

आयकर अपीलीय अधिकरण, 'जी' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "G" BENCH

सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं संदीप गोसाई, न्यायिक सदस्य
Before S/Sh. B.R. Baskaran, Accountant Member &
Sandeep Gosain, Judicial Member

आयकर अपील सं/.ITA No.2066/Mum/2013,निर्धारण वर्ष/Assessment Year-2007-08
आयकर अपील सं/.ITA No. 2071/Mum/2013,निर्धारण वर्ष/Assessment Year- 2008-09

DCIT-Central Circle-40 Room No.653, 6 th Floor, Aayakar Bhavan, M.K. Road Mumbai-20.	Vs	M/s.Gibs Computers Ltd. Radha Bhavan, 121 Nagindas Master Road Mumbai-400 023. PAN: AABCG 0096 L
--	----	---

(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : S/Shri Rajiv Khandelwal and Neelkanth Khandelwal
राजस्व की ओर से/ Revenue by : Ms. Sasmita Misra--CIT-DR,

सुनवाई की तारीख/ Date of Hearing : 10.02.2016
घोषणा की तारीख / Date of Pronouncement : 04.03.2016

ORDER

लेखा सदस्य बी.आर. बास्करन के अनुसार/ Per B.R. Baskaran, AM-

The revenue has filed these two appeals challenging the orders passed by Ld CIT(A)-36, Mumbai for assessment years 2007-08 and 2008-09. Since issue urged in both the appeals is identical in nature, these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the additions made by the AO u/s 68 of the Act.

3. We heard the parties and perused the record. The assessee herein is a public limited company engaged in the business of investments in securities. During the years under consideration, the assessee had raised capital by way of allotment of preference share capital and also through receipt of share application money. During the course of assessment proceedings, the assessee furnished all the details relating to the share application money as well as preference share capital., i.e., according to the assessee, it has discharged the initial burden placed upon it u/s 68 of the Act. It appears that the revenue has conducted investigation in the hands of some of the companies from whom the assessee had received share application money as well as the preference share capital. It appears that the directors of those companies had deposed that they were providing only accommodation entries only. Based on those statements, the AO assessed the cash credits in the hands of the assessee in both the years. The Ld CIT(A), however, deleted the addition on the basis of orders passed by the Tribunal in the hands of the sister concerns of the assessee, viz.,M/s Chat Computers Ltd (ITA No.3859/Mum/2009 dated 22-07-2011) and M/s Netscape Software Ltd (ITA No.3852/Mum/2009 dated 19-10-2011) and also the decision rendered by the Tribunal in the assessee's own case relating to AY 2005-06 & 2006-07 passed in ITA No.1715 and 3858/Mum/2009. Aggrieved, the revenue has filed these appeals before us.

4. We have gone through the orders passed by Ld CIT(A) on the issue disputed before us. For the sake of convenience, we extract below the operative portion of the order passed by Ld CIT(A) for the assessment year 2007-08:-

"Ground No.3 is against making addition of Rs.5,61,00,000/- and a sum of Rs.17,50,00,000/-, being amount received on account of preference capital on the ground that the. same represented appellant's own unaccounted income and was therefore unexplained cash credit u/s.68 of the I.T.Act. Ld. A.O. has dealt with this issue in great detail and has relied on the statement of one Shri Kishan Kumar Verma, resident of Howrah. Ld. A.O. has also adverted to the fact that Director of the appellant company, Shri Kaushik: Chhota Lal Shah

denied to have paid any cash to any of the companies. Further, the Ld. A.O. has made a reference to the opportunity given to the appellant to cross examine the share applicants on 13.12.2010 and 21.12.2010 respectively. In this connection, it is also pertinent to mention that the appellant vide its letter dated, 12.12.2010 had stated the following before the A.O.

"It In this connection, we would like to inform you that we have filed all the relevant documents received on application, and thereafter, as required by you, to prove the genuineness of the transactions - please refer our letter dated 2nd Dec. 2010. In your aforesaid letter you have required us to cross examine the parties without calling them that is, you have required us to produce the parties, however, as indicated earlier and as you are aware the companies are based in Kolkata and hence, we cannot insist them to travel to Mumbai for cross. examination. Moreover, they are your witness and hence, you are required to produce them for cross examination. Further, you are vested with powers under section 131 to issue them summons and produce them for cross examination."

During the course of appellate proceedings, the Ld. A.R. has made a detailed submission in the form of 5 spiral bound paper books which according to the Ld. A.R. were available before the Ld. A.O. as well. These paper books basically contain the details of amount received, share application forms, resolution, memorandum of association, acknowledgement of returns of income, annual accounts, net worth, balance sheet, bank statements as well as confirmations of various share holders or the persons making share application to whom shares were yet to be allotted.

It has further been stated by the Ld. A.R. that the issue of share application money being taxed by the Ld.A.O. and which were received from several Kolkata based companies was also a subject matter of appeal before Hon'ble ITAT, Mmnbai in appellant's own case for A.Y.2005-06 & 2006-07 as well as in two other related cases viz. Chat Computers Ltd. and Netscape Software Ltd. in ITA Nos. 1715 and 3858/M/09 dated 25.01.2012 , ITA No.3859/M/09 dated 27.7.2011 and ITA No.3852/M/09 dated 19.10.2011 respectively. It has been stated that under similar circumstances where statements of various individuals were recorded by the Investigation Wing at Kolkata and where no opportunity was given to the appellants to cross examine the share applicants during the course of assessment proceedings, Hon'ble ITAT deleted the additions made u/s.68 of the LT. Act on the ground that the entire share application money were received through account payee cheque/draft and the share application money was found in the bank account of the investing companies through account payee cheques and not through any cash transaction. Hon'ble ITAT further held that statements recorded during the course of investigation by the Investigation Wing, Kolkata without any corroborative evidence had no evidentiary value. It may be pertinent to advert to the decision of the Hon'ble ITAT in the appellant's own case for A.Y.2005-06 & 2006-07 where Hon'ble ITAT. Mumbai vide order dated 25.01.2012, inter alia, held/noted as under:-

".....

14. It is to be noted that it is not the case of any additional evidence or fresh material produced by any of the parties before us which requires examination or investigation to verify the correctness of the new facts first time brought before us. The case of the revenue is that the cash moved from the assessee routed though various. level and

then reached to the assessee in the form of share application money. The stand of the revenue is not in consonance with the statements of the directors of the investing companies which is the basis of the investigation report as well as addition by the AO. In their statements the directors stated to have received cash from assessee for investing in the preferential share of the assessee company, whereas, this fact was not found to be correct from the record and the revenue also took a stand that the cash was not directly given to the investing companies but routed through various levels. When it was found by the investigating unit as well as recorded by the AO that the fund in the bank account of the investing companies was deposited through a/c payee cheques than it is apparent that the statements of the directors are in total contradiction of the facts emerged from the record as well as stand of the revenue. Hence the said statements do not support the case of the revenue and the reliance place by the AO on such statements is highly misplaced and improper. When the stand of the revenue is in total contraction of the material on record then in view of the latest decision of the Hon'ble Delhi High Court in the case of Oasis Hospitalities P Ltd (supra), we are of the considered opinion that the issue can be decided on merit and need not to be remand to the record of the AO because at the time of the order for the AY 2005-06, the coordinate Bench of the Tribunal was not having the benefit of the decision of the Hon'ble Delhi High Court in the case cited supra. Further in view of the decision of hon'ble Gujarat High Court in case of Rajeh Babubhai Damania (supra), we see no reason for giving the A.O. any further innings to fill up the lacunas or lapses in the assessment which would cause a great injustice to the assessee.

15. In view of the above discussion and the facts and circumstances of the case, the share application money cannot be treated as income of the assessee company until and unless it is proved beyond doubt that the assessee's own money has come back through some closely related applicant. Once the identity of the applicant. is disclosed and found as correct then, even if the said transaction is suspected by the revenue authorities, the same cannot be treated as income of the assessee company which is a public limited company. Accordingly, we delete the addition made by the Assessing Officer and confirmed by the CIT(A) on this account. However, we may clarify that our findings on the issue are based on particular facts of this assessment year and therefore, would not affect the respective rights of the parties for the other assessment years. "

10. In the case of Netscape Software Ltd.(supra), the co-ordinate bench has held as under:-

"14. We have given a careful consideration to the submissions. At the outset it will be useful to take a look at the law when there are cash credits in the books of a company by way of increased share capital. The applicable provision of law in this regard is Sec. 68 of the Act, which provides that Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income-tax Officer; satisfactory, the sum so credited may be charged to income-tax as the income. of the assessee of that previous year. In a very recent decision of the Hon'ble Delhi High Court in the case of CIT Vs. Oasis Hospitalities Pvt.Ltd. 333 ITR 119 (Delhi), the Hon 'ble Delhi High Court after considering several decisions referred to by the learned D.R. in his arguments before us, summed up the approach in cases where cash credits in the books of company by way of increase in share capital is found: "The initial burden is upon the assessee to

explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove (i) the identity of the share-holder, (ii) the genuineness of the transaction, and (c) the creditworthiness of the shareholders. In case the investor/shareholder is an individual, some documents will have to be filed or the shareholder will have to be produced before the Assessing Officer to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc., can be furnished. When the money is received by cheque and is transmitted through banking or other indisputable channels, the genuineness of the transaction would be proved. Other documents showing the genuineness of the transaction could be copies of the shareholders register, share application forms, share transfer register, etc. As far as the creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. Once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the Assessing Officer to scrutinise the same and in case he nurtures any doubt about the veracity of these documents, to probe the matter further. However, to discredit the documents produced by the assessee on the aspects, there have to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion. "

15. The Hon'ble Bombay High Court in the case of CIT Vs. Creative World Telefilms us. 333 ITR 100 (Bom) observed that if the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department can always proceed against them and if necessary reopen their individual assessments. The Hon'ble Court further observed that if the assessee had given the details of names and addresses of the shareholders, their PAN / GIR numbers and had also given the cheque numbers, name of the bankers. The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the share-holders. The Hon'ble Court followed the decision of the Hon'ble Supreme Court in the case of CIT v. Lovely Exports P. Ltd. [2009] 319 ITR (St.) 5 (SC).

16. In the case of Lovely Exports (Supra), the Hon'ble Supreme Court dismissed SLP against the decision of the Hon'ble Delhi High court by the Revenue against the judgment of the Hon 'ble Delhi High Court in the case of CIT Vs. Divine Leasing & Finance Ltd. 299 ITR 268(Del) by observing as follows: "Can the amount of share money be regarded as undisclosed income under S. 68 of IT Act, 1961 We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the Assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment. Subject to the above, Special Leave Petition is dismissed. "

17. In the case of Divine Leasing (supra), the Hon 'ble Delhi High Court summed up the approach in cases where cash credits in the books of company by way of increase in share capital is found as follows:

"In the case of a company the following are the propositions of law under section 68. The assessee has to prima fade prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels ; (3) the creditworthiness or financial strength

of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders' register, share application forms, share transfer register, etc., it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/ subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee; and (7) the Assessing Officer is duty bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation. In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. A delicate balance must be maintained while walking the tightrope of sections 68 and 69 of the Income-tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription, he is empowered, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company. "

.....

.....

21. The Hon'ble Delhi High Court in the case of Divine Leasing (supra) has laid down that if the Assessee satisfies prima fade the three ingredients as set out above then what the AO has to do. The Hon'ble Court has held that the onus thereupon shifts to the AO and he has to show that 'the money in question is that of the Assessee.

.....

22. We shall now see what is the evidence gathered by the AO against the Assessee. It has also to be mentioned that the Director of the Assessee was examined by the AO and in his examination he denied having given cash to the companies which made application for allotment of shares of the Assessee. The copy of the statement of the Director is at page-38 to 387 of the paper book. The other facts with regard to the evidence gathered by the Assessee are in the case of the Assessee are identical to the case of Chat Computers Ltd. (supra) and the Tribunal has already analysed the evidence gathered by the AO against the Assessee and has held as follows:

"6. It is evident from the assessment order that the Assessing Officer has not conducted any independent enquiry during the assessment proceedings; but simply relied upon the report of the ADIT (Inv.)Unit 1, Kolkata as well as the statements of the directors of various Kolkata based companies, who have paid the application money. The said investigation by the ADIT(Inv) Unit 1, Kolkata was not carried out during the assessment proceedings; therefore, the said investigation was neither the inquiry carried out during the assessment proceedings nor part of the assessment proceedings. It is clear that the scrutiny assessment commenced after about one year from the alleged investigation was over. The Assessing Officer has heavily relied upon the investigation report and proceedings and specifically on the point that the assessee was given opportunity to cross examine the directors of the investing companies, who paid the application money and further, the assessee was also asked

by the Assessing Officer to produce the directors, whose statements were recorded by the investigation unit 1, Kolkata for cross examination of them.

6.1

6.2 Since the investigation proceedings were not part of the assessment proceedings in the case of the assessee and even the investigation was not either u/s 132 or u/s 133 of the I T Act. It seems that investigation by the ADIT(Inv) Unit 1, Kolkata is preliminary investigation only to verify the suspicion of any concealment of income. The Assessing Officer, during the course of assessment proceedings asked the assessee to produce the said directors for cross examination. It is evident from the letter of the Assessing Officer dated 01.10.2008 as well as dated 16.9.2008 that the Assessing Officer did not summon these directors to be present in the office of the Assessing Officer for the purpose of cross examination by the assessee; but on the contrary, the assessee was asked to produce these directors for cross examination purpose. This is a gross violation of principles of natural justice when the Assessing Officer asked the assessee to produce the directors for availing opportunity of cross examination. The Assessing Officer relied upon the statement of the directors of the investing company recorded during the investigation proceedings by the ADIT(Inv) Unit 1, Kolkata. Instead of ensuring the presence of these persons for giving opportunity to the assessee to cross examine, the Assessing Officer asked the assessee to produce them, which in our considered opinion is an absolute unjust and opposite to the rule of law and what procedure demands. Therefore, there is a total denial of opportunity to the assessee to cross examine the persons, whose statements are used against the assessee.

6.3 Further, when the director of the assessee categorically denied, during the investigation, the allegation of giving cash to those investing companies then the onus is on the revenue to prove that the application money received by the assessee is assessee's own money routed through those applicants companies. There is no evidence or material brought on record by the Assessing Officer, except the uncross examined statements of the third party, to show any movement of cash routed back to the assessee in form of application money in the alleged allotment of cumulative preferential shares .. Rather, it is undisputed fact that the application money was received through account payee cheque/bank draft given by the investing companies from their respective bank account. It is also an accepted fact that source of the application money was found in the bank account of the investing companies deposited through account payee cheques; therefore, no cash transaction was found by the Assessing Officer in the bank account of the investing companies.

6.4 The Assessing Officer doubted the movement of cash from the assessee as being passing through various levels and reached to the assessee company. However, no finding has been given to the effect as to how the alleged cash/money of the assessee company routed through various levels finally reached to the assessee. Not an iota of evidence or material has been brought on record to show even, prima fade that the said amount representing application money moved from the assessee and reached to the assessee. Rather, documentary evidence on record exhibits different facts i.e. as per books of account of the assessee as well as those of investing companies together with the return of income, board resolution go to prove that the said application money was paid by the investing company to the assessee against allotments of the preferential shares. The Investing companies have shown the said amount as investment in their books of account. The money routed through banking channels and through account payee cheques/bank draft, undisputed given by the parties. Even, the source of the application money was found in the bank account of the investing companies not by any cash deposit; but through account payee

cheques. Therefore, when all the documentary evidence contradicts the statements of the directors recorded by the investigation unit of the department then such statements alone cannot be taken as the basis much less a good or proper basis for any addition.

6.5 It is settled proposition of law that the statement recorded during the course of investigation without corroborative evidence has no evidentiary value. It is pertinent to mention that the statements recorded in this case are not under search or survey or assessment proceedings therefore the same cannot be used against the assessee without following the due process of corroboration and cross examination. Even otherwise, the statement without cross examination and corroborative evidence cannot be used against the assessee.

6.6 As pointed out by the Id AR of the assessee the credibility of the statements is also not free from doubt as it appears that all the statements are prepared by the department in an identical fashion and manner before those were got signed on different dates. It is apparent that certain identical mistakes are appearing in those statements allegedly recorded on different dates.

For examples-

Question no.4:- Does your company has transaction with the following companies? If so, give details and nature of such transaction: This mistake "Does you" is appearing in question No. 4, of all the statements, which shows that questionnaire was already prepared and answers were already written in the same manner as it is evident from the answer to question no.6 as under:

Question No. 6 Do you have to say anything else?

Ans: I have gone through the above statement and the same has been recorded correctly and without any fabrication. The above statement has been given by me without the use of any force, coercion or threat.

The mistake in the answer no. 6 is also identical in all the statements recorded on different dates. Since the statements were recorded by the investigation team of ADIT(Inv) Unit 1, Kolkata and not during the proceedings before any Court of law; therefore, all these facts suggest and indicate to believe that the same are not recorded as a verbatim of what the concerned person stated; but obtained by the department in a mechanical manner. However, without going into validity of the statements when all other records, material and documentary evidences contradict and nullify the statements then the reliance placed by the Assessing Officer on such statement is highly unjustified and improper.

7. Even otherwise, in the case of the Ashwani Gupta (supra), the Hon'ble Delhi High Court has taken a note of the finding of the Tribunal in para 2 as under:

"2. The Tribunal has confirmed the order passed by the CIT(A) which held the entire addition made by the Assessing Officer to be invalid and had deleted the same. The CIT(A) had clearly held that the Assessing Officer had passed the assessment order in violation of the Principles of natural justice in as much as he had neither Provided copies of the seized material to the assessee nor had he allowed the assessee to cross-examine one Mr. Manoj Aggarwal on the basis of whose statement the said addition was made. The CIT(A) also held that the entire addition deserved to be

deleted, particularly so, because the transactions also stood duly reflected in his regular returns. "

7. 1 The Hon'ble High Court has held that once there is violation of Principles of natural justice by not providing seized material to the assessee as well as cross examination of the persons on whose statements, the Assessing Officer relied upon, amounts to denial of opportunity and would be fatal to the proceedings. The Hon'ble Delhi High Court has observed in para 7 as under:

"7. In view of the foregoing circumstances, we feel that no interference with the impugned order is called for. The Tribunal has correctly understood the law and applied it to the facts of the case. Once there is a violation of the Principles of natural justice in as much as seized material is not provided to an assessee nor is cross-examination of the person on whose statement the Assessing Officer relies upon, granted, then, such deficiencies would amount to a denial of opportunity and, consequently, would be fatal to the proceedings. Following the approach adopted by us in SMC Share Brokers Ltd. (supra), we see no reason to interfere with the impugned order. No substantial question of law arises for our consideration. "

8 Similarly, in the latest decision, the Hon'ble Delhi High Court in the case of Oasis Hospitalities P Ltd (supra), after considering all the relevant decisions on the issue including the decision of the Hon'ble Supreme Court in the case of Lovely Exports P Ltd (supra), decision of the Full Bench of the Hon'ble Delhi High Court in the case of Sophia Finance Ltd reported in 205ITR98 (Del)(FB) and the decision in the case of Divine Leasing & Finance Ltd (supra) has observed in paras 11 to 16 as under:

" It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove:

- (a) the identity of shareholder ;*
- (b) the genuineness of transaction; and*
- (c) the creditworthiness of shareholders.*

12 In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be Produced before the Assessing Officer to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc., can be furnished.

13 The genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the - said shareholder and it came from the coffers of that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, the genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be copies of the shareholders register, share application forms, share transfer register, etc.

14 As far as creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by Producing the bank statement of the

creditor/subscriber showing that it had sufficient- balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are Produced, the assessee would have satisfactorily discharged the onus cast Upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to Probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there have to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion.

15 At this stage, we would like to refer to the judgment of the Bombay High Court in the case of CIT v. Creative World Telefilms Ltd. (in L T. A. No. 2182 of 2009 decided on October 12,2009) [2011J 333 ITR 100. The relevant portion of this order is reproduced below:

"In the case in hand, it is not disputed that the assessee had given the details of name and address of the shareholder, their PA/GIR number and had also given the cheque number, name of the bank.

It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement 'not traceable'. In our considered view, the Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the-assessee to the Assessing Officer . In the above circumstances. the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal. In the result, the appeal is dismissed in limine with no order as to costs. " (emphasis supplied)

16 The court thus clearly held that once documents like PAN card, bank account details or details from the bankers were given by the assessee, onus shifts upon the Assessing Officer and it is on him to reach the shareholders and the Assessing Officer cannot burden the assessee merely on the ground that summons issues to the investors were returned back with the endorsement "not traceable". The same view is taken by the Karnataka High Court in Madhuri Investments Pvt. Ltd. v. Asst. CIT (in I T. A. No. 110 of 2004, decided on February 18, 2006). In this case also, some of the share applicants did not appear and notices sent to them were returned with remarks "with no such person". Addition was made on that basis. which was turned down by the High Court in the following words: " 6. Having heard the learned counsel for the parties, we notice that whenever a company invites applications for allotment of shares from different applicants, there is no procedure contemplated to find out the genuineness of the address or the genuineness of the applicants before allotting the snares. If for any reason the address given in the application were to be incorrect or for any reason if the said applicants have changed their residence or the notices sent by the Assessing Officer have not been received by such applicants, the assessee-company cannot be blamed. Therefore, we are of the view that the Tribunal was not justified in allowing the appeal of the Revenue only relying upon the statement of Sri Anil Raj Mehta, a chartered accountant. "

8.1 The Hon 'ble High Court further discussed the issue in paras 20 to 24 as under:

" 20 The observations of the Supreme Court in the case of *Lovely Exports P. Ltd.* [2009] 319 ITR (St.) 5 (SC) go to suggest that the Department is free to proceed to reopen the individual assessments in the case of alleged bogus shareholders in accordance with law and, thus, not remediless. It is, thus, for the Assessing Officer to make further inquiries with regard to the status of these parties to bring on record any adverse findings regarding their creditworthiness. This would be more so where the assessee is a public limited company and has issued the share capital to the public at large, as in such cases the company cannot be expected to know every detail pertaining to the identity and the financial worth of the subscribers. Further the initial burden on the assessee would be somewhat heavy in case the assessee is a private limited company where the shareholders are family friends/close acquaintances, etc. It is because of the reason that in such circumstance, the assessee cannot feign ignorance about the status of these parties.

21 We may also usefully refer to the judgment of the Supreme Court in the case of *CIT Y. P. Mohanakala* / [2007] 291 ITR 278. In that case, the assessee had received foreign gifts from one common donor. The payments were made to them by instruments issued by foreign banks and credited to the respective accounts of the assesseees by negotiations through bank in India the legal position contained in section 68 of the Act was explained by the Supreme Court by assessing that a bare reading of section 68 of the Act suggests that (i) there has to be credit of amounts in the books maintained by the assessee; (ii) such credit has to be a sum of money during the previous year; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books, or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on the record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material on record. Application of mind is the sine qua non for forming the opinion. In cases where the explanation offered by the assessee about the nature and source of the sums found credited in the books is not satisfactory there is, prima facie, evidence against the assessee, viz., the receipt of money. The burden is on the assessee to rebut the same, and, if he fails to rebut it, it can be held against the assessee that it was a receipt of an income nature. The burden is on the assessee to take the plea that even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature.

22. We would like to refer to another judgment of the Division Bench of this court in the case of *CIT v. Value Capital Services P. Ltd.* [2008] 307 ITR 334. The court in that case held that the additional burden was on the Department to show that even if share applicants did not have the means to make investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. In the absence of such findings, addition could not be made in the income of the assessee under section 68 of the Act.

23. It is also of relevance to point out that in *CIT v. Stellar Investment Ltd.* [1991] 192 ITR 287 (Delhi) where the increase in subscribed capital of the respondent-company accepted by the Income-tax Officer and rejected by the Commissioner of Income-tax on the ground that a detailed investigation was required regarding the genuineness of subscribers to share capital, as there was a device of converting black money by issuing shares with the help of formation of an investment which was reversed by the Tribunal, this court held that even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company. This view was confirmed by the apex court in *CIT v. Stellar Investment Ltd.* [2001] 251 ITR 263.

24. Having taken note of the legal position in detail, we now proceed to decide each appeal on the application of the aforesaid Principles. I T. A. No. 2093 of 2010 and I T. A. No. 2095/2010"

9. It is clear from the decision of the Hon 'ble Delhi High Court in the case of *Oasis Hospitalities P Ltd* (supra) that once the assessee filed copy of PAN, Acknowledgement copy of the return of income of the investing companies, their bank accounts statements for the relevant period; then even the parties were not produced in spite of the specific directions of the Assessing Officer, the addition could not be sustained as the primary onus was discharged by the assessee by producing the PAN, balance sheet, copy of the acknowledgement copy of return of the applicants etc.

10. In the case in hand, there is no dispute about the identity of the applicant companies, who had paid the application money and the source of the application money was also found in the respective bank accounts of the investing companies and there was no trace of cash deposit in the bank accounts of the investing companies, then, the action of the Assessing Officer under influenced of the report of the investigation wing without giving opportunity to the assessee for cross examination of the persons, is not sustainable.

11. The Assessing Officer has raised some doubts and suspicion about the movement of the money through various levels but could not establish any direct or indirect link of the said outward movement from the assessee and then again received by the assessee in the form of application money. Even the revenue has failed to bring anything on record to show movement of the alleged cash from the assessee

12. The Hon 'ble Delhi High Court, in the case of *Oasis Hospitalities P Ltd* supra) in para 33 and 34 has observed as under:

"33 The Tribunal while confirming the aforesaid view of the Commissioner of Income-tax (Appeals) has summarized the discussion as under:

"9. We have carefully considered the rival submissions in the light of the material placed before us. The necessary details were filed by the assessee with the Assessing Officer to show the identity of the person who had applied for the shares. The shares also been allotted to respective persons in respect of which intimation was given to the Registrar of Companies and necessary evidence has also been placed on record in the paper book which found place at pages 23 and 24 of the paper book. The assessee also had placed on record the evidence as well as copy of income-tax returns of the share applicants. Keeping in view all these evidence it cannot be held

that the assessee did not establish the identity of the share applicants. If it is so, theft the law as pronounced by the hon 'ble Supreme Court in the case of CIT v. Lovely Exports P. Ltd. [2009] 319 ITR (St.) 5 is clear that if the share application money is received by the assessee-company from alleged bogus shareholders whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law, but the same cannot be regarded as undisclosed income of the assessee. In this view of the situation, we find no infirmity in the order of the Commissioner of Income-tax (Appeals) vide which addition made on account of share application money has been deleted. "

34. Having regard to the decisions noted above, we are of the view that the addition was rightly deleted by the Commissioner of Income-tax (Appeals) and the Tribunal. Requisite documents were furnished showing the existence of the shareholders from bank accounts and even their income- tax details. From bank accounts of these shareholders, it was found that they had deposited certain cash and source thereof was questionable. The Assessing' Officer should have made further Probe which he failed to do. Moreover, the remedy of the Department lies in reopening the case of these investors and the addition cannot be made in the hands of the assessee.'

Thus in view of the above observation of hon 'ble High Court when requisite document were produced and available with the AO to establish that no cash was deposited in the bank accounts of the investing companies then without 'further probe to Prove contrary the addition in the hand of the assessee cannot be made.

13. As regards the order of the coordinate Bench of the Tribunal in assessee's own case for AY 2005-06, it is evident that the coordinate bench of the Tribunal was also of the view that the Assessing Officer did not fully establish his case that the money has been received by the investing companies from the assessee company.

.....
.....
.....
.....

13.1 Before us, the Id AR of the assessee has forcibly urged that in view of the decision of the Hon'ble Delhi High Court in the case of Oasis Hospitalities P Ltd (supra) as well as the decision of the Hon 'ble Gujarat High Court in the case of Rajeh Babubhai Damania (supra), the issue may be decided on merits on the basis of the material available on record.

14. It is to be noted that it is not the case of any additional evidence or fresh material produced by any of the parties before -US which requires examination or investigation to verify the correctness of the new facts first time brought before us. The case of the revenue is that the cash moved from the assessee routed through various level and then reached to the assessee in the form of share application money. The stand of the revenue is not in consonance with the statements of the directors of the investing companies which is the basis of the investigation report as well as addition by the AO. In their statements the directors stated to have received cash from assessee for investing in the preferential share of the assessee company, whereas, this fact was not found to be correct from the record and the revenue also took a stand that the cash was not directly given to the investing companies but routed through various levels.

When it was found by the investigating unit as well as recorded by the AO that the fund in the bank account of the investing companies was deposited through a/c payee cheques than it is apparent that the statements of the directors are in total contradiction of the facts emerged from the record as well as stand of the revenue. Hence the said statements do not support the case of the revenue and the reliance place by the AO on such statements is highly misplaced and improper. When the stand of the revenue is in total contraction of the material on record then in view of the latest decision of the Hon'ble Delhi High Court in the case of Oasis Hospitalities P Ltd (supra), We are of the considered opinion that the issue can be decided on merit and need not to be remand to the record of the AD because at the time of the order for the AY 2005-06, the coordinate Bench of the Tribunal was not having the benefit of the decision of the Hon'ble Delhi High Court in the case cited supra. Further in view of the decision of Hon 'ble Gujarat High Court in case of Rajeh Babubhai Damania (supra), we see no reason for giving the A.O. any further innings to fill up the lacunas or lapses in the assessment which would cause a great injustice to the assessee;

15. In 'View of the above discussion and the facts and circumstances of the case, the share application money cannot be treated as income of the assessee company until and unless it is proved beyond doubt that- the assessee's own money has come back through some closely related applicant. Once the identity of the applicant is disclosed and found as correct then, even if the said transaction is suspected by the revenue authorities, the same cannot be treated as income of the assessee company which is a public limited company. Accordingly, we delete the addition made by the Assessing Officer and confirmed by the CIT(A) on this account. However, we may clarify that our findings on the issue are based on particular facts of this assessment year and therefore, would not affect the respective rights of the parties for the other assessment years. "

23. The above observations of the Tribunal in our view are squarely applicable to the case of the Assessee also as the statement of the directors of the companies who applied for shares were also similar in the case of the Assessee as well as the case of Chat Computers (supra). The order of the AD as well as that of the CIT(A) in both the cases are verbatim the same.

24. Apart from the above, we also find that the Assessee has filed before the Registrar of Companies return of allotment in respect of the shares which were allotted to the applicants and the same has been taken on file by the Registrar of Companies. Perusal of the same reveals that the shares allotted to the various companies totaling Rs.27,61,50,000/- has been duly shown as shares allotted in those returns. The objections raised by the learned D.R. before us at best could raise doubts about the satisfaction of the three conditions for accepting credit entry in the books of accounts. Those objections cannot be the basis to hold that the Assessee has not satisfactorily explained credit entry in its books of accounts. The investigation referred to by the AD in the order of assessment, as we have already seen has been held by the Tribunal in the case of Chat Computers (supra) to be insufficient to hold that the credits in question were unexplained. We are therefore of the view that the addition of Rs. 27,61,50,000/- being the share capital received by the Assessee during the previous year for which allotment of shares were made and the share application money received pending allotment of Rs.6,42,00,000/- cannot be treated as unexplained and the addition made in this regard is directed to be deleted. "

11. *Since the issue under consideration is identical to that of the cases decided by the Tribunal (supra), respectfully following the same, we set aside the order of the CIT(A) and delete the additions made by the AO u/s 68 of the Act in both the years under consideration*
"(Emphasis supplied)

From the facts emanating in this year, it is evident that the Ld.A.O's case is on a much weaker footing as he has relied on the statement of one Kishan Kumar Verma dt.13.10.2006 whereas the share application money received during the impugned assessment year were after that date. The statement relied upon is not at all relevant as it is not in respect of companies regarding which additions were made in this year. Nevertheless, as the other facts of the case in current year are identical to the facts in appellant's own case decided by the Hon'ble ITAT, Mumbai as well as in two other group cases viz. Chat Computers Ltd. and M/s. Netscape Software Ltd. referred to earlier, respectfully following the decision of Hon'ble ITAT this ground of appeal is allowed."

5. We notice that the co-ordinate benches of the Tribunal are consistently taking the view that the assessing officer has not disproved the documents furnished by the assessee to discharge the initial burden placed upon it u/s 68 of the Act. Since the facts and circumstances available in the present case are identical with the cases decided by the co-ordinate benches of the Tribunal and since the Ld CIT(A) has followed the decisions rendered by the Tribunal, we do not find any reason to interfere with the orders passed by the Ld CIT(A) on the issue agitated before us in the two years under consideration. Accordingly, we uphold the order of Ld CIT(A).

6. In the result, the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 4th March, 2016
आदेश की घोषणा खुले न्यायालय में दिनांक 04 मार्च, 2016 को की गई।

Sd/-
(संदीप गोसाई / Sandeep Gosain)
न्यायिक सदस्य / JUDICIAL MEMBER
मुंबई/Mumbai, दिनांक/Date: 04.03.2016
व.नि.स. Jv.Sr.PS.

Sd/-
(बी.आर. बास्करन / B.R. Baskaran)
लेखा सदस्य / ACCOUNTANT MEMBER

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

1.Appellant /अपीलार्थी
/प्रत्यर्थी

2. Respondent

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT
/संबद्ध आयकर आयुक्त; **5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, G**
खंडपीठ,आ.अ.न्याया.मुंबई **6.Guard File/गार्ड फाईल**

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**