment of Hon'ble Delhi High Court in the case of Stellar Investment Ltd. came before by Hon'ble Supreme Court and the Hon'ble apex court made the following order as reported in 251 ITR 263 (SC): We have read the question which the High Court answered against the Revenue. We are in agreement with the High Court. Plainly, the Tribunal came to a conclusion

on facts and no interference is called for. The appeal is dismissed. No order as to costs.

The fact of the fate of civil appeal filed by revenue in the case of Stellar Investment Ltd. at the hands of Hon'ble apex court has been considered at length by Hon'ble Calcutta High. Court in the case of Hindustan Tes Trading Co. Ltd. v. CIT 263 ITR 289 (Cal.). It was argued before the Hon'ble High Court that the judgment of the Full Bench of the Hon'ble Delhi High Court in the case of Sophia Finance Ltd. (supra) was no longer a good law because the earlier judgment of the Division Bench in the case of Stellar Investment Ltd. had been affirmed by the apex court. Hon'ble Calcutta High Court came to the conclusion that while doing so Hon'ble apex court had not laid down any proposition of law. According to the Hon'ble High Court : had passed the following order (page 263) : "We have read the question which the High Court answered against the Revenue. We are in agreement with the High Court. Plainly, the Tribunal came to a conclusion on facts and no interference is called for. The appeal is dismissed. No order as to costs." From the above observation, it appears that the Supreme Court has not entered into the question involved or has not decided the ratio laid down. It had plainly held that it was a question of fact. The Supreme Court has not laid down any proposition with regard to the. question. It was purely a question of fact with which the apex court had dealt with and was in agreement with the High Court on conclusion of facts. Therefore, it cannot be said that the Supreme Court answered the ratio laid down as sought to be propounded by the Delhi High Court in Stellar Investment Ltd's case . A decision becomes binding as a precedent only when the court decides a particular question of law or lays down the ratio through conscious adjudication. Agreement with the finding of fact without adverting to the ratio laid down does not create a precedent. In order to support this view, we may refer to the decisions in Municipal Corporation of Delhi v. Gumam Kaur contention of Mr. Pal that the decision in Sophia Finance Ltd.'s case (Delhi) [FB] is no longer good law.

Hon'ble Calcutta High Court thereafter considered a large number of judgments relating to the provisions of Section 68 and arrived at a view similar to Sophia Finance Ltd. , the Hon'ble Calcutta High Court held that apart from the identity of the shareholders, then creditworthiness and genuineness of the transaction needs

also to be proved.

57. In the case of CIT v. Ruby Traders and Exporters Ltd. 263 ITR 300 (Cal.) the aforesaid judgment in the case of Hindustan Tea Trading Co.

Ltd. (supra) has been followed. The Hon'ble Calcutta High Court once again reiterated that while dismissing the SLP against Delhi High Court in the case of Stellar Investment Ltd., the Hon'ble Supreme Court had not discussed the question involved having regard to the law.

Accordingly dismissal of the SLP had no binding effect under Article 141 of the Constitution and as such the Full Bench decision in Sophia Finance Ltd.'s case overruling Stellar Investment Ltd. Case continued to be good law. The Hon'ble High Court reiterated the provisions of Section 68 also and held that the directions had been rightly given to the Assessing Officer to undertake investigation in order to establish the creditworthiness of the subscriber and genuineness of the transaction. Thereafter the matter once again came before the Hon'ble High Court m the case of CIT v. Nivedan Vanijya Niyojan Ltd. 263 ITR 623 (Cal.). Following the earlier two judgments reported in 263 ITR, the Hon'ble Calcutta High Court upheld the applicability of Section 68 of the Act.CIT v. Antarctica Investment P. Ltd. , Hon'ble Delhi High Court held that the only question for consideration is whether the finding of the Tribunal accepting share capital as genuine is without any evidence or material or is it contrary to the evidence on record or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based.CIT v. Gujarat Heavy Chemicals Ltd. 256 ITR 795 (SC), Hon'ble Supreme Court passed the following order : We have read the order of the High Court and heard learned Counsel for the appellant. We are satisfied that upon the facts, no interference with the order of the High Court is called for. The civil appeals are dismissed. No order as to costs.

In that case the assessee M/s Gujarat Heavy Chemicals Ltd. was a Joint Sector company. 40% of share holding was by public sector undertaking, public shareholding was 31% and 29% share holding was by the Dalmia Group of companies. There was allegation against one of the shareholder company, viz.. Golden Investment (Sikkim) P. Ltd. that it was a bogus company and being used

as by big industrialists for laundering of their black money. On these facts the learned CIT(Appeals) held that there was no justification for assessing the share capital contributed by Sikkim company in the assessment of Gujarat Heavy Chemicals Ltd. On revenue's appeal the Tribunal found that while the department's enquiries pointed to a person to whom such income might belong, yet it was attempting to take the income m the hands of the assessee company.

On reference to Hon'ble Gujarat High Court, the Hon'ble High Court held that the appeal involved question of appreciation of evidence only.

60. In the case of CIT v. Down Town Hospital Pvt. Ltd. 267 ITR 439 (Gaii.), the following question No. 2 was presented to Hon'ble High Court for admission in revenue appeal Under Section 260A of the Act: 2. Whether, on the facts and in the circumstances of the case, is not the decision of the Tribunal in directing deletion of the addition made Under Section 68 of the Income-tax Act, 1961, placing reliance on the decision of the Delhi High Court in the case of Stellar Investment Ltd. as erroneous and perverse Hon'ble Gauhati High Court held that the Tribunal found on the facts that the identities of the creditors had been established and all essential particulars were furnished by the assessee. Hence no opinion contrary to the views expressed by the Tribunal was plausible in the given facts of the case.

61. In the case of CIT v. Lanco Industries Ltd. 242 ITR 357 (A.P), during the course of a search the directors of the company admitted that a sum of Rs. 74.2 lakhs was undisclosed income representing investments made by them in the names of their friends and relatives.

The Tribunal deleted the addition made by the Assessing Officer in the hands of the company on the grounds that no proper enquiries had been made by the Assessing Officer and that in any case the information regarding the contributions of shareholders by friends and relatives of the directors could not be said to be an information based on an entry in the documents or material unearthed at the time of the search.

Hon'ble High Court while expressing its reservations in accepting the Tribunal's view observed as under: But, this is a matter of appreciation of evidence and we

do not think that a substantial question of law arises on that account.

Moreover, we fail to see how merely by reason of unsatisfactory explanation relating to the source of investment by the shareholders, the money invested on shares should be treated as income of the assessee. If the ostensible shareholders failed to explain the means of investment, that should have been treated as unexplained income in their hands. In order to add it to the income of the assessee there must be a further finding that in fact the shareholders were mere name-lenders and the money allegedly invested by them really belonged to the directors of the assessee-company. In the absence of a finding that the persons to whom the share certificates were issued, on receipt of consideration as per the book entries 'were in fact dummies or stooges of the directors of the assessee-company, the same cannot be treated as unaccounted income of the assessee. There was no such finding by the assessing authority. In this view of the matter, the ultimate conclusion of the Tribunal cannot be faulted in any case. We, therefore, see no ground to admit this appeal as no substantial question of law arises for consideration. The income-tax Tribunal appeal is dismissed.CIT v. Makhni & Tyagi (P) Ltd. 267 ITR 433 (Del) and CIT v. Achal Investment Ltd. 268 ITR 211 (Del). According to the learned Counsel for the assessee the judgment in the case of Makhni & Tyagi Pvt. Ltd. is an authority to the proposition that in the case of a company no addition can be made in relation to its share capital. The assessee in that case is one among many companies in relation to which the identical material was seized during the course of the same search as in the present case.

The Tribunal, as we have already noted, decided the matter in favour of the assessee on the ground that the share capital stood recorded in the account books maintained by the assessee which were seized during the search and stood considered because income-tax case of the assessee had also been completed before the date of the search. All the shareholders had confirmed in writing their investment in the share capital of the assessee and all had given their PAN/GIR numbers and other relevant particulars. The Tribunal, therefore, held that no adverse inference should be drawn against the assessee, if in response to summons Under Section 131 none of the shareholders appeared before the

Assessing Officer. If the Assessing Officer felt that their examination was absolutely necessary, then he could have enforced the attendance. On the appeal filed by the revenue Under Section 260-A against the order of the Tribunal, Hon'ble Delhi High Court held as follows: This Court is of the opinion that when documentary evidence was placed on record to prove the identity of all the shareholders including their PAN/GIR numbers and filing of other documentary evidence in the form of ration card, etc., which had neither been controverted nor disproved by the Assessing Officer, then no interference is called for. It may be noted that as pointed out by a Full Bench of this Court in CIT v. Sophia Finance Ltd. "if the shareholders exist then, possibly, no further enquiry need be made ". If still in the opinion of the Assessing Officer it was necessary to enquire further, then, it was for him to issue coercive process to see that the shareholders are before him and they are questioned about the investment. In the case of CIT v. Precision Finance (P.) Ltd. Court of Calcutta was required to examine the question from a different angle as in that case the enquiry of the Income-tax Officer revealed that either the assessee was not traceable or there was no such file and accordingly the first ingredient as to the identity of the creditors had not been established. In the instant case, when necessary material has been produced before the Assessing Officer to establish the identity of the persons with their PAN/GIR numbers and other details, it was for the Assessing Officer to enquire further if he felt that it was necessary. Instead of doing so, after issuance of summons when these materials were produced before him, he thought that he is helpless and he passed the burden on the assessee to bring the shareholders before him. The Tribunal, considering the facts of the case, arrived at the following conclusion : We find that the identity of the shareholders who had. also confirmed their investment in the share capital in response to summons Under Section 131 of the Income-tax Act also stood proved.

Consequently, the addition of Rs. 30 lakhs is deleted.

In the backdrop of this finding on facts, we find that no substantial question of law arises in this matter and hence the appeal is dismissed.

63. In the case of CIT v. Achal Investment Ltd. 268 ITR 211 (Del), the Assessing Officer completed the assessment Under Section 143(3) and accepted the assessee's claim of having received share application money. The learned CIT, however, held that the Assessing Officer did not verify the genuineness of the confirmation letters and set aside the assessment order directing him to carry out the exercise as indicated in the order Under Section 263. The Tribunal following the decision of Delhi Tribunal in the case of Stellar Investment Ltd. (supra) decided the appeal in favour of the assessee. The revenue thereafter moved the High Court Under Section 256(2) and thereupon the Hon'ble Delhi High Court have pronounced the following judgment: We are not required to examine the matter in detail as we are of the opinion that the Tribunal has allowed the appeal of the assessee following its judgment delivered in Stellar Investment Ltd. 's case which was the subject matter of a reference entitled in CIT v. Stellar Investment Ltd. decided on April 16, 1991.

In that case, the subscribed capital of the respondent-company had been increased and the Income-tax Officer accepted the increase and assessed the company. The Commissioner, in revision, set aside the order of assessment, being of the view that there had been a device of converting black money into white by issuing shares with the help of formation of an investment company, and that the Assessing Officer did not make any enquiries with regard to the genuineness of the subscribers to the share capital, While confirming the decision of the Appellate Tribunal, the Division Bench held as under (page 288) : It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself.

In our opinion, no question of law arises and the petition is, therefore, dismissed.

The aforesaid decision in the case of Stellar Investment Ltd. was challenged by the Revenue before the Supreme Court which, by its decision reported in the case of CIT v. Steller Investment Ltd. disposed of the appeal by passing We have read the question which the High Court answered against the Revenue. We are in agreement with the High Court. Plainly, the Tribunal came to a conclusion on facts and no interference is called for. The appeal is dismissed. No order as to costs.

It is in view of this, the question framed need not be answered. The reference is, accordingly, disposed of.

64. On consideration of the matter I find that Hon'ble High Court have neither in the case of Makhni & Tyagi Pvt. Ltd. (supra) nor in the case of Achal Investment Ltd. (supra) laid down any proposition of law, much less the proposition that in the case of a company under no circumstances any addition can be made in relation to its share capital. In the case of Makhni & Tyagi Pvt. Ltd. , the Hon'ble High Court considered the Full Bench judgment in the case of Sophia Finance Ltd. and found that no substantial question of law had arisen and, therefore, the revenue's appeal was dismissed. In the case of Achal Investment Ltd., the Hon'ble Delhi High Court held the view that the question framed need not be answered. Thus, in both the cases the Hon'ble High Court have not made any declaration of law. This position emerges clearly because in both cases the Hon'ble High Court held that there was no question of law. Hence the position remains the same as explained by Hon'ble Calcutta High Court in the case of Hindustan Tea Trading Co. Ltd. v. CIT (supra) in relation to the Supreme Court pronouncement in the case of Stellar Investment Ltd. (supra). The same reasoning would apply in relation to the verdict of Hon'ble Delhi High Court in these two cases.

65. In the case of Nirma Industries Ltd. v. ACIT 95 ITD 199 (Ahd.)(SB), the Hon'ble Special Bench after closely analyzing the provisions of.

Section 260A, held as under: From the above, it is clear that under Sub-section (1) an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, only if the High Court is satisfied that the case involves a substantial question of law. Sub-section (2) of the said Section permits a party aggrieved by any order passed by the Appellate Tribunal to file an appeal to the

High Court and it has to be in the form of Memorandum of appeal precisely stating therein the substantial question of law involved. Sub-section (3) provides that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and the appeal shall thereafter as provided in Subsection (4) be heard on the question so formulated and at the time of hearing the respondent is also permitted to argue on the appeal that the case does not involve such question without taking away or to abridge the power of the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it.

Sub-section (5) of this Section further provides that the High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit. From these provisions, it is clear that an appeal lies to the High Court only where a substantial question of law is involved. In an appeal filed by the party, when the High Court dismisses the same by stating that no substantial question of law arises, it cannot, in our opinion, be said that it was a decision of the High Court on merits. What the High Court can be said to have observed is that they declined to entertain/admit the appeal in the absence of any substantial question of law, which is pre-requisite for assuming the jurisdiction of the High Court. If there is no substantial question of law, in the opinion of the High Court, then by virtue of provision of Sub-section (1) of Section 260A, there lies no appeal.

Therefore, when the High Court dismisses an appeal stating that no substantial-question of law arises it only mean that the High Court has declined to entertain/admit the appeal in the absence of any substantial question of law. There is no decision on merits by the Jurisdictional High Court on the issues raised by the parties.

66. On perusal of the above enumerated judgments in relation to the assessment of unexplained share capital of a company it is seen that the courts have held that the question is predominantly a question of fact. It should be borne in mind that in the case of CIT v. Stellar Investment Ltd. 192 ITR 287 (Del), the revenue's petition has been dismissed with the remark, "No question of law arises". When the

Hon'ble High Court themselves have observed that no question of law has arisen from the order of the Tribunal, it is hard to see as to how that judgment may be considered to have made a declaration of law on the subject. In the case of Sophia Finance Ltd. (supra), Hon'ble High Court have held that it would be open to the Assessing Officer to go into the question as to whether the amount credited as share capital is indeed share capital of that company. The Hon'ble Delhi High Court have further held that it would be the duty of the Assessing Officer to enquire whether the alleged shareholders do in fact exist or not. If the alleged shareholders do not exist, then, in effect it would mean that there is no valid issuance of share capital. In the decision reported in 251 ITR 263 (S.C.) in the case of CIT v. Stellar Investment Ltd., Hon'ble Supreme Court reiterated, "Plainly, the Tribunal came to a conclusion on facts and no interference is called for." It is held by Hon'ble Delhi High Court in the case of Antarctica Investment P. Ltd. supra) also that a finding of the Tribunal as to whether share capital is genuine or not is a finding of fact. In the case of Lanco Industries Ltd. (supra) also Hon'ble Andhra Pradesh High Court held that no substantial question of law had arisen on that account. In the case of Makhni & Tyagi Pvt. Ltd. (supra), the Hon'ble High Court was pleased to dismiss the appeal filed by the revenue as, "No substantial question of law arises in this matter." The same is stated in the judgment of Hon'ble Delhi High Court: in the case of Achal Investment Ltd. (supra), "It is in view of this, the question framed need not be answered." In my opinion it would be quite unreasonable to hold that the Tribunal as well as Income-tax authorities are precluded from going into the question of genuineness of share-holding by any of the judgments enumerated by me in this behalf. While it may be that m the course of some of the judgments above enumerated, there are some observations that in the case of a company the share capital cannot be seen as representing income that may be assessed in the hands of the company itself, such observations have been made as a matter of appreciation of evidence and not as a proposition of law because in the ultimate analyses all the courts have only held that what the Tribunal decided is a question of fact and no question of law arises. It, therefore, appears to me that in every case where a dispute a rises about the genuineness of share capital, it would be necessary to examine the facts and circumstances of each case- whether the dispute is confined to the financial capacity of the share

applicant or there is material/evidence to call in question the genuineness of the issuance of share capital itself. In a case where the public issue of sharers not in doubt, it cannot be conceived as to how any share capital contribution can be assessed as income of the company for reason only of some share applicants not being able to explain the source of funds invested by them. At the same time in a case where the facts and circumstances justify the finding that what has been credited as share capital of the company is actually not so, the provisions of Section 68 clearly permit an IT. authority to make enquiries and if necessary to assess the same as representing the income of the company. In this context a question as to whether or not the share holder really exists becomes the most relevant question. I may mention here that similar view has been held by the Hon'ble Third Member in the case of ACIT v.Modern Cement Industries Ltd. 90 ITD (Ahd.) (TM). I therefore, do not see any force in the preliminary objection of the learned Counsel for the assessee in the present appeal because here the learned A.O. has called in question the very issuance of the share capital itself.

67. The second aspect raised by the learned Counsel for the assessee is whether these amounts can be made part of. the undisclosed income of the assessee within the meaning of the provisions of Section 158BC. He has raised the plea of presumption Under Section 132(4A) also. It is true that while making an order Under Section 158BC, the Assessing Officer does not have the same jurisdiction that he has while assessing the income of an assessee under the general provisions of the Act. An order Under Section 158BC can be made only in respect of that undisclosed income which the Assessing Officer detects as a result of search. It is not correct position in law that while completing an order Under Section 158BC, the Assessing Officer can make assessment of the entire undisclosed income that comes to Ms notice during the course of proceedings Under Section 158BC. He can make assessment of only that undisclosed income which has a direct nexus with the search proceedings in the case of the assessee. Reference in this respect may be made to the judgments reported in 234 ITR 733 (Guj.); 45 ITR 488 (Guj.); 247 ITR 448 (Bom,); 248 ITR 310 (Bom.); 248 ITR 350(Raj.); 248 ITR 562 (Cal); 249 ITR 4 (AIL); 250 ITR 141 (Del); 256 ITR 129(Bom.) and so on.

The contention of the learned Counsel for the assessee before me is that during the course of the search proceedings, the Assessing Officer did not find any material/evidence to suggest that the share capital of the assessee company in fact represented the undisclosed income of the assessee company. The documents found/seized during the course of search proceedings were share certificates, share transfer forms, sale bills, cash receipts. affidavits etc. There was a legal presumption Under Section 132(4A) that the contents of those documents were true.

The issue of such shares was already recorded in the books of accounts maintained by the assessee and disclosed during the course of returns of income filed by the assessee/ assessment proceedings. The documents found or seized during the course of the search did not reveal any investment outside the books of accounts by the assessee. According to the learned Counsel for the assessee while the learned Accountant Member has applied the judgment of Hon'ble Delhi High Court in the case of Ravi Kant Jain 250 ITR 141(Del) there is no discussion in the order of the learned Judicial Member in this respect. As she did not differ with the Hon'ble Accountant Member in this vital respect, the appeal was required to be decided in favour of the assessee following the judgment of Hon'ble Delhi High Court in the case of Ravi Kant Jain (supra). On consideration of the matter I find that the Hon'ble Judicial Member has based her order on the discovery of the very same documents, which according to the assessee establishes its case of genuineness of the share capital. It cannot, therefore, be said that in the order of the Hon'ble Judicial Member no basis have been found in the material/evidence found during the course of the search. The case of the assessee is that these were the documents made in the ordinary course of the business of the assessee and supported by the books of accounts of the assessee and, therefore, it cannot be said that there is any discovery or detection during the course of the search.

According to the contention of the revenue the discover}' itself of all these documents, coupled with blank signed transfer forms and blank signed affidavits indicated that the assessee had merely fabricated a bogus claim of share application money as credited in the assessee's books of accounts. On consideration of the matter I do not see that the order of the Hon'ble Judicial

Member suffers for want of jurisdiction within the provisions of Section 158BC. At the outset it may be stated that it is not true that all the material found during the course of the search had already been disclosed in the return of income/the assessment proceedings of the assessee company. The assessee nowhere disclosed or produced blank signed share transfer forms, blank receipts of sale proceeds of shares and blank affidavits. This is the material found during the course of the search. This is the material on which the revenue's case of bogus share capital is based that the Hon'ble Judicial Member has found acceptable. It cannot, therefore, be said that the undisclosed income sought to be assessed in the impugned order Under Section 158BC is not " as a result of search". In my humble opinion, it is not necessary that during the course of the search foolproof material/evidence indicating undisclosed income should be found. That is not the true interpretation of the judgment of the Hon'ble jurisdictional High Court in the case of Ravi Kant Jain (supra). As long as during the course of the search certain material/evidence that may lead to a legitimate enquiry into the genuineness of the transaction alleged by an assessee and undisclosed income is detected as a result of such legitimate enquiry during the course of proceedings Under Section 158BC it would amount to income computed, "on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence" within the meaning of Section 158BB(1) of the Act. It is important to bear in mind that computation of income Under Section 158BC is to be made not exclusively on the basis of evidence found as a result of search but such other materials or information also available with the Assessing Officer relatable to that evidence. On perusal of the order of the Hon'ble Judicial Member in entirety there is no manner of doubt that the same is pre-dominantly based on evidence/material found as a result of the search and it cannot be said that the findings given by her has no nexus with the search Under Section 132. As to the legal presumption of facts Under Section 132(4A) that does not in its very nature appear to be available to an assessee for where is the question of a presumption of fact being drawn by the person in the knowledge and possession of true facts? Moreover Hon'ble Delhi High Court have held in the case of Daya Chand v. CIT 250 ITR 327 (Del) that the presumption under section 132(4A) is linked with

search and seizure and is applicable only in relation to provisional adjudication contemplated Under Section 132(5) of the Act.

Hon'ble Delhi High Court have further held that operation of Section 68 remains unaffected. The same view has been taken by Hon'ble Allahabad High Court in Pushkar Narain Sarraf v. CIT 183 ITR 388 (All); by Hon'ble Gujarat High Court in Mansukhlal Nanjibhai Patel v. Dy. CIT 251 ITR 341 (Guj.); by Hon'ble Rajasthan High Court in Man Mohan Gupta v.ACIT 274 ITR 179 (Raj.). Hon'ble Karnataka High Court have in the case of CIT v. P.R. Metrani (HUF) 251 ITR 244 (Kar.) held that in relation to assessment proceedings it raises a rebuttable presumption only. I, therefore, hold that there is no assistance to the assessee by virtue of the provisions of Section 132(4A). I, therefore, do not see force in the second objection either of the learned Counsel for the assessee.

68. I now proceed to consider the second limb of the question referred to by the Hon'ble Accountant Member i.e., whether in the light of material on record the learned Accountant Member is justified in deleting the addition on account of investment in share capital of Rs. 21,63,070/- made as undisclosed income of the block period of the appellant or that the learned Judicial Member is justified in restoring the issue back to the file of the Assessing Officer for adjudication afresh. To put the matter in short, the issue is whether the Hon'ble Accountant Member is justified in accepting the assessee's explanation relating to blank but signed share transfer forms, sale bills, cash receipts and affidavits along with original share certificates relating to the assessee company found and seized from the office of Shri Alok Agarwal, Chartered Accountant or the Hon'ble Judicial Member is justified in restoring the matter back to the Assessing Officer for further enquiries. In substance the case of revenue is based on the nature of these documents and presence thereof at the premises of Shri Alok Aggarwal and the assessee's inability to satisfactorily explain those documents and to substantiate that explanation. The assessee explained that some of the shareholders, who were in dire need of money, were getting restless due to company's failure to pay any dividend approached the directors for assistance in selling shares in the assessee company. For that purpose advance receipts and blank transfer forms were given by them to Shri Alok Aggarwal, so that the same may be handy when the

transaction of sale materialized. The assessee relied upon confirmations submitted by the shareholders of having paid share application money for subscription to the assessee's share capital. Examination of the bank pass books of shareholders revealed that in most cases there was a deposit of an equivalent amount just before the date of withdrawal of share money from the bank account for application of shares of the assessee company. The learned Assessing Officer, therefore, disputed the genuineness of the transactions. With a view to enquire further into the matter the Assessing Officer asked the assessee to produce the shareholders but the assessee did not produce any of them. On the basis of these facts and circumstances the learned Assessing Officer held that share application money credited in the books of accounts of the assessee did not represent genuine investments made by the alleged shareholders. The Hon'ble Accountant Member noted that share capital was raised through account payee cheques and relevant entries had been made in the regular books of accounts. The Income-tax returns filed by the assessee had been accepted in the regular assessments. Details of shareholding and confirmations/affidavits of the shareholders had been placed on record.

Bank pass books were also produced. With all that material on record genuineness of investment stood proved. There is not much discussion, however, in the order of the Hon'ble Accountant Member as to how blank but signed share transfer forms, sale bills, cash receipts and affidavits along with original share certificates themselves from such a large number of persons could be found at the premises of Shri Alok Aggarwal. For that the learned Accountant Member has relied upon the earlier orders of the Tribunal in the cases of the various companies relating to the same search Under Section 132 where similarly blank signed sale bills, share transfer forms, cash receipts and affidavits along with share certificates in large scale were found with Shri Alok Aggarwal. He has relied upon the orders of the Tribunal on identical facts in the cases of Real Overseas Pvt. Ltd.; M/s Makhni & Tyagi Pvt.

Ltd.; Indradhan Agro Products Ltd.; Akriti Media Pvt. Ltd. and Garg Polymers Pvt. Ltd. It is pointed out that the decision of the Tribunal in the case of M/s Real Overseas Pvt. Ltd. has been rendered by the Bench comprising of the same

Members and of which the Hon'ble Judicial Member is the author. The Hon'ble Judicial Member has, however, found it difficult to follow her own order in the case of Real Overseas Pvt.

Ltd. in the instant case. That is primarily because in that case as well as all other cases decided by the Tribunal, as above mentioned, the facts of the case of each assessee had been considered in isolation without consciously looking at the totality of the picture emerging from the fact that none of these companies were alone but they were part of a crowd of similarly planned companies. The Hon'ble Judicial Member has sought to distinguish the orders of the Tribunal including her own order on this basis. For that purpose she has quoted at length from the Tribunal's orders in the case of M/s Real Overseas Pvt. Ltd. and M/s Makhni & Tyagi Pvt. Ltd. The Hon'ble Judicial Member has given her reasons to distinguish the facts of this case from other decisions of the Tribunal (supra) including the decision in the case of M/s Real Overseas Pvt. Ltd. (supra) in the following words : 13. In the said facts and circumstances, coming back to the impugned order and taking note of the serious submissions of the learned DR in an attempt to shake the judicial consciousness, the overwhelming impact of serious allegations made, documents found and identical ingenuous explanation that everyone needed money direly calls for a moment to pause and seriously reconsider since it is a little surprising that in the case of almost 5-6 companies allegedly floated by the searched person or taken care of professionally as per the assessee's version by the searched person, blank but signed share transfer forms, bills, receipts etc. had been found from the premises of the searched person and the shareholders no doubt identifiable give the same reason. When each and every individual case has been considered by different benches, then, necessarily, they have confined themselves to the facts of that case and had not the ld. DR made his impassioned submissions then probably the present appeal would have folio-wed the same course. However, once in an attempt to shake the judicial consciousness, the facts vis-a-vis the impugned order are addressed, then we are faced with a scenario entirely different from the one appreciated by this very Bench in the case of M/s Real Estates. In the circumstances, the facts as argued need due consideration and the alarm sounded by the learned DR cannot be wished away.

14. Being of the view that the issue cannot be decided by wearing blinkers, the full scape of the picture which emerges has to be taken cognizance of and dealt with and merely blindly disposing the issue holding it as covered z the peculiar facts as are emerging from the impugned order will to my mind in the circumstances be not appropriate as once a judicial consciousness has been stirred, then it must be taken to its logical conclusion.

69. While on the question of "material" I find it is of crucial importance to bear in mind the fundamental distinction between income tax assessment proceedings and the proceedings before a court. It is settled position that the proceedings before the Assessing Officer are not a "suit" between the contesting parties, as held by the Hon'ble Supreme Court in the case of S.S Gadgii v. Lal & Co. 53 ITR 231 (SC).

Accordingly the proceedings before the Assessing Officer are not strictly judicial proceedings. This aspect is in built in the statutory provisions of Section 143(3) itself. According to the Sub-section, the Assessing Officer should take into consideration such "evidence' as the assessee may produce and such other "evidence" as Assessing Officer may require on specified points and after taking into account all relevant "material" which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment. It is striking that the Sub-section employs "evidence" for assessee and "material" for the Assessing Officer.

70. In the case of Addl. CIT v. Jay Engineering Works Ltd. 113 ITR 389 (Del), Hon'ble Delhi High Court have explained this distinction in the following words : The Income tax Officer and certain other authority functioning under the Income tax Act have a dual character. They are both agencies of investigation made into the incomes of assesses and they are also quasi judicial authorities assessing the liabilities of the assesses to payment of income tax. Under Section 142(2) of the Act the Income tax Officer may make such enquiry as he considers necessary for the purpose of obtaining full information in respect of the income or loss of an assessee. Under Section 143(3) of the Act, the Income tax Officer does not only

hear such evidence as the assessee may produce or as he may require to be produced, but also takes into consideration "all relevant material which he has gathered" for the purpose of making an assessment. While the word "evidence" may recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of the word "material" shows that the Income tax Officer not being a court can rely upon material which may not be strictly evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment.

Courts often take judicial notice of certain facts which need not be proved, while administrative and quasi judicial authorities can take "official notice" of wider varieties of facts which need not be proved before them, Thus, not only in respect of the relevancy but also in respect of proof the material which can be taken into consideration by the Income tax Officer and other authorities under the Act is far wider than the evidence which is strictly relevant and admissible under the Evidence Act.

71. It is well settled position that the Assessing Officer may take into consideration material which would be wholly inadmissible in a court of law. Reference in this respect may be made to the judgments reported in 4 ITR 1 (All.); 7 ITR 21 (Mad.); 20 ITR 562 (Punj.); 37 ITR 461 (AIL); 45 ITR 206 (SC); 52 ITR 231 (Assam); 63 ITR 356 (AIL); 83 ITR 778 (Pat); 91 ITR 630 (P & H); 94 ITR 616 (Bom.); 120 ITR 529 (Cal.) and 129 ITR 426 (Cal.). What is necessary is that the Assessing Officer should have material upon which to base the assessment. Such material may be distinguishable from evidence both direct and circumstantial. The only requirement is that the Assessing Officer should act having regard to the principles of natural justice. As pointed out by Hon'ble Supreme Court in the case of CIT v. Simon Carves Ltd. 105 ITR 212 (SC), it is not as if the Assessing Officer should exercise his powers only in a manner beneficial to the revenue and adverse to the assessee. He should arrive at his decision in judicial spirit on the basis of sound reasoning. He may not act on suspicion or conjectures or pure guess. Reference in this respect may be made to the judgments in the case of Dhakeshwari Cotton Mills Ltd. v. CIT 26 ITR 775 (SC); Omar Sahay Mohamed Saife v. CIT 37 ITR 151 (SC); Umacharan Shaw and Brothers v. CIT 37 ITR 271 (SC) and a host of High

Courts judgments thereafter. In this view of the matter I am unable to subscribe to the view of the Hon'ble Accountant Member that after filing the affidavits confirming investment in purchase of shares of assessee company, bank pass books etc. the assessee had discharged its onus and once the assessee had discharged its onus his burden went away for ever. The judgment of Hon'ble Supreme Court m the case of Arumungham (Deed.) v. Simderambal and Anr. 4 SCC (1999) 350 is not applicable to Income-tax assessment proceedings. It is also not correct to say that the Assessing Officer had required the assessee to produce the shareholders who were not under the control of the assessee company. When the share certificates physically, blank signed forms of transfer, blank cash receipts, sale bills and affidavits etc. duly signed by these persons were found in the possession of the assessee, it was a far cry on the part of the assessee to state that he could exercise no control over the shareholders. It is also not correct to say mat the Assessing Officer was under an obligation to treat the apparent as real. The moot question is what is apparent on the peculiar facts and circumstances of the case when practically everything relating to these shares is found in the possession of the Chartered Accountant at the behest of the assessee? 72. In the case of Sree Meenakshi Mills Ltd. v. CIT 31 ITR 28 (SC), the Hon'ble Supreme Court held as under: When a conclusion has been reached on an appreciation of a number of facts established by the evidence, whether that is sound or not must be determined not by considering the weight to be attached to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting in the picture as a whole. In Edwards (Inspector of Taxes) v. Bairstow, Lord Raddiffe stated: ...I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

This furnishes the corrective to the course adopted by counsel for the appellant in his argument.

The aforesaid ruling of Hon'ble Supreme Court in the case of Sree Meenakshi Mills has been followed by Hon'ble Bombay High Court in the case of Gordhandas Hargovandas v. CIT 126 ITR 560 (Bom.) and by Hon'ble Rajasthan High Court in

the case of Hemandass Bhanrajmal v. CIT 132 ITR 369 (Raj.) and by Hon'ble Supreme Court once again in the case of Sir Shadilal Sugar & General Mills Ltd. v. CIT 168 ITR 705 (SC) and so on.CIT v. Karam Chand Thapar and Bros. (P) Ltd. 176 ITR 535 (SC), the Hon'ble Supreme Court have observed: It is true that the Tribunal has not stated in terms that it has considered the cumulative effect of the circumstances pointed out to the Tribunal, but, on the other hand, a plain reading of the judgment of the Tribunal makes it clear that the Tribunal has, in fact, taken into account the cumulative effect of the circumstances on record before the Tribunal. It is not necessary for the Tribunal to state in its judgment specifically or in express words that it has taken into account the cumulative effect of the circumstances or has considered the totality of facts, as if that were a magic formula ; if the judgment of the Tribunal shows that it has, in fact, done so, there is no reason to interfere with the decision of the Tribunal.

74. In the case of Newton Chikli Collieries Ltd. 44 ITR 495 (SC) at page 499, the Hon'ble Supreme Court have observed that if the explanation of the assessee for discrepancies are not accepted, it cannot be said that the authorities have acted on no material at all.

75. On consideration of the matter I am of the view that Hon'ble Judicial Member has correctly relied upon the judgment of Hon'ble Supreme Court in the case of Sumati Dayal v. CIT 214 ITR 801 (SC). In that case the assessee was carrying on business as a dealer in art pieces, antiques and curios. During assessment year 1971-72 the assessee disclosed a sum of Rs. 3,11,831/- by way of race winning in Jackpots and treble events in races at Bangalore, Madras and Hyderabad.

For assessment year 1972-73 again the assessee showed receipts of Rs. 93,500/- in like manner. Before the Assessing Officer the assessee admitted that these amounts did not represent winning in races. It was shown that the assessee lacked any knowledge of race techniques and the theory of probabilities precluded any systematic and continuous winning at races on as many as 16 occasions during a period of less than two years. The majority opinion of Settlement Commission was that the winning of races shown by the assessee in fact represented her income from undisclosed sources. The Chairman of the

Settlement Commission, however, had dissenting opinion on the ground that the assessee had produced evidence in support of the credits in the form of certificates from the racing clubs and given particulars of the crossed cheques for payment of amounts of winning to the assessee. After consideration of the matter, the Hon'ble Supreme Court observed : This, in our opinion, is a superficial, approach to the problem. The matter has to be considered in the light of human probabilities. The Chairman of the Settlement-Commission has emphasised that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. It is. in our view, a neutral circumstance, because if the appellant had purchased the winning ticket after the event she would be having the winning ticket with her which she could surrender to the Race Club.

The observation by the Chairman of the Settlement Commission that "fraudulent sale of winning tickets is not an usual practice but is very much of an unusual practice" ignores the prevalent malpractice that was noticed by the Direct Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972, whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc., was withdrawn. Similarly, the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleged to prove that it is so, ignores the reality'. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available.

An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering the surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winnings from races is not genuine. It cannot be said that the

explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence.

76. In the instant case share certificates issued by the assessee to as many as 50 shareholders have been found in the possession of Shri Alok Aggarwal. These share certificates were accompanied by blank but signed share transfer forms, sale bills, cash receipts and affidavits in the name of the ostensible shareholders. The Assessing Officer "has recorded the finding that on examination of the bank: pass books of these shareholders, it was found that in majority of the cases there was cash deposit of equivalent amount just before the withdrawal of the same for the purpose of purchase of shares in question. The cumulative weight of all these circumstances weighed very heavily against the assessee. There is no mention of a single prospective purchaser nor is there any instance of any actual sale. How could so many persons be at the same time in such dire need of money as to hand over all these documentation to the assessee's Chartered Accountant without receipt of single rupee by way of advance or actual sale consideration. The learned Judicial Member has found that such facts are not peculiar to the assessee alone. The same Chartered Accountant Shri Alok Aggarwal was found in possession of shares and accompanying documents in the same manner in respect of half a dozen other companies. When a twin or a triplet is born, people are surprised. The surprise turns into wonder if the birth of a quadruplet is announced, and no body is going to believe if it is claimed that the birth to a quadruplet is given not by the same parents but by four different parents. That is what has happened in this case and I think on such facts the Hon'ble Judicial Member has ample justification to come to the conclusion that the matter requires a second look.

77. In view of the discussion in the foregoing paragraphs, I answer the question referred to by Hon'ble Accountant Member and the questions 1 and 5 referred to by the Hon'ble Judicial Member that the learned Judicial Member is justified in restoring the matter back to the file of the Assessing Officer for decision afresh. As to the questions 2, 3, 4 and 6 referred to by Hon'ble Judicial Member the thrust of the questions is whether while deciding an appeal the Tribunal should attach due

importance to the contentions of the revenue as well as the assessee. The answer to these questions is self-evident that the Tribunal while deciding an appeal has to accord a treatment of equality between the assessee and the revenue, However, the fact that Hon'ble Judicial Member has repeatedly referred to these questions makes me pause for a moment as apparently the Hon'ble Judicial Member gathered the impression that while deciding an appeal the Tribunal should attach more importance to the arguments of the assessee than the arguments of revenue. In my humble opinion, such an impression is totally incorrect.

While deciding an appeal the Tribunal as an appellate body has to decide issues before it objectively on merits irrespective of the fact whether the decision goes in favour of the assessee or in favour of revenue, as both deserve equal treatment.

78. The matter will now go before the regular Bench for deciding the appeal in accordance with the opinion of the majority.