

आयकर अपीलीय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष)श्री पी. एम.जगताप,उपाध्यक्ष एवं श्री ए.टी. वर्की,न्यायिक सदस्य)
 [Before Shri P.M. Jagtap, Vice President (KZ) &Shri A. T. Varkey, JM]

ITA No.2548/Kol/2019
Assessment Year: 2013-14

M/s. Modern Malleables Limited (PAN: AABCM5669D)	Vs.	Deputy Commissioner of Income- tax,Circle-8(1), Kolkata
Appellant		Respondent
Date of Hearing	23.01.2020	
Date of Pronouncement	20.03.2020	
For the Appellant	Shri A. K. Gupta, FCA	
For the Respondent	Shri Imokaba Jamir, CIT, DR	

ORDER

Per A. T. Varkey, JM:

This is an appeal preferred by the assessee against the order of Ld. CIT(A)-5, Kolkata dated 07-11-2019 for AY 2013-14.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) in confirming the addition of Rs.17.46 cr. which according to it on account of joint venture agreement.

3. Brief facts of the case as noted by the AO are that the assessee company furnished return of income for AY 2013-14 on 29.03.2013 disclosing total income of Rs. Nil (claiming current year's loss of Rs.1,37,86,521/-). According to AO, the return was selected for scrutiny and after serving of statutory notices the AO noticed that assessee company is engaged in manufacturing and selling of overhead transmission and distribution line equipments, conductors and hardware accessories etc. According to AO, an operation of search and seizure u/s. 132 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) was conducted at the business/residential premises of one Shri Anand Sharma and Shri Janardan Chokhani at Kolkata on 02.07.2013 in which the said Shri Anand Sharma and Shri Janardan Chokhani confessed that they were entry operators and that they have

registered a large number of paper companies with bogus share capital/premium which have subsequently been sold for a commission or used for giving one time entry of bogus share capital or expenses or unsecured loans/advances. According to Investigation Wing, Shri Anand Sharma and Shri Janardan Chokhani were found to be operating and controlling large number of bank accounts in the names of proprietorship concerns where cash received from the beneficiaries were deposited and from these bank accounts cheques/RTGS were issued to transfer funds into the several middle layered paper companies controlled by the said Shri Anand Sharma and Shri Janardan Chokhani before finally advancing it to the beneficiaries. The AO notes that as per the statement of Shri Anand Sharma recorded by Search Wing of Kolkata, it revealed that the assessee has received an amount of Rs.16.18 cr. from a paper company namely M/s. Navratra Commercial Pvt. Ltd. (PAN: AACCN5258J) as advance/share application money/bogus loan during the year under consideration. The AO noted that Mr. Sharma further stated that the beneficiary party i.e. the assessee gave him cash in lieu of which he has given the assessee cheque for some commission income. Mr. Sharma also stated that the total amount of Rs.16.18 cr. was given as accommodation entry to the assessee during the year under consideration by his paper company M/s. Navratra Commercial Pvt. Ltd. (in short M/s. NCPL). Thereafter, the AO records the general modus operandi which was disclosed by Shri Anand Sharma and he also disclosed that the directors of M/s. NCPL are dummy directors namely, Shri Sushil Kumar Bhattar, Shri Manish Sharma and Shri Raj Kumar Bhotika who had lent their names for directorship in lieu of some remuneration. Thereafter, the AO notes that he issued letter to the assessee dated 08.03.2016 by which he informed the assessee about the search and seizure operation and the assessee was also asked to furnish details of transaction with M/s. NCPL along with bank statement, ledger of M/s. NCPL for FY 2012-13 and 2013-14 and also the reasons for transaction with the said paper company controlled by Shri Anand Sharma. The AO notes that the assessee was also asked to produce the director of M/s. NCPL for recording statement regarding transaction with the assessee company and simultaneously he issued summons u/s. 131 dated 08.03.2016 to the assessee to serve upon the director of M/s. NCPL. The AO acknowledges that pursuant to the said notice the assessee had filed ledger copy of M/s. NCPL for FYs. 2012-13 and 2013-14, bank statements in respect of all banks and relevant bank books. The AO acknowledges that assessee has accepted to have

received from M/s. NCPL an amount of Rs.17.46 cr. in view of a joint venture agreement with M/s. NCPL to establish manufacturing, trading and exports facilities relating to products of overhead transmission and distribution line equipment at survey No. 16/2, Union Territory of Dadra and Nagar Haveli, Silvassa where assessee had a large piece of industrial land. According to AO, the assessee had submitted that ultimately the joint venture project had to be cancelled and that the amount of Rs.17.46 cr. was refunded back to M/s. NCPL. The AO notes from a perusal of the ledger of M/s. NCPL that assessee received total amount of Rs.17.46 cr. through a number of cheques of different amounts from 27.08.2012 to 20.03.2013 as receipt of advance and also noted that Rs.17.46 cr. has been refunded to M/s. NCPL on 31.03.2013 by five cheques all dated 31.03.2013. The AO also observed that the five cheques dated 31.03.2013 by the assessee to M/s. NCPL were not encashed up to 31.07.2013 and for which a reverse entries have been passed in the ledger of M/s. NCPL on 31.07.2013. Thereafter, from 26.08.2013 the said amount of Rs.17.46 cr. have been finally refunded back to M/s. NCPL through a number of transactions on various dates upto 29.01.2014 to M/s. NCPL. The AO also observed on a perusal of the ledgers of M/s. NCPL that no interest has been provided for such huge sum of Rs.17.46 cr. Thereafter, the AO observed that in view of summons u/s. 131(1) of the Act one director of M/s. NCPL Mr. Sushil Kumar Bhatte appeared before him on 16.03.2016 and a statement of Mr. Sushil Kumar Bhatte was recorded on the same date. According to AO, Shri Bhatte admitted that he did not know the directors or key managerial persons of assessee [M/s. Modern Malleables Ltd.] and that he had no knowledge about the search and seizure operation on 02.07.2013 in the business premises of Mr. Anand Sharma and Mr. Janardan Chokhani where books of accounts of M/s. NCPL was found wherein the payment of Rs.17.46 cr. to assessee was indicated. According to AO, Mr. Bhatte admitted that he was not aware of payment of such a huge amount to the assessee company and he also confessed his ignorance about the source of money of M/s. NCPL for such payment to the assessee company. According to AO, when Mr. Bhatte was confronted with the joint venture agreement between M/s. NCPL and assessee company, Mr. Bhatte submitted that he did not know about the agreement of joint venture and also did not know about the place called 'Silvassa' where the joint venture project pursuant to the JV agreement was proposed to be implemented. The AO acknowledges that Mr. Bhatte only furnished copy of the joint

venture agreement dated 31.07.2012 duly signed by himself as director of M/s. NCPL but Mr. Bhattar admitted that he had not read the agreement till date i.e. on 16.03.2016(date of recording of his statement by AO). According to AO, when asked about the cheques dated 31.03.2013 by which repayment of advance of Rs.17.46 cr. was made by the assessee, Mr. Bhattar has stated that he has no knowledge about the receipt of the said five cheques by his company M/s. NCPL. The AO further noticed that this JV agreement advance of Rs. 17.46 cr. was mentioned neither in the copy of the financial accounts of the assessee company for FY 2012-13 nor in the director's report or in the auditor's report. According to AO, the joint venture agreement has also not been reported in the tax audit report given by auditor.Mr. P. Khaitan on 15.05.2013. According to AO from a perusal of the financial statement of M/s. NCPL for FY 2011-12 to 2013-14 it was seen that the said company was not actually engaged in any real business and its Balance Sheet shows only rotation of amounts. The AO observes after recording the statement of Mr. Bhattar that he (Mr. Bhattar) is a dummy director and M/s. NCPL is not controlled by him and according to AO, Mr. Anand Sharma controlled this paper company which has no actual business and the main motive of formation of this company was only to provide accommodation entry to various beneficiaries in lieu of commission of income. The AO disbelieved the assessee's explanation that it being a sick industrial undertaking in order to revive its financial position had entered into a joint venture agreement with M/s. NCPL and Rs. 17.46 cr. was advanced to it for a project to implement at 'Silvasa'. According to AO, M/s. NCPL is a shell company and have no business at all and the JV agreement etc. is a designed story of assessee. So, according to AO, the joint venture agreement and its cancellation are falsely fabricated by assessee. Thus, according to AO, assessee had taken accommodation entries amounting to Rs.17.46 cr. through M/s. NCPL in lieu of cash during the FY 2012-13; and later on 02.07.2013, when the search operation was conducted at the business premises of Mr. Anand Sharma and receipt of accommodation entries by assessee through M/s. NCPL has been exposed, the assessee in order to wriggle out of the problems had tried to prove the genuineness of the accommodation transaction of Rs. 17.46 cr. has shown to have made book entries and repayment of advance as on 31.03.2013 through five cheques (though encashment was not made). Thereafter, the AO issued notice as to why the amount of Rs.17.46 cr. should not be added as undisclosed income of the assessee and the AO notes

that assessee reiterated the story of joint venture agreement and receipt of advance of Rs. 17.46 cr and also the cancellation of JV agreement and repayment of Rs. 17.46 cr back to M/s. NCPL.

4. The AO did not believe the aforesaid explanation of J V Agreement etc. given by the assessee and relying upon the statements given by Mr. Anand Sharma (recorded by Investigation Wing on 02.07.2013) and Mr. Sushil K. Bhattar, Director of M/s. NCPL (recorded by AO on 16.03.2016) was pleased to make the addition of Rs. 17.46 cr. in the hands of the assessee u/s. 68 of the Income-tax Act, 1961 (in short, the 'Act'). Aggrieved, the assessee preferred an appeal before the Id. CIT(A), who was pleased to confirm the same. Aggrieved by the decision of the Id. CIT(A), the assessee is before us.

5. Assailing the decision of the Id. CIT(A) the Id. Counsel for the assessee submitted that the assessee company is a listed company and became sick. Therefore, the 'BIFR proceedings' were going through and Shri Abhijit Biswas was appointed by the BIFR as a special director to the said assessee company, who was brought in to the Board of assessee as per direction of the BIFR to stabilize the company and he was fully aware of the day to day activities happening in the assessee company. According to the Id. AR, the assessee was engaged in manufacturing and selling/distributing of overhead high tension line and equipment conductors hardware accessories and it had in 'Silvasa' in UT of Dadar & Haveli large industrial plot. Since the assessee company was in dire financial situation, wherein it had huge losses the assessee's board of directors authorized the assessee company to enter into a JV (Joint Venture) agreement on 28-05-2012 with M/s. NCPL (M/s. Navaratri Commercial P. Ltd). For which the project report was also made, which is placed at pages-22-37 of the P/B. In the said Board Meeting, Mr. Abhijit Biswas, Special Director of the BIFR, was also present and thereafter, only the decision was taken for entering into J.V (joint Venture) with M/s. NCPL. The Ld. AR drew our attention to the Minutes of the Meeting of Board of Directors to enter into a JV found placed at pages 186 of the P/B. It was also brought to our notice that there was several communication between the assessee and M/s. NCPL regarding JV project and before the agreement was signed and drew our attention to the sample copy of communication placed at page 187-190 of the P/B. It was also brought to our notice that "technical know-how" agreement had been entered into between M/s. Nouva Electromeccanica Sud ("NES Italy") and assessee, which is placed at

page 191-196 of the PB, which was entered into by the assessee for obtaining technical know-how for the project proposed by the JV. According to JV agreement, the assessee was supposed to provide technical know-how, technical back up for the project and also had agreed to give equitable mortgage of land measuring about 72,500 sq. mtrs, as collateral security to M/s. NCPL. The Id. AR submitted that as per J.V agreement between the assessee and M/s. NCPL, M/s. NCPL provided Rs. 17.46 cr. to the assessee to set up the JV project at Silvasa. However, since the project could not materialize JV had to be cancelled and the amount of Rs. 17.46 cr. was duly returned back to M/s. NCPL. This according to Id. AR, actually happened in respect of Rs.17.46 cr. which has been disbelieved by the AO because of a report from Investigation Wing after a search in a third party's place on 02.07.2013.

6. According to the Id.AR, the AO got information from the Investigation Wing pursuant to search operation conducted at the premises of one, Mr. Anand Sharma and Mr. Janardhan Chokhani at Kolkata on 2-7-2013, Shri Anand Sharma had confessed that he and Mr. Janardhan Chokhani were entry operators who control penny/shell companies, which were engaged in giving one time entry of bogus share capital or expense or unsecured loans/advances in lieu of small commission. According to the AO, M/s. NCPL is also a shell company, wherein the assessee had taken the benefit of accommodation entry to the tune of Rs.16.18 Crs. According to AO, the assessee had given cash to the M/s. NCPL, which was given back to the assessee in the form of cheque for a commission. Based on this statement purportedly recorded by Investigation Wing as cash as on 02.07.2013 only, the AO had summoned the director of M/s. NCPL, Shri Sushil Kumar Bhattar on 16-03-2016 and recorded his statement, wherein the AO notes that though, Shri Bhattar brought the JV agreement signed by him dt. July, 2012, but he denied knowing the contents of the JV agreement. According to AO, Shri Bhattar did not even know the place called as 'Silvasa' and he even did not know about the amount of Rs. 17.46 Crs. being returned back to M/s. NCPL. According to Id. AR based on these two statements of S/Shri Sushil Kumar Bhattar recorded by 16.03.2016 and Anand Sharma recorded on 02.07.2013, the AO disbelieved the "JV agreement" to fasten the addition simply believing the statements of S/Shri Sushil Kumar Bhattar and Anand Sharma, which action of AO is erroneous.

7. According to the Id.AR, the AO has erred in making the addition based on the statement of Shri Sushil Kumar Bhatte for following reasons:-

- a. Mr. Bhatte was signatory of the agreement between the assessee and M/s. NCPL. He only carried the copy of the JV agreement before the AO on 16-03-2016, when his statement was recorded by the AO.*
- b. Shri Sushil Kumar Bhatte's education was only upto Class II and he did not know English properly. So he requested before the AO to ask the question(s) either in English or Bengali, which request was brushed aside and the AO recorded his statement in English. Shri Sushil Kumar Bhatte signed his statement without knowing the contents of the statement so recorded by the AO.*

8. And the Id. AR drew our attention to the fact that Shri Sushil Kumar Bhatte has retracted the statement given before the AO and then he has also filed a complaint before the Officer-in-charge, Kasba Police Station and has also retracted his statement before the First Class Magistrate. Therefore, according to Id. AR, Shri Sushil Kumar Bhatte's statement could not have been the basis for making the addition. When he specifically has denied knowing any Shri Anand Sharma or Shri Janardhan Chokhani and in the affidavit he has admitted of having entered into JV agreement and also about the fact of M/s. NCPL providing Rs.17.46 cr. to assessee and the money being repaid to it.

9. Coming to the statement of Shri Anand Sharma is concerned the Id. AR pointed out that the AO had simply relied upon the statement recorded by the Investigation Wing, when the search was conducted on 12-07-2013 on him (a third party) and the AO did not bother to summon him during assessee's assessment proceedings and recorded the statement. According to the Id. AR the AO did not even give a copy of the statement supposed to have been made against the assessee regarding M/s. NCPL (i.e. transaction between NCPL and the assessee). Moreover, according to the Id.AR, the statements of Shri Anand Sharma & Shri Sushil Kumar Bhatte cannot be the basis for making the impugned addition because they were not subjected to cross examination by the assessee. For that proposition of law, he referred to the decision of the Hon'ble Supreme Court in Andaman Timber Industries Vs. CIT reported in CIVIL Appeal No. 4228 OF 2006 order dt : 02/09/2015

10. In the light of the aforesaid submissions, the Id. AR of the assessee drew our attention to the following case laws to support his arguments. According to him, since the AO has not conducted any independent enquiry and had merely relied upon the Investigation Wing's report i.e. on the statements recorded by them as early as that of

02.07.2013, then the statement of Mr. Anand Sharma who is a third party could not have relied upon by AO to draw any adverse inference against the assessee. For that, he relied upon the decisions of the Hon'ble Supreme Court in CIT vs. Odeon Builders P. Ltd reported in (2019) 418 ITR 315 (SC), wherein the Hon'ble Supreme Court took note of the facts in that case (Odeon) the AO had disallowed certain portion of purchases made by assessee. It was found by their Lordships that entire disallowance was based on third party information gathered by Investigation Wing of Department, which had not been independently subjected to further verification by Assessing Officer and he had not provided copy of such statements to assessee, thus, denying opportunity of cross examination to assessee, who on other hand, had prima facie discharged initial burden of substantiating purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and fact of payment through cheques, VAT Registration of sellers and their Income-tax Return. The Revenue appeal was dismissed, and the order of Hon'ble High Court was affirmed.

11. The Id. AR, thereafter, relied on the case of PCIT vs. Himachal Fibers Ltd (2018) 259 taxman 3(SC), wherein the Hon'ble Supreme Court had dismissed the SLP filed against the order of High Court where it (High Court) had set aside addition made by AO u/s. 68 in respect of share application money by holding that identity of share applicants was clearly revealed but AO did not conduct any further enquiry except resting his conclusions on surmises.

12. The Id. AR, thereafter, relied on the case of CIT vs. Fair Finvest Ltd (2013) 357 ITR 146 (Del) wherein the Hon'ble Delhi High Court deleted the addition u/s. 68 of the Act and noted that no independent enquiry was made by the AO and that he simply choose to base himself merely on the general inference drawn from the reading of the investigation report and the statement of some third party.

13. The Id. AR, thereafter, relied on the case of CIT vs. Vignesh Kumar Jewellers reported in (2011) 330 ITR 209 (Mad.), wherein the Hon'ble Madras High Court held that additions cannot be sustained by relying on the findings of the custom authorities without making any independent enquiries and without corroborating evidence.

14. The Id. AR of the assessee also drew our attention to the case laws which lays down the principle that if there is violation of natural justice while framing the assessment (order)

i.e. non allowing the cross examination of the third party or supplying any third party's documents on which the AO relies vitiate the addition/disallowances.

a) Andaman Timber Industries vs. CIT (2015) 62 taxmann.com 3(SC), wherein it was held that when statements of witnesses are made basis of demand, not allowing assessee to cross-examine witnesses is a serious flaw which makes order nullity, as it amounts to violation of principles of natural justice.

b) CIT vs. Sunil Aggarwal (2015) 379 ITR 367(Del), Held, it was incumbent on the AO to afford the assessee an opportunity to cross-examine the third party relying on whose statement addition was made.

15. The Id. AR of the assessee drew our attention to the following case laws, wherein it was laid down by the Hon'ble Courts, that once primary onus has been discharged by the assessee, onus shifts to the revenue to dislodge or prove otherwise:

a) *PCIT vs. Andamine Construction P.Ltd (2018) 99 taxmann.com 45(SC)* Held, SLP filed against the decision of High Court was dismissed where High Court confirmed Tribunal's order deleting addition made to assessee's income under section 68 on the ground that assessee had discharged initial burden cast upon it by providing necessary details.

b) *PCIT vs. Hi-Tech Residency P.Ltd (2018) 257 taxman 335(SC)* Held, SLP filed against the decision of High Court was dismissed where addition under section 68 was deleted where assessee company had discharged its onus of establishing identity, genuineness and creditworthiness of both investors as well as lenders. Similarly, SLP was dismissed.

16. Thereafter, the Id. AR relied on the following case laws for the proposition that retracted statements cannot be relied upon.

a) *PCIT -vs.- Texraj Realty Pvt Ltd (ITA 612 of 2018 dated 12-06-2018 Gujarat High Court)* - Addition of undisclosed income cannot be made on the basis of (a) entries in dairy found during survey & (b) admission of director in section 133A survey if assessee has filed a retraction and alleged that the entries/ statement were recorded under pressure. A section 133A statement is merely information simpliciter and not evidence per se. Addition cannot be sustained if the Dept has not investigated the matter and find material to support the addition.

b) *CIT -vs.- Sunil Aggarwal [2015] 379 ITR 367 (Delhi)* Held, it was incumbent on the AO to afford the assessee an opportunity to cross-examine the third party relying on whose statement addition was made

17. He also relied upon the following decisions of this Tribunal and Hon'ble High Court wherein it have been laid down that no addition could be made where the amount received has been ultimately repaid.

a) *ACIT -vs.- Rakesh Bhartia (ITA No. 428/Kol/2012 dated 29-02-2016)* - it was held as under-

"We also find that the entire loan of Rs. 2.5 crores have been paid by the loan creditor by 3 account payee repaid cheques drawn on Syndicate Bank, Esplanade Branch, Kolkata. These facts have been cleared through banking channels. We also find that the entire loan has been repaid by the assessee in May- June 2009 by account payee cheques, which was also confirmed by the loan creditor. We find that the assessment has been completed in this case on 27-12-2010, which is after 18 months from the date of repayment of the loan by the assessee. All these facts prove the genuineness of the transaction beyond doubt. We further find that the assessee has duly filed confirmation letters from the loan creditor by duly disclosing its income tax particulars. We find that the loan transaction of Rs. 2.5 crores have been duly reflected in the balance sheet of the loan creditor, which were also placed before the Id.AO. However, the Id.AO based on certain factual errors committed by him with regard to the status and creditworthiness of the loan creditor that it is assessee's own money, which has been laundered and found it is way back to his own coffers in the garb of loan from M/s. Bright Impex& Agencies Pvt. Ltd. From the facts and material available on record, we find that the assessee has duly proved his complete onus with regard to the identity of the creditor, genuineness of the transaction and creditworthiness of the creditor and had satisfied all the three ingredients of section 68 of the Act. We find that the Id.AO had not chosen to issue summon/notice u/s.133(6)/131 of the Act to verify the loan creditor and its veracity together with the creditworthiness of the loan creditor. We find that the wild allegation is made by the Id.AO that the assessee has laundered his unaccounted money/income and the sum is brought back in the form of loan. We find from the entries of the bank statement of the loan creditor that no cash was deposited in the account of the loan creditor immediately before issuing the cheques to the assessee .

...

Hence, the basic allegation that the assessee has laundered his unaccounted income is not prima facie proved by the Id. AO even during the remand proceedings when the Id.AO got the second opportunity to make necessary verification by using his statutory powers vested on him and provided to him in the statute. We find that the facts of the case clearly proved that the assessee had completely discharged his onus by filing all the documentary evidences in support of the loan transaction from M/s. Bright Impex& Agencies Pvt. Ltd in terms of section 68 of the Act. [Para 6 to 9]

b) H.R. Mehta -vs.- ACIT [2016] 387 ITR 561 (Bombay) - In the instant case, the loan was received and repaid vide account payee cheques. Addition under section 68 was deleted on the ground that Assessing Officer should have provided assessee material used against him apart from providing him an opportunity to cross examine deponents whose statements were relied upon.

c) CIT -vs.- Hitesh Somani [2014] 41 taxmann.com 152 (Gujarat) - In the instant case, the assessee had received certain advances from one MadhavVidharbh Estate Pvt. Ltd. for sale of its property. The bill, however, did not materialize since the assessee did not give NOC for transfer of property. The same was later on cancelled and money was returned. Additionally, the assessee had furnished the copy of the sale agreement, copy of the cancellation of the agreement, copy of PAN number of the intending purchaser and copy of acknowledgement of return of income of the proposed purchaser. In case of such deposits the assessee had produced a copy of confirmation from the party, copy of the acknowledgement of the return of income and also PAN number of said entity. Such facts were not controverted by the revenue nor contended that the documents produced by the assessee were not genuine. Addition under section 68 was deleted following the decision in case of CIT v. RanchhodJivabhaiNakhava [2012] 208 Taxman 35/21 taxmann.com 159.

18. After referring to the aforesaid case laws the Id.AR submitted that since the assessee company was a sick company and it had obtained money pursuant to JV agreement, which action/proposal was approved by the board meeting, wherein special director (Shri Abhijit

Biswas) appointed by BIFR was present and the JV project was proposed/planned to be implemented at the Industrial plot of the assessee in Silvassa (part of Union Territory-Dadra, Nagar & Haveli). And it was submitted by the Id. AR that “ technical know- how agreement” was entered into between M/s. Nouva Electtromeccanica Sud (“NES Italy) and assessee for manufacturing new products as is evident from the JV Agreement, which could be used to develop/up-grade the electrical products at the JV project at Silvassa. So according to Id. AR, the action of entering into JV with M/s. NCPL cannot be held to be an afterthought and moreover, since the amount advanced by M/s. NCPL was repaid at any rate cannot be added as income of the assessee. Therefore, he prayed that addition may be deleted.

19. Per Contra, learned CIT/DR vehemently opposing arguments of the Id. AR contended that when the search took place at the residences of S/Sh. Anand Sharma and Janardhan Chokhani on 2-7-2013, Investigation Wing came across the fact that they were both involved in running a racket in giving/providing accommodation entries, for which purpose they had formed many shell companies which were manned by dummy directors and M/s. NCPL was one among them. The search further revealed that M/s. NCPL had given accommodation entry to the tune of Rs. 16.18 Crs to the assessee, which fact is clear from the statement of Shri Anand Sharma recorded by Investigation Wing, wherein he admitted that M/s. NCPL is an entry providing shell company and its directors are dummy persons appointed by him. According to Id. DR, from the statement of Shri Anand Sharma, it is clear that the assessee company had given cash to M/s. NCPL and took the amount (Rs. 16.18 cr/Rs. 17.46 cr) in the form of cheque in lieu of commission. Based on this information, the AO of the assessee was alerted by Investigation Wing, who in turn took for scrutiny the assessment of the assessee. According to Id. DR, when confronted with these hard facts, the assessee had come with this make- belief story of JV etc. etc. The Id. DR drew our attention to the fact that in the audited financial report of the assessee it does not report any thing about the assessee entering into any JV or existence of any JV with M/s. NCPL. It was also brought to our notice that the assessee had given 5 (five) cheques dt. 31-03-2013 to M/s. NCPL, which were not encashed upto 31-07-2013 and since accommodation entry came to the notice of the department, the assessee some how managed to show that it had returned back the amount of Rs. 17.46 Crs before/between 26-

08-2013 to 29-01-2014 to M/s. NCPL. According to the Id. CIT/DR in the aforesaid facts and circumstances the AO & Id. CIT(A) both did not believe the genuineness of money (transaction) being returned back and made the impugned addition u/s. 68 of the Act which action of AO has been rightly confirmed by the Ld. CIT(A). Therefore, he does not want us to interfere with the impugned order of the Id. CIT(A).

20. Having heard the rival submissions and after carefully going through the records and the case laws brought to our notice, we note that the assessee company is in existence for the last four decades and is a Public Listed Company since the year 1956. And it was/ is engaged in manufacturing and selling of overhead transmission and distribution of line equipment, conductors and hardware accessories etc. It has two factories both are in Liluah, Howrah near Kolkata. It is noted that the assessee company had made reference to BIFR u/s. 15(1) of the Sick Industrial Companies Act (Special Company Act, 1985) (hereinafter referred to 'SICA' Act in short). Based on its audited & financial accounts as on 31-3-1999, the BIFR declared the assessee company as a "sick industrial company" within the meaning of section 3(1) (o) of the SICA Act vide its order dt. 28-03-2001 (page 4-5 of the P/B). When the proceedings was going on in the BIFR, the company closed down one of its plant/unit since there was lack of adequate fund/capital. It is noted that in between the year 1999 and 2007 several schemes for revival of the assessee company was placed before the BIFR, and while the proceeding was going on in the BIFR, the BIFR appointed Mr. Abhjit Biswas as a special director of the assessee company for five years (upto 5/5/2015) to look after overall activities, which fact is revealed from a perusal of letter dt. 8-7-2011 at page 11 of the P/B. By virtue of being special director (Sh. Abhijit Biswas), who was appointed by the Govt. of India, Ministry of Finance, Department of Economic Affairs, BIFR, Shri Abhijit Biswas was present during the assessee's company board meeting and his advice was adhered to for reviving the sick company (the assessee company) as per the Rehabilitation Scheme SS-09 sanctioned by the BIFR on 5-9-2009. As per the Scheme SS-09, assessee company should have positive net worth by 31-03-2014 and Shri Biswas being the representative of the BIFR and Govt. of India appointee advised the assessee company to infuse funds as working capital, so that the company can achieve its target as per Rehabilitation Scheme SS-09 sanctioned by the BIFR. Since Shri Biswas (special director of BIFR) was aware that being a sick industry financial institutions/Banks may not lent

money to the assessee, the assessee company explored possible means to infuse working capital and start productions at the earliest, so that it can revive and come out to its sickness i.e. before 31-03-2014. Shri Biswas took note of the fact that the assessee had its own research & development unit, which was duly approved by Ministry of Science & Technology (New Delhi) and had an unencumbered vacant industrial land situated at Silvassa (part of Union Territory-Dadra, Nagar & Haveli), which he advised to be used for the JV project by entering into tie up with like minded entrepreneur/investors for investment in the proposed JV project at Silvassa. According to him, with the new advance technologies, the assessee acquires by entering with M/s. NES Italy and the experience & expertise of the assessee company in the field of manufacturing electrical goods as well as having the unencumbered industrial land at Silvassa, it could attract investors for the JV project at Silvassa. So to put up a production plant and Silvassa was planned and project report was made accordingly. By this way, according to Shri Biswas (Special Director) was of the opinion that the assessee company would be able to produce new technically advance products and sell/export to different States Electricity boards and thus, the assessee company would be able to achieve the target set by Rehabilitation Scheme SS-09 of having positive net worth by 31-03-2014. Keeping the aforesaid advice of Mr. Biswas (special director of BIFR)the assessee/ its directors started looking for potential investors for J.V to set up factory at the vacant industrial Survey No. 16/2 in Silvassa (U.T) and simultaneously started taking steps to convert the vacant land/agricultural land at Silvassa for industrial purpose, which fact is evident from a perusal of pages 197-211 of P/B which are the copies of letters of the revenue department, Dadra & Nagar Haveli, Silvassa granting permission to assessee for use of agricultural land for industrial purpose vide letter dt. 25-04-2012 and page 202 of P/B is the cheque/receipt of Rs. 18,00,500/- dt. 24-4-2012 of Dadra & Nagar Haveli, Planning & Development Authority from the assessee on account of land conversion charges for converting agricultural land to industrial purpose. And it was brought to our notice, that without converting the agricultural land at Silvassa for industrial purpose, no investor is going to advance and fund taking the agricultural land as mortgage and the time was running out for achieving the target as stipulated by Scheme of BIFR (SS-09) supra. So, in advance itself the assessee got the land at Silvassa converted for industrial purpose.

21 Meanwhile looking for investors, the assessee company's director Shri A.N. Choudhuary came across an interested company M/s. NCPL which showed keen interest on the proposal of the JV to start factory at Silvasa with the assessee company. Then after a series of discussions and correspondences exchanged between M/s. NCPL and the assessee company, finally the assessee company's board of directors approved the JV agreement with them and got the funds as investment from M/s. NCPL to the tune of Rs. 17.46 crs. This JV agreement through which the assessee received Rs. 17.46 cr which was later re-paid by the assessee has been disbelieved by the AO & the Id. CIT(A) as an afterthought and cooked up story to cover the investigation wings discovery during the search on 02.07.2013 at the premises of Shri Anand Sharma and Shri Janardhan Chokhani, wherein Shri Anand Sharma admitted to the department that assessee received Rs. 16.18 cr from M/s. NCPL, which is a shell company of his and that transaction was only an accommodation entry. Based on the strength of the statement of Shri Anand Sharma, the AO took up the assessment of assessee for scrutiny and asked for explanation from assessee as to the amount of Rs.17.46 cr it received from M/s. NCPL. Pursuant to which the assessee explained that it received the sums of Rs. 17.46 cr from M/s. NCPL on the strength of a JV agreement proposed to start a factory at Silvasa to produce highly advanced products. The AO disbelieved the JV agreement produced before him. For that he relied upon the statement recorded by him of the director of M/s. NCPL, Shri Sushil Kumar Bhattar and drew adverse inference against the assessee and made the entire addition of Rs. 17.46 cr u/s. 68 of the Act, which action of AO has been confirmed by Id. CIT(A). So first of all we have to examine the JV agreement carefully and we note that the JV agreement between the assessee company and M/s. NCPL (M/s. Navratra Commercial Pvt. Ltd) was finalized and signed on 31-07-2012 before Sri B.K. Banerjee, NOTARY PUBLIC, CALCUTTA & 24 PARGANAS, C.M.M's Court, Compound, 2, Bankshall Street, Calcutta-700 001 and copy of the same is found placed at page-12 to 21 of the P/B. On a perusal of the same, we note that it was signed/executed on 31-07-2012. This JV agreement has been executed between the assessee and M/s. NCPL on a Non Judicial Stamp Paper of Rs. 50/- (Fifty Rupees) with the Seal affixed of Shri B.K. Banerjee, Notary Public, whose Regn No. 145/80 is found placed at page-12 of the P/B and a Notarial Certificate has been issued by Shri B.K. Banerjee, Notary, Regd. No. 145/80. This document (JV agreement) has been disbelieved

by the AO/ld. CIT(A). They have alleged the same to be an afterthought to cover the admission made by Shri Anand Sharma during search that M/s. NCPL was a Shell company and it provided accommodation entry to the assessee company to the tune of Rs. 17.41 cr. However, we note that the aforesaid document (JV agreement dt. 31.7.2012) was produced before the AO and if he had any doubt about the veracity of the document, he ought to have summoned the Notary Public and examined as to whether the JV agreement has been executed after the date given on it i.e. 31-07-2012 by inspecting the statutory books maintained by the Notary Public. And the AO could have summoned and examined the Stamp Vendor to find out the date of purchase of Stamp Paper by the assessee to find out as to whether the document was prepared ante-dated which would have brought to light that it was an afterthought action of assessee or not, which exercise unfortunately the AO has not bothered to inquire at all. Without carrying out any inquiry by collecting some evidence/material to find any infirmity in the document from which some adverse inference could have been drawn, instead the AO had simply brushed aside the notarized document by simply stating that he disbelieved it on the basis of conjectures and surmises which action of AO cannot be countenanced for the following facts and circumstances also brought to our notice. We note that in order to show the bona fide of the JV agreement the ld. AR drew our attention to the project report prepared pursuant to the Joint Venture agreement signed between the assessee (Modern Malleables Ltd & M/s. NCPL), which is found placed at pages 22-38 of the P/B. From a perusal of the same, it is noted that the assessee company owns a plot of land admeasuring 72,500 sq.mtrs situated at Survey No. 16/2, where the JV proposed to set up a factory and manufacture the following items:-

- EHV Transmission Line Hardware & Accessories
- Overhead Cable & Conductors
- Accessories for Earthwire
- Distribution Line fittings
- Optical Fibre fittings

22. We note from a perusal of page-25 of P.B reveals that as per the J.V (joint venture) a factory was to be set up which is to be operationalized by 1st July, 2013. We find copy of the Project Plan wherein the site plan, plan of workshop, office building, etc. is found placed at 36 of the P/B. A perusal of pages-34 & 35 shows the estimated project

profitability report/balance sheet. We also note that the assessee had entered into a technical “know- how” agreement dt. 3-3-2009 between the assessee & M/s. Nouva Eletromeccanica Sud (“NES Italy), copy of the same is found placed at pages 191-196, signed by assessee’s Chairman Biswanath Jhunhunwala & Chairman Giovani Ferrero. From a perusal of page-192 of P.B it is noted that NES Italy is a pioneer in designing and supplying significant quantity of spacers dampers system to many important utilities in Italy and abroad. By this agreement, M/s. NES Italy would provide the assessee with the “ technical know” to design spacers dampers including development & up gradation of the unit and production of advanced products. We note that this agreement aided the assessee to manufacture spacers dampers in India and for the services rendered by M/s. NES Italy, the assessee had to make payments in Euro as NES license fees and cater for the cost of visit of their engineers to assessee’s plant etc. is spelled out in the said agreement, which is valid for 10 years, which tie up the assessee intended to use in the JV project at Silvasa. The said agreement was signed on 3-3-2009 by assessee’s Chairman Shri Biswanath Jhunhunwala & Chairman of M/s. NES Giovani Ferrero which is valid for ten years. We also note from the P/B that there were several correspondences between the assessee and M/s. NCPL, some copies are found placed at pages 114-116 of the P/B. A perusal of Pages 117-121 of P/B shows cheques receipts of Rs. 17.46 crs of Rs.17.46 crs. Extracts of minutes of board meeting of assessee held on 31-07-2012 is found at pages-128 of the P/B. Extracts of Minutes of meeting of Board of Directors dt. 15-5-2012 is found placed at page 186 of the P/B, wherein we note the resolution taken which is reproduced as under:-

”RESOLVED THAT that Mr. Vinay Kumar Jha, Sr. Vice President & Company Secretary of the assessee company was authorized to act on behalf of the assessee in all matter regarding the generation of funds from strategic investors for the beneficial interest of the assessee company.

23. The aforesaid events as records speaks we find has taken place very well before the search at Shri Anand Sharma’s premises on 2.7.2013, so the Id. AR contended as to how the AO came to the conclusion that the JV agreement in the aforesaid back drop can be termed as an afterthought to cover the accommodation entry as alleged by Shri Anand Sharma. Moreover, the following events also shed light to the fact of events taking place before and after the JV agreement was finalized, which were also before the search on 2nd July 2013.

24. We note that on 28-05-2012 M/s. NCPL (Navratra Commercial P. Ltd) had written a letter to the assessee/through Mr. A.N. Chowdhury, Director of assessee and expressed interest in the JV and pursuant to which the assessee responded positively vide letter dt. 14-06-2012 to M/s. NCPL, wherein we note that there were correspondence between them and discussions about the proposed JV for participating in the business of manufacturing of overhead transmission line, hardware and conductor accessories etc. in Silvassa, Union Territory of Dadra & Nagar Haveli. A letter dt. 23.06.2012 from M/s. NCPL is seen placed at page 189 which is the correspondence from M/s.NCPL in respect of proposed visit to Silvassa land-Survey No. 16/2 and discussion on the preparation of the draft of JV agreement prepared by Mr. A.N. Chowdhury. A perusal of page-190 which is the assessee's letter dt. 6-7-2012 written to M/s. NCPL regarding establishment of new unit by JV agreement. And a perusal of pages 197 -211 of P/B are the copies of letters of the revenue department, (Dadra & Nagar Haveli, Silvasa) granting permission to assessee for use of its agricultural land for industrial purpose vide letter dt. 25-04-2012 and page 202 of P/B is the cheque receipt of Rs. 18,00,500/- dt. 24-4-2012 from Dadra & Nagar Haveli, Planning & Development Authority to the assessee on account of land conversion charges for conversion to industrial purpose.

25. And we note the JV agreement was finally signed on 31.7.2012 and the fund was infused by the M/s. NCPL for the proposed JV project at Silvasa after preparation of the project report etc. as discussed (supra) and assessee took steps to operationalize the unit by 1st July, 2013. So that they could achieve the target of attaining the positive net worth by 31-3-2014 as set by Rehabilitation Scheme SS-09. So from all the facts discussed on the basis of documents, we have referred to, we cannot hold or accept the view of AO or Id. CIT(A) that to cover the incriminating statement of Shri Anand Sharma (3rd party), which was revealed during the search conducted on 2-7-2013 (at Shri Anand Sharma's place), that this amount of Rs. 17.46 crs was nothing but assessee's own money given as cheque through his shell company, M/s. NCPL in lieu of commission. In the light of the evidences adduced before us which were placed before the AO/ Id. CIT(A), we note that the authorities below could not controvert the veracity of the documents produced (supra) and discussed in detail by us. Thus, based on the facts and circumstances discussed, we cannot accept the view of the lower authorities that the JV agreement was an afterthought to cover the allegation

made by Shri Anand Sharma discovered by the Investigation Wing during search at his premises 2.7.2013.

26. Coming back to the facts as revealed by documents placed before us, we note that later on since the assessee company could not perform as per the projection it made before it, M/s. NCPL withdrew from the JV project and then M/s. NCPL cancelled the said JV by letter dt. 20-03-2013 blaming the assessee for non-performance and directed the assessee to refund the entire amount of Rs. 17.46 crs., which letter is found placed at page 213 of paper book. And through this letter M/s. NCPL gave notice to the assessee company that in case of failure to repay the amount then they would enforce the mortgage of the assessee's property in Silvassa, Union Territory of Dadra, Nagar & Haveli. Thereafter, we note that the assessee has repaid to M/s. NCPL Rs. 17.46 cr. by 21.4.2014 (AY 2015-16). This amount of Rs. 17.46 cr. we note has been taxed by AO u/s. 68 of the Act and the bone of contention in this appeal is whether the addition made by AO and confirmed by Id. CIT(A) can be sustained in the light of the aforesaid facts.

27. We note that the addition u/s. 68 of the Act of Rs. 17.46 crs was made by the AO on the basis of two statements. One on the strength of the statement recorded by Investigation Wing during search conducted in the premises of Shri Anand Sharma on 2-7-2013 and second on the basis of the statement recorded by the AO of Shri Sushil Kumar Bhattar (director of M/s. NCPL).

28. We have already noted that when the AO asked for explanation in respect of infusement of Rs. 17.46 crs; the assessee had explained about the JV agreement with M/s. NCPL for the project of setting up factory at Silvassa. We have already found that the action of the AO was without conducting any inquiry about the veracity of the documents produced before him during assessment proceedings, the AO ought not to have brushed aside the documents to draw an adverse inference against the assessee only on the strength of statements which we will discuss infra.

29. Now, we would like to deal with other foundation of the AO i.e statement of Shri Anand Sharma which was recorded by the Investigation Wing when they searched his premises on 02.07.2013. This means that the Shri Anand Sharma's statement was recorded in a third party premises wherein he has admitted to be running a racket with the aid of several shell companies wherein he has appointed several dummy directors and M/s. NCPL

is one among it and has given loan/advance/share application money to the tune of Rs.16.18 cr. as accommodation entry in the form of cheque for a commission. This information prompted the AO to scrutinize the assessment of the assessee company. When the AO asked for explanation in respect of the money received from M/s. NCPL the assessee brought to the notice of the AO about the JV agreement to start a manufacturing facility at Silvasa and since it could not materialize the money was returned back to M/s. NCPL and filed all the documents before him. However, the AO brushed aside the documents as an afterthought on the part of the assessee to cover the incriminating statement recorded by the Investigation Wing against the assessee on 02.07.2013. So, we have to examine whether Mr. Anand Sharma's statement can be relied upon to draw adverse inference against the assessee. As we noted earlier, the statement was recorded by the search team when they searched Shri Anand Sharma on 02.07.2013 at his office/residential premises. The statement is riddled with factual infirmities like the amount, nature of transactions etc as pointed out by the assessee. We note that the statement was recorded admittedly behind the back of the assessee. The complete set of recorded statements of Shri Anand Sharma has not been given to the assessee. Before relying upon any material which is adverse against the assessee, the AO is duty bound to confront the assessee with that adverse material and furnish a copy of it so that assessee would be able to explain its stand or lay its defense before the AO and the AO should allow assessee to produce documents in its favour/defense. Still if the AO is not satisfied like in this case Shri Anand Sharma should have been summoned and allowed to be cross examined by the assessee which has not been done in this case. Neither the AO had summoned Shri Anand Sharma and independently recorded his statement nor allowed the assessee to cross examine Shri Anand Sharma, which vitiates the statements of Shri Anand Sharma which has been recorded on 02.07.2013 and, therefore, the statement of Shri Ananda Sharma cannot be relied upon by the AO and it has to be discarded. For this proposition, we rely on the Hon'ble Supreme Court's decision in Andaman Timbers (supra) and Odeon Builders (supra).

30. Now coming to Shri Sushil Kumar Bhattar's statement, we note that he was the director of M/s. NCPL and whose statement has been recorded by the AO on 16.03.2016 to support the allegation made by Shri Anand Sharma that M/s. NCPL was an accommodation entry provider and there was no genuineness about the JV agreement between M/s. NCPL and

the assessee. We note that AO had relied upon the statement recorded by him of Shri Sushil Kumar Bhatte on 16-03-2016, wherein he (Shri Bhatte) has made certain statements, which goes on to show that he was not aware of the JV agreement or about amount of transaction etc. etc. According to the Id.AR, the statement recorded by the AO of Shri Sushil Kumar Bhatte (director of M/s. NCPL) cannot be relied upon because it was taken under coercion and duress and that Shri Sushil Kumar Bhatte was not conversant with the English language and he had requested the AO to ask question in Hindi or Bengali. But the AO asked and recorded answers in English so, Shri Bhatte never understood what was recorded by Ao and resultantly was not aware of the contents of the recorded statement. In short, Shri Bhatte retracts the adverse statements recorded by the AO on 16.03.2016 on 31.03.2016 by way of an affidavit sworn before Judicial fist Class Alipur. And also Shri Sushil Kumar Bhatte had lodged a complaint with the Kasba Police Station on 31-03-2016 against wrong recording and use of coercive action against him.

30. We find that Shri Sushil Kumar Bhatte director of M/s. NCPL had preferred a complaint to the Officer in Charge, Kasba Police Station which has been received by the Police vide G. Diary No. 2141 dt. 31-03-2016, found placed at pages-214-215 of the P/B. Moreover, we note from a perusal of Pages 216-217 of the P/B that an affidavit has been solemnly sworn/affirmed by Sri Sushil Kumar Bhatte which has been executed before the Judicial Magistrate, 1st Class Alipur, wherein he has stated that he is the director of M/s. NCPL and that a Joint Venture Agreement dt. 31-07-2012 was made between the assessee and M/s. NCPL. And that M/s. NCPL had agreed to finance amounting to Rs. 17.46 crore to set up the manufacturing units at Silvasa and as a security the assessee had offered an equitable mortgage of land situated at Silvasa. And that due to unavoidable circumstances, the JV agreement dt. 31-07-2012 was terminated and the assessee had duly refunded the full amount back to M/s. NCPL. Mr. Bhatte, in his sworn affidavit had further stated that on 16-03-2016 the AO [Dy. Commissioner of Income Tax (DCIT), Circle 15(2), Room No. 615, 6th Fl., 110 Shantipally, Kolkata-107] summoned him through the assessee company to be present before him for an enquiry in respect of certain facts revealed during search and seizure operations conducted on 2.7.2013 at the residence and office premises of one, Mr. Anand Sharma and Mr. Janardhan Chokhani. Moreover, we note that Mr. Bhatte of M/s. NCPL in the said affidavit swears that he does not know Mr. Anand Sharma or Mr.

Janardhan Chokhani. It was also stated in the affidavit that he had brought to the notice of AO/DCIT, that he is not conversant with English and requested him to ask question either in Hindi or Bengali. But according to Mr. Bhattar, his request was turned down and the AO kept on recording in English without him understanding the contents of the recorded statement. According to him (Mr. Bhattar) he is a Marwari and does not have basic knowledge of English and he is only educated upto class II. According to him, his request to AO to ask questions in Hindi or Bengali was ignored and the Id. DCIT (AO) recorded the questions and answers in English which action resulted in him not understanding the content of the purported recorded statement. According to him, further the Id. DCIT (AO) did not read over the statement recorded by him or translated the same. We note that these facts were duly sworn & affirmed by Sri Sushil Kumar Bhattar, director of M/s. NCPL by way an affidavit on Non Judicial Stamp Paper before the Judicial Magistrate, 1st Class Alipur, which fact has been acknowledged by the AO in his Remand Report (infra), but dismissed by him as an afterthought. However, we note that the AO has not expressed his comments or defense in the remand report in respect of the allegation made by Shri Sushil Kumar Bhattar that despite him informing his ignorance of English language and his request to ask question either in Hindi or Bengali was ignored by AO and was recorded in English and it was not read over to him or translated to him, which implies that AO recorded whatever he wanted to record without the knowledge of Shri Bhattar. So this statement in the back drop of all developments and allegation and which has been retracted cannot be a reliable piece of material and at any rate cannot be the basis for drawing adverse inference against the explanation given by the assessee in respect of infusement of Rs.17.46cr .

31. We also note that a Remand report was called for from the AO by the Id. CIT-A, which is found placed at pages 224-225 of the P/B wherein the AO gives his report as under:-

1. On perusal of the pages 09 to 19 of the paper books, it appears that page 09 to 11 relates to BIFR proceedings whereas pages bearing No. 12 to 19 relates to Joint Venture Agreement duly signed by the assessee and M/s.Navratra Commercial Pvt. Ltd. It is factually correct that sum of Rs.17.46 Crores was given to the assessee company by M/s Navratra Commercial Pvt. Ltd. during the F. Yr. 2012-13 and the assessee company kept it up to 26.08.2013 although no business activities in the said Joint Venture had taken place. It is also correct the assessee company had returned the said amount to M/s Navratra Commercial Pvt. Ltd. from 26.08.2013 to 29.01.2014.

2. Having gone through the submission (Page No.186 to 217) made before the CIT(A),it is amply clear that:-

(a) Payment of Rs.27,70,000/- to Planning and Development Authority, Dadar and Nagar Haveli, Silvassa for grant of NA use permission in respect of land bearing Survey No.16/1. (6-60Hect.) & 16/2 (7-25 Hect.) of village Karad for Industrial purpose was made by the assessee company itself, on 24.04.2012, i.e. much before conceptualization of the alleged Joint Venture. So, the payment of such fees did not have bearing on the JV, instead it was purely confined to the assessee company. Moreover, no materialization of the Joint Venture came on the ground instead it remained on papers only.

(b) ShriSushilKumarBhatter, one of the director of the paper company, i.e. M/s NavratraCommercial Pvt. Ltd. that had been under management & control of ShriAnand Sharma, a renowned accommodation entry provider, had recorded his Statement u/s 131 of the Act under oath voluntarily on 16.03.2016 wherein he categorically expressed hisunknowingness regarding the transaction of money between the M/s Navratra Commercial Pvt. Ltd and M/s Modern Malleables Ltd. were taken place during the F. Yr. 2012-13. Such recording of the statement before the assessing officer is a civil in nature. An FIR was lodged against the DCIT, Circle-15(2), Kolkata on 31.03.2016 though the assessment order has already been passed u/s. 143(3) of the act on 30.03.2016. Further Mr. Bhatter had also undertaken before First Class Magistrate stating that the statement was taken by the DCIT, Circle-15(2), Kolkata under pressure. These are afterthought mechanism adopted by the assessee company through deponent and the same is not acceptable.

32. We note from a perusal of the remand report that the AO did not find any fault with the said JV agreement duly signed between the assessee and M/s. NCPL. The transfer of money of Rs. 17.46 cr. to the assessee by M/s. Navratra Commercial Pvt. Ltd [M/s. NCPL] has also been accepted by the AO. The AO notes that the assessee company kept the money with it upto 26-08-2013 without carrying out any business activity as stated in the JV. The AO accepted that the assessee company returned Rs. 17.46 cr back to M/s. NCPL from 26-02-2013 to 21-04-2014. We also note from perusal of the said remand report that AO has made certain adverse observation about the assessee making a payment of Rs. 27,70,000/- to Planning & Development Authority, Dadara & Nagar Haveli, Silvassa for conversion of agricultural land at Silvassa for industrial purpose. We note that the only aspect highlighted by the AO in respect to the payment of Rs. 27,70,000/- i.e fee for conversion of land on 24-04-2012, is that it was made before conceptualization of the JV (joint venture). We note that the payment was made for conversion of land on 24-4-2012 and the permission was sought for conversion of the use of land as industrial land by the assessee itself does not in any manner affects the JV project in the light of the explanation given by assessee. It has to be kept in mind that the assessee at that point of time was continuing as a SICK Unit and was looking out for potential investor, who was willing to fund for setting up the JV Project/factory/unit in Silvassa and this land was an unencumbered immovable property of assessee which was undisputedly an agricultural land. So when assessee's director need to convince an investor to fund/ join the JV first of

all the agricultural land needed to be converted for utilization for setting up industrial project and any prudent investor would demand security for its funds, which the assessee was ready to mortgage its 7400 sq. mtrs of land at Silvasa with the funding investor. And in order to show the bonafide of JV Project the assessee got the agricultural land at Silvasa converted for use as industrial land. Therefore, the assessee had converted the land for utilization for industrial purpose and for setting up the proposed manufacturing unit as per the JV agreement/project and the JV agreement was signed on 31.07.2012 after sanction and after number of correspondence and discussion. Therefore, nothing turns against the assessee on this count.

33. We also note from the remand report that the AO was of the opinion that Shri Sushil Kumar Bhattar's decision to lodge a FIR on 31-03-2016 was an afterthought when the assessment order in respect of assessee was passed on 30-03-2016 u/s. 143(3) of the Act. We note that assessee has filed the complaint dated 30/3/2016 before the Police Station making the allegation stated therein which we have discussed, wherein Shri Sushil Kumar Bhattar has made specific allegation, which has not been controverted by the AO like he stated that he was only educated upto class II, and he was not conversant with English language and he requested the AO to ask questions in Hindi or Bengali and that even the statement which was recorded in English was not read over to him or translated to him. Without even attempting to give some explanation on these allegations the AO has merely made a remark that the action resorted to by the assessee of filing police complaint and the sworn affidavit before judicial first class Magistrate was an afterthought, cannot be countenanced and so the recorded statement of Shri Sushil Kumar Bhattar by the AO cannot be acted upon to draw any adverse inference against the assessee. Moreover, even if the statement of Shri Sushil Kumar Bhattar recorded by the AO is incriminating against the assessee, then also this statement which is adverse against the assessee ought to have been confronted with the assessee and the assessee given an opportunity to cross-examine, which exercise the AO has not carried out to do, which makes the statement of Shri Sushil Kumar Bhattar fragile and cannot be used against the assessee and for the various reasons discussed it has to be discarded. For this proposition, we rely on the Hon'ble Supreme Court's decision in Andaman Timbers (supra) and Odeon Builders (supra).

34. Other adverse aspect as noted by the AO in the remand report is that Rs. 17.46 crs was not transferred to the J.V account instead, it was transferred to the assessee company's account and the amount was credited in the books of account of the assessee company. Therefore, according to the AO section 68 of the Act is attracted. We note that JV Agreement is between M/s. NCPL and assessee and the terms and conditions of the JV has been stated in the JV agreement found placed at page 1 to 21 of the paper book. From a perusal of the said agreement there is no clause which stipulated that the amount of Rs.17.46 cr. provided by M/s. NCPL should be deposited in the Joint account opened together. So the AO's observation is nothing but suspicion based on conjecture and surmises. From the facts discussed (supra), we cannot subscribe to the AO's view that JV agreement of the assessee with M/s. NCPL was an afterthought to cover the statement of Shri Anand Sharma that M/s. NCPL was an accommodation entry provider and the JV agreement was an eye wash.

35. Thus, when we sum up the entire case we note that the statement of Shri Sushil Kumar Bhatte as recorded by AO as well as of that of Shri Anand Sharma cannot be relied upon to support the adverse view of AO. Coming to the statement of Shri Anand Sharma we note that AO had based his adverse view on the strength of the statement of Mr. Anand Sharma, which was recorded by the Investigation Wing while search happened on 2-7-2013 on his premises means at the third party premises without even giving the complete copy of the recorded statement by Investigation Wing to the assessee. We further note that AO has not even independently examined Shri Anand Sharma and not allowed the assessee to cross examine Mr. Anand Sharma. Therefore, his statement cannot be relied upon for drawing any adverse finding against the assessee. Even Mr. Bhatte's (Director of M/s. NCPL) statement cannot be relied upon by the AO as it was taken behind the back of the assessee. We also note that within 15 days, he has retracted the statement recorded by AO by a sworn affidavit before the 1st class magistrate. We note that Mr. Bhatte was made to sign the statement which was recorded in English without him knowing the contents of the statements recorded. For argument sake even if the retracted affidavit of Mr Bhatte is kept aside, still the statement of Mr Bhatte cannot be relied upon by the AO to draw adverse inference against the assessee because he did not give an opportunity to assessee to cross examine Mr

Bhatter. So we note that both the statements of Shri Anand Sharma & Shri Sushil Bhatter cannot be relied upon to support the addition made by AO.

36. Further, we note that M/s. NCPL had filed following documents to substantiate its identity, creditworthiness and genuineness of the transaction:-

- Ledger copy of NCPL for F.Y 2012-13
- Bank statement of all Banks of the Company for F.Y 2012-13 and 13-14
- Cash Book for FY 2012-13 and 2013-14
- Bank Book for Financial Year 2013-14
- Copy of ITR Acknowledgement Return, page 263 of the P/b
- Balance sheet & P & L account of NCPL as on 31-3-13, 264-265 of the P/b
- Copy of intimation issued by Income Tax department u/s. 143(1) of the Act of NCPL for the AYs 2015-16, '16-17, 17-18 and 18-19, pages 266-269 of the P/b.

37. From a perusal of the balance sheet of M/s. NCPL, we note that as on 31-3-2013 M/s. NCPL had share capital of Rs.19,27,000/- and Reserve & Surplus of Rs. 18,07,40,956, thus total of Rs. 18.26 crs. We also take note of the copy of the accounts of the assessee for the year ending on 31-03-2013, placed at pages 226-262 of the P/B. From the aforesaid documents, we cannot subscribe to the allegation of the AO that assessee in order to wriggle out of the search conducted on 2.7. 2013 at the premises of Mr. Anand Sharma and Mr. Janardhan Chokhani and their statements before the Investigation Wing that M/s. NCPL is a bogus company is engaged in giving/providing accommodation entry, the assessee had come out with a story of JV and is an afterthought.

38. Moreover, we also note from a perusal of the JV agreement dt. 31-7-2012, that it was executed on Non Judicial Stamp Paper of Rs. 50/- and in case if the AO had any doubts about the veracity of the JV agreement, then the AO had powers to investigate and find out the truth which could have come to light whether the Stamp Paper was purchased on 31.7.2013 or was procured later and JV agreement was executed ante-dated by summoning the stamp vendor itself. The AO could have summoned the Notary Public and got the statutory books maintained by him and inspected/verified to see whether the date on which the JV agreement executed was on 31.07.2012 is correct or not, which exercise the AO has

not carried out and he based his adverse finding on the basis of conjectures & surmises. And it is a matter of fact, that the assessee company was declared as a 'sick industry' by BIFR. The BIFR had appointed Shri Abhijit Biswas as a special director of the said sick company and based on the board meetings in which Shri Abhijit participated only the resolution to infuse funds through JV was passed and one of the director of the assessee company, Shri A.N. Chowdhury had brought an investor, M/s. NCPL, which had funded of Rs. 17.46 crs to the assessee company for which an equitable mortgage of industrial land situated at Silvassa in Dadra & Haveli (Union Territory) was given to M/s. NCPL. Later when the JV project could not materialize, M/s. NCPL cancelled the JV and as such the money was returned back to M/s. NCPL by the assessee and the mortgage was released. Additionally, the assessee had furnished the copy of the JV, copy of the cancellation of JV, and in addition the assessee produced documents to prove the identity, creditworthiness and genuineness of the transaction with M/s. NCPL, M/s. NCPL's PAN is AACCN5258J and that M/s. NCPL is a regular income tax assessee the ITR intimation is of AYs 2015-16, 2016-17, 2017-18 and 2018-19 are seen at pages 266 to 269 of the paper book, the director of M/s. NCPL has filed an affidavit sworn before the Judicial 1st class Magistrate wherein he has admitted that M/s. NCPL provided Rs.17.46 cr. to set up manufacturing unit at Silvassa along with the assessee and that the JV has been terminated and that the assessee had refunded the full amount of Rs.17.46 cr. back to M/s. NCPL. These documents were filed before the authorities below and the documents could not be controverted or its veracity was assailed before us as not genuine documents, therefore, the addition made u/s. 68 of the Act only on the basis of two statements which could not stand the scrutiny of law, was warranted and therefore, the addition cannot be sustained as per law. On similar facts, the Hon'ble Gujarat High Court in the case of CIT v. Hitesh Somani, 221 Taxman 119 (Guj HC) has held as under:

"3. From the above, it can be seen that assessee's case was that, it had received certain advances from one MadhavVidharbh Estate Pvt. Ltd. for sale of its property. The sale, however, did not materialize since the assessee did not give NOC for transfer of property. The same was later on cancelled and money was returned. Additionally, the assessee had furnished the copy of the sale agreement, copy of the cancellation of the agreement, copy of PAN number of the intending purchaser and copy of acknowledgement of return of income of the proposed purchaser. In case of such deposits the assessee had produced a copy of confirmation from the party, copy of the acknowledgement of the return of income and also PAN number of said entity. Such facts were not controverted by the revenue nor contended that the documents produced by the assessee were not genuine.

In that view of the matter, in our opinion, the Tribunal correctly followed the decision of this Court in case of CIT v. Ranchhod Jivabhai Nakhava[2012J 208 Taxman 35121 taxmann.com 159. No question of law arises. Tax appeal is dismissed."

39. The other deficiency pointed out by the AO to draw adverse view is that the audit report of the assessee does not mention the existence of any J.V with assessee. We note that the auditor has not reported the event because the M/s. NCPL had terminated the JV agreement in Feb., 2013 itself and that the assessee company had issued 5 cheques of Rs. 17.46 crs on 31/3/2013 itself in the name of M/s. NCPL. Therefore, the auditor has not reflected the same in his audit report prepared as on 31/3/2013. Thus, we do not subscribe to the views taken by the AO/ld. CIT(A) that the assessee had infused its own fund through accommodation entry provider, M/s. NCPL for the reasons discussed supra. Therefore, we delete the addition of Rs. 17.46 crores as confirmed by the ld. CIT(A) made u/s. 68 of the Act.

40. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 20th March, 2020.

Sd/-

(P. M. Jagtap)
Vice President

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated :20th March, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant –M/s. Modern Malleables Limited,53, MirzaGhalib Street, Kolkata-700 016.
- 2 Respondent –DCIT, Circle-8(1)Kolkata.
3. CIT(A)-5 , Kolkata. (sent through e-mail)
4. CIT, Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

By order,

/True Copy,

Assistant Registrar