

**IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai**

**Before Shri Joginer Singh, Judicial Member
and Shri Rajesh Kumar, Accountant Member**

ITA No.1091/Mum/2016
(Assessment Year: 2012-13)

M/s. Jasamrit Constructions Private Ltd. Flat No. 901, Building 'B' Ashok Tower, Near ITC Hotel Parel, Mumbai 400017	Vs. Income Tax Officer-6(3)(2) Room No. 503, 5th Floor Aayakar Bhavan, M.K. Road Mumbai 400020
PAN – AABCJ8295L	

Appellant

Respondent

Appellant by: Shri Vijay Mehta
Respondent by: Shri Aarju Goradia

Date of Hearing: 28.12.2017
Date of Pronouncement: 08.02.2018

ORDER

Per Rajesh Kumar, AM

This appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-12 (hereinafter "CIT(A)"), Mumbai dated 28.12.2015 for A.Y. 2012-13.

2. The grounds of appeal raised by the assessee are as under: -

- "1. The learned CIT(A) has erred in law and on facts in passing the appellate order, which is invalid and bad in law.*
- 2. The learned CIT(A) has erred in law and on facts in confirming the addition of ₹5,00,00,000/- made by the Assessing Officer u/s. 68 of the Act. The learned CIT(A) ought to have deleted the afore-stated addition of ₹5,00,00,000/- in respect of share capital and share premium.*

3. The issue raised in ground No. 1 is not pressed during the course of hearing and therefore dismissed as not pressed.

4. The issue raised in ground No. 2 relates to confirmation of addition of ₹5 crores by CIT(A) as made by the AO under Section 68 of the Income Tax Act, 1961 (hereinafter "the Act") in respect of share capital and share premium received by the assessee-company for allotment of 10% non cumulative preference shares to M/s. Janitor Distributors Pvt. Ltd.

5. The brief facts of the case are that the assessee-company filed its return of income on 28.09.2012 declaring a loss of ₹3,946/-. The case of the assessee was selected for scrutiny. Notice under Sections 143(2) and 142(1) were duly issued and served upon the assessee. The AO noticed from the Balance Sheet of the company that the assessee has allotted 10% non cumulative preference shares of face value of ₹100/- each at a premium of ₹100/- each to M/s. Janitor Distributors Pvt. Ltd. on 31.03.2012 thereby receiving a total amount of ₹5 crores. According to the AO the transaction of receiving money by way of share capital on premium was unnatural, suspicious and accordingly the AO called the assessee to prove the genuineness of the said transaction. The assessee during the course of assessment proceedings filed a copy of the return of income, Balance Sheet and Profit & Loss Account of M/s. Janitor Distributors Pvt. Ltd. as desired by the AO. As per the Balance Sheet the total paid up capital, reserves and surplus of M/s. Janitor Distributors Pvt. Ltd. were ₹50,02,26,286/-. According to the AO the shares of the assessee were purchased by the said investor on a huge premium without any justification and therefore the transaction was sham as the creditworthiness of the investor was not satisfactory. In response to the notice under Section 133(6) of the Act M/s. Janitor Distributors Pvt. Ltd. vide letter dated 19.02.2015 submitted the details of shares sold to various private limited companies and the source of investment in shares of the assessee company. However, according to the AO the investor was not carrying on any business activity and this was a case of circulating money and thus the genuineness of the transaction was doubtful. The AO accordingly issued show cause notice to the assessee dated 05.03.2015 as to why the share capital and share premium amount should not be treated

as unexplained income of the assessee under Section 68 of the Act which was replied by the assessee by filing written submission dated 04.03.2015 which is reproduced in para 3.5 of the assessment order by the AO. Thereafter the learned AO treated the same as unexplained cash credit by rejecting the contention and submissions made by the assessee during the course of assessment proceedings by relying upon a serious judgements which have been incorporated in para 4 of the assessment order and finally he framed the assessment order under Section 143(3) vide order dated 13.03.2015 assessing the total income at ₹5 crores.

6. Aggrieved, assessee preferred appeal before the First Appellate Authority. The learned CIT(A) dismissed the appeal of the assessee after considering the contention of the assessee as has been incorporated in paras 7.2 and 7.3 of the order. According to the learned CIT(A) the funds were not utilised for the purpose of business or generating any income. Since the condition of the company is not very sound , the CIT(A) noted that the AO has rightly doubted the genuineness of such investment in the assessee company. Finally the learned CIT(A) dismissed the appeal of the assessee by observing and holding as under: -

“8.1 The case here falls within the ambit of the above mentioned cases.

One has to consider the totality of facts, surrounding circumstances and human probability for arriving at a conclusion as held in by the Hon. Supreme Court sin the following cases :

- 1. CIT Vs Durga Prasad 82 ITR 540 (SC)*
- 2. Sumati Dayal Vs CIT (1995) 214 ITR 801 (SC)*

The A.O. has done all the above to arrive at a conclusion that it is an unexplained credit u/s. 68.

8.2 This case also falls within the ambit of the term "colourable devices" as coined by Hon. Supreme Court wherein the Hon. Supreme Court has observed in the case of Me Dowell and Co. Ltd. Vs ITO 154 ITR 148 that "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be a part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious method. It is obligation of every citizen to pay the taxes, honestly without resorting to subterfuges". Thus, the addition of

Rs.5,00,00,000/- is confirmed since the A.O. has passed a very speaking order by bringing out all the facts and issues involved in the said transaction.

Thus, in the light of the discussion above in Para 7 and 8, I have no hesitation in confirming the A.O's order and dismissing Ground of Appeal No.2.

7. Aggrieved by the order the CIT(A), assessee is in appeal before us. The learned A.R. vehemently submitted before the Bench that the order of the CIT(A) confirming the assessment order was totally wrong because the order of AO is based upon mere suspicion and conjectures and is against the ratio laid down by the jurisdictional High court and various other forums. The learned A.R. submitted that the assessee had issued 10% non cumulative redeemable preference shares of ₹100/- each at a premium of ₹100/- to M/s. Janitor Distributors Pvt. Ltd. and as desired by the AO duly furnished various documents relating to the said allotment comprising: -

- (i) duly confirmed copies of account;
- (ii) Articles and Memorandum of the Janitor Distributors Pvt. Ltd.;
- (iii) audited annual accounts of Janitor Distributors Pvt. Ltd.;
- (iv) bank statement for the period 01.04.2011 to 31.03.2012 evidencing the impugned investment;
- (v) copy of acknowledgment of Return of Income along with computation of Total Income;
- (vi) Form No.20B being annual return of the assessee company;
- (vii) Form 2 being Return of Allotment and
- (viii) Explanation regarding source of funds for subscribing to 10% redeemable preference shares.

The learned A.R. submitted that the source of investment, creditworthiness, identity of the lender and genuineness were proved by filing voluminous records before the AO. The action of the AO in treating the transaction by way of share capital and premium amounting to ₹5 crores was wrong and against the facts on record. The learned A.R. pointed out that the AO referred to nil turnover and profit of the company to support his case by noting that no prudent businessman will invest in the shares of the company which is not doing nay business. The observation of

the learned AO that the assessee has raised money by way of share capital at a very high premium especially when the assessee was not carrying on any business was doubtful and suspicious was uncalled for and without any basis as it is for the assessee to decide as to how and on what terms the funds are to be raised from the market. The learned A.R. also pointed out that the funds were raised by way of 10% non cumulative redeemable preference shares which mean that the assessee was to pay 10% dividend on the said money raised by the assessee. The learned A.R. submitted that the conclusion of the AO that the shares of the assessee-company were not worth subscribing in absence of any business activity was incorrect. The ld AR further submitted that the assessee company belongs to G.R. Agarwal Group, Udaipur and its flagship company was G.R. Infraprojects Ltd. which is engaged in development of infrastructural facilities and is renowned in the market for quality construction and timely completion of infrastructural projects like road, highways and flyovers, etc. The average turnover for the last three years of the said flagship company was around ₹800 to ₹850 crores with the net profit ranging between ₹35 to 50 crores. Considering the potential of infrastructure in India there are large number of investors including FIIS and financial institutions which are interested in investment in the group by way of equity participation, preference shares or inter corporate loans etc. The learned A.R. also pointed out that the renowned equity funds, namely India Business Excellence Fund I and IDFC Investment Advisors Ltd. invested ₹80 crores by way of equity capital in G.R. Infraprojects Ltd. in 2011 and the company is in the process of listing of its shares. The learned A.R. further stated that the objective of these investors were to invest in the group on long term basis and to reap handsome returns in due course of time. Thus the decision of the investors was influenced and taken on the basis of business motive, financial stability, future prospects and growth in the entire group rather than in examining the issue in solitary manner as has been done by the AO. It was argued that the observations of the AO while framing the assessment were contrary to these facts that the AO on the one hand stated that premium is excessive and not justifiable whereas on the other hand the entire

investment was treated as sham and non genuine which conflicting in as much as if the entire transaction is sham and non-genuine there would be no question of justification for the premium. If there is no justification for the premium, the entire transaction cannot be held to be non genuine. The learned A.R. also referred to the information obtained by the AO under Section 133(6) of the Act from the investor and without finding any incriminating or adverse evidences/information, the AO simply expressed doubt on the share premium received from M/s. Janitor Distributors Pvt. Ltd. without bringing any cogent material on record or carrying out further enquiry on M/s. Janitor Distributors Pvt. Ltd. The learned A.R. submitted that M/s. Janitor Distributors Pvt. Ltd. is not a shell company either on the website of SEBI or other govt agencies and in order to prove this averment the learned A.R. placed before the Bench the muster data extracted from the website of the Ministry of Corporate Affairs. The learned A.R. also placed before the Bench a copy of the assessment order dated 30.09.2009 passed under Section 143(3) for A.Y. 2007-08 considering the issue of shares at premium and increase in the share capital of ₹43 crores in the case of M/s. Janitor Distributors Pvt. Ltd. The learned A.R. also placed before the Bench a copy of the assessment order dated 15.09.2017 passed under Section 143(3) for A.Y. 2012-13 of the above said investor and submitted that there is no pending proceedings against the company either under Section 147 or 263 in respect of completed assessment unlike in the case of private companies whose cases have been reopened by the government which are engaging in accommodation business. The learned A.R. for the assessee took us through similar transactions in the case of group company M/S Lokesh Builder Pvt. Ltd. which has received share capital from M/s. Janitor Distributors Pvt. Ltd. in A.Y. 2012-13 and the transaction was accepted by the Income Tax Officer, Ward-1, Udaipur after carrying out a detailed enquiry and gathering various information. The ld AR stated that the AO after satisfying about the genuineness and creditworthiness thereof framed the assessment under Section 143(3) vide order dated 27.03.2010 accepting the contentions and submissions of the assessee qua said transaction. The learned A.R. also placed before the

Bench a copy of letter dated 25.11.2014 addressed by the AO to Lokesh Builder Pvt. Ltd. and copy of assessment order of the said group company. The learned A.R. contended that in view of the contemporary evidence filed on record of the Department itself, the suspicion of the AO as regards the transaction being non-genuine was wrong and misplaced. So far as the affairs of M/s. Janitor Distributors Pvt. Ltd. is concerned, the learned A.R. submitted that the assessee is in no way connected with the said company and therefore it is not for the assessee to explain the transaction which has been entered into by M/s. Janitor Distributors Pvt. Ltd. The learned A.R. contended that the assessee has made adequate and full compliance to various queries and questionnaires issued by the AO and furnished all the necessary evidences which was evident from paragraphs 3 and 3.1 of the assessment order of the AO and the AO has not done anything except levying allegations against the assessee. Controverting the observations of the AO in para 3.2 of the assessment order the learned A.R. submitted that the assessee had filed all the documents before the AO which proved the identity, genuineness and creditworthiness of the transaction. According to the learned A.R. the AO's opinion was based upon guess work and he has totally failed to prove as to how the premium was not justified. In defence of his argument the learned A.R. relied on a series of judgements, viz.: -

- i. ACIT Vs Gagandeep Infrastructure Pvt Ltd for AY 2008-09 ITA No 5784/Mum/2011 dated 23.01.2014
- ii. CIT Vs Creative World Telefilms Ltd 333 ITR 100 (Bom)
- iii. Arceli Reality Ltd Vs ITO AY 2007-08 ITA No6492/Mum/2016 dt 21.04.2017
- iv. Lalitha Jewellery Mart Pvt. Ltd Vs DCIT 399 ITR 425 (Mad)
- v. Orchid Industries Pvt. Ltd Vs DCIT AY 2004-05 ITA 1867/Mum/2012 dt 07.02.2014
- vi. Principal CIT Vs M/S Paradise Inland Shipping Pvt. Ltd ITA No. 66 of 2016 dated 10.04.2017 (Bom)

8. Per contra the learned D.R. relied heavily on the orders of the Authorities below. The learned D.R. submitted that in this case the assessee is not carrying on any business and therefore has no basis for issuing 10% non cumulative preference shares on a premium of ₹100/-

and thus the transaction was a colourable device which was nothing but structured transaction to generate money from other entities. The learned D.R. submitted that even the investor M/s. Janitor Distributors Pvt. Ltd. was not doing any business. They merely invest in the shares of private limited companies and doing the purchase and sale thereof. Even the said transaction of subscribing the preference shares in the assessee company at a premium was sourced and financed by the said investor from the sale of shares of other private companies. As far as genuineness, credit worthiness and identity of the investor is concerned the learned D.R. submitted that mere production of records such as ITR, Balance Sheet and source out of sale of shares could not be taken to mean that the transaction is genuine especially when in both the companies, investor and investee there was no business. The learned D.R. argued that the benefit of similar transaction in the group company M/s. Lokesh Builder P. Ltd. from the same investor which was examined and accepted by Income Tax Officer, Ward-1, Udaipur could not be taken to mean that the instant transaction of the assessee is genuine and not suspicious. The learned D.R. finally relying on the orders of the Authorities below prayed that the order of the CIT(A) be confirmed as this is a case of circuiting transactions intended to route black money into company. The ld DR while distinguishing the decisions relied upon by the ld AR placed reliance on the following decisions in support of her arguments:-

- i. Sreelekha Banerjee and Ors. vs. CIT 49 ITR 112 (SC)
- ii. Income Tax Officer vs. Zara Trading P. Ltd. ITA No. 3284/Del/2009 dated 26.02.2010 and Khushara Real Estate Pvt. Ltd. ITA No. 4247/Del.2009
- iii. Major Metal Ltd. vs. Union of India 207 taxmann.com 185 (Bom)
- iv. Bisaka Shares Pvt. Ltd. vs. CIT ITA No. 1493/Kol/2013
- v. CIT vs. Durga Prasad More 82 ITR 540 (SC)
- vi. Shankar Industries vs. CIT 114 ITR 689 (Cal)
- vii. C. Kant & Co. vs. CIT 126 ITR 63 (Cal)
- viii. Prakash Textile Agency vs. CIT 121 ITR 890 (SC)
- ix. Oriental Wire Industries P. Ltd. vs. CIT 131 ITR 688 (Cal)

- x. CIT vs. United Commercial & Industries Co. (P) Ltd. 187 ITR 596 (Cal)
- xi. M.A. Unneeri Kutti vs. CIT 198 ITR 147 (Ker)
- xii. CIT vs. Precision Finance Pvt. Ltd. 208 ITR 465 (Cal)
- xiii. CIT vs. Nova Promoters & Finlease Pvt. Ltd. 342 ITR 169 (Del)
- xiv. Independent Media (P) Ltd. 210 Taxman 14 (Del)
- xv. CIT vs. Focus Exports Pvt. Ltd. ITA No. 218/Del.2012
- xvi. CIT vs. N R Portfolio Pvt. Ltd. 263 CTR 456 (Del)
- xvii. Gee Vee Enterprises vs. Addl. CIT 99 ITR 375 (Del)
- xviii. CIT vs. Divine Leasing and Finance Ltd. & Anr. 299 ITR 263 (Del)
- xix. Sumati Dayal vs. CIT 214 ITR 801 (SC)
- xx. Smt. Vasantibai N. Shaha vs. CIT 213 ITR 803 (Bom)
 - a. Govindarajulu Mudaliar vs. CIT 34 ITR 807 (SC)
- xxi. VIP (P) Ltd. vs. CIT 265 ITR 202 (MP)
- xxii. CIT vs. Sophia Finance Ltd. 205 ITR 98 (Del)
- xxiii. CIT vs. Active Traders (P) Ltd. 214 ITR 583 (Cal)
- xxiv. CIT vs. Nivedan Vanijya Niyojan Ltd. 263 ITR 623 (Cal)
- xxv. CIT vs. Bhagwati Jewels Ltd. 201 ITR 461 (Del)
- xxvi. CIT vs. Prateek Finance and Investment Co. Ltd. 215 ITR 272 (Del)
- xxvii. Shankar Industries vs. CIT 114 ITR 689 (Cal)
- xxviii. Nanak Chandra Laxman Das vs. CIT 140 ITR 151(All)
- xxix. Hari Chand Virender Paul vs. CIT 140 ITR 148 (P&H)
- xxx. CIT vs. Biju Patnaik 160 ITR 674 (SC)
- xxxi. Income Tax Officer vs. Skyjet Aviation (P) Ltd. 71 ITD 95 (Ahd)
- xxxii. CIT vs. Precision Finance Pvt. Ltd. 208 465 (Cal)
- xxxiii. Orient Wire Industries (P) Ltd. 131 ITR 688 (Cal)
- xxxiv. CIT vs. Korlay Trading Co. Ltd. 232 ITR 820 (Cal)
- xxxv. K.C.N. Chandrassekhar vs. ACIT 66 TTJ 355 (Bang)
- xxxvi. Gayathri Associates vs. Income Tax Officer 41taxmann.com 526 (AP)
- xxxvii. Agrawal Coal Corpn. (P) Ltd. vs. ACIT 135 ITD 270 (Ind)
- xxxviii. Nipun Builders & Developers P. Ltd. 350 ITR 407 (Del)
- xxxix. CIT vs. Ultra Modern Exports P. Ltd. 40 taxmann.com 458 (Del)
 - xl. ACIT vs. Dhanalaxmi Steel Re-rolling Mills 57 ITD 361 (Hyd)
 - xli. CIT vs. Meenakshi Mills Ltd. 63 ITR 609 (SC)

The learned A.R. in the rebuttal distinguished the various decision decisions relied upon by the AO in the assessment order and also the CIT(A).

9. We heard the rival submissions and perused the material on record including the impugned order and various decisions cited by rival parties. The undisputed facts of the case are that the assessee issued 250,00,000 10% non cumulative e redeemable preference shares of ₹100/- each at a premium of ₹100/- each to M/s. Janitor Distributors Pvt. Ltd. on 31.03.2012. The assessee company was not carrying on any business during the year and so was the investor company M/s. Janitor Distributors Pvt. Ltd. The source of investment was out of sale of shares which were held by M/s. Janitor Distributors Pvt. Ltd. The AO also recorded a finding in the assessment order that M/S Janitor Distributors Pvt. Ltd. the investor company was not doing any business but was doing purchase and sales of shares of other companies and the instant investment in the assessee company was made out of sale of shares by the said company. According to the AO the transaction is not genuine and is a sham transaction on the ground that the assessee company was not doing any business and there was no justification in issuing shares on a premium to the investor when the company has no background such as modality of business and growth trajectory etc and thus doubted the entire transaction. The AO even obtained information under Section 133(6) of the Act from the investor M/S Janitor Distributors Pvt. Ltd. but was not satisfied with the same mainly in view of the fact that there was no business in both the companies investor as well investee company and thus the shares could not have been issued at such a high premium. We find from the record that the assessee has produced the following records before the AO in order to prove the genuineness, creditworthiness and reasonableness of the transaction: -

- (i) duly confirmed copies of account;
- (ii) Articles and Memorandum of the Janitor Distributors Pvt. Ltd.;
- (iii) audited annual accounts of Janitor Distributors Pvt. Ltd.;

- (iv) bank statement for the period 01.04.2011 to 31.03.2012 evidencing the impugned investment;
- (v) copy of acknowledgment of Return of Income along with computation of Total Income;
- (vi) Form No.20B being annual return of the assessee company;
- (vii) Form 2 being Return of Allotment and
- (viii) Explanation regarding source of funds for subscribing to 10% redeemable preference shares.

The AO examined all these documents filed by the assessee during the course of assessment proceedings and by disapproving the same treated the entire the entire capital and premium aggregating to ₹5 crores as unexplained income under Section 68 of the Act relying on various decisions as has been discussed in the assessment order. The AO while coming to the conclusion of said transaction being non genuine and suspicious observed that the turnover of the assessee was nil and there being no profit to support to justify the issue of preference shares at a premium and in view of that the assessee company could not have been made at huge premium. We find that the assessee company belongs to G.R. Agarwal Group, Udaipur and its flagship company is G.R. Infraprojects Ltd. which is engaged in development of infrastructural facilities/projects and is very famous and known in the market for quality construction and timely construction of infrastructural projects like road, highways and flyovers, etc. The average turnover for the last three years of the said flagship company was around ₹800 to ₹850 crores with the net profit ranging between ₹35 to 50 crores. It is also a fact the private equity funds, namely India Business Excellence Fund I and IDFC Investment Advisors Ltd. invested ₹80 crores by way of equity capital in G.R. Infraprojects Ltd. in 2011 and the company is in the process of listing of its shares in the market. In view of all these facts we are not in a position to agree with the conclusion of the AO as confirmed by the learned CIT(A) that the shares in the assessee company were issued at a premium which is sham and non genuine as the potential and growth trajectory of the entire group has to be seen and not the individual company. In our opinion the investments in the market are driven by the past track record,

market reputation and growth potential of the group and not on the basis of the net worth or turnover of the company. It is also revealed from the record before us that out of the money raised by the assessee a sum of ₹1,32,52,572/- was utilised for acquiring office at Mumbai from which the assessee company earns regular rental income and ₹3,35,00,000/- was utilised for acquiring plot No. 45 at PWD Colony, Jodhpur for real estate project and ₹20,00,000/- was invested in shares of G.R. Infraprojects Ltd. and the balance amount was advanced to group concerns. We find merit in the argument of the learned A.R. that M/s. Janitor Distributors Pvt. Ltd. is not a shell company either by RBI or SEBI and is an active company on the website of the Ministry of Corporate Affairs, Government of India and the company is being assessed to tax and even the scrutiny assessments were made for A.Y. 2007-08 and A.Y. 2012-13 u/s 143(3) of the Act. Copies of relevant assessment orders were placed before the bench. It was also noted that these assessments have attained finality and no proceedings under Section 147 or 263 are pending in respect of the said investor. Further the genuineness of the transaction can be seen from the fact that a similar transaction of investment by M/s. Janitor Distributors Pvt. Ltd. in the group company M/S Lokesh Builders Pvt. Ltd. has been examined by the Income Tax Officer, Ward-1, Udaipur in the assessment proceedings of M/S Lokesh Builders Pvt. Ltd. and accepted while framing assessment under Section 143(3) of the Act vide order dated 27.03.2015 after conducting detailed enquiry dated 25.02.2015 which has been placed before the Bench during the course of hearing. The Department cannot accept one of the two same transactions entered into by group companies, one the assessee and the second of Lokesh Builder Pvt. Ltd. with the same investor under same facts and circumstances as non genuine and sham and treat the other as a valid transaction. In our opinion the investment is a conscious decision which is taken after weighing the pros and cons as to the group to which the company belongs, growth and future prospects and status of the group vis-a-vis other similarly placed companies in a particular arena of the same field of activities. In this case we note that the assessee belong to the very famous G.R. Agarwal group of companies with

the flagship company G.R. Infraprojects Ltd. which is engaged in the development of infrastructural facilities like road, highways and flyovers and has a turnover of more than ₹800 crores to 850 crores over a period of three years with net profit of ₹30 to 50 crores. The investment in the flagship company to the tune of ₹80 crores by private equity funds, i.e. India Business Excellence Fund I and IDFC Investment Advisors Ltd. in 2011 realising the gross potential of the company, which is in the process of listing the shares in the market. Seeing the facts in totality we are of the view that the AO has not brought any evidence on record to prove that the transaction to be sham and non genuine and thus we are not in agreement with the conclusion drawn by the CIT(A) on the issue. The case of the assessee is also supported by a series of decisions relied upon by the learned A.R. is discussed as under: -

- In the case of ACIT vs. Gagandeep Infrastructure Pvt. Ltd. it has been held that the issue of shares at premium is always a commercial decision which does not require any justification. It was further held by the Hon'ble Tribunal that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such premium. The Revenue authorities cannot question charging of such huge premium.
- In CIT vs. Creative World Telefilms Ltd. [333 ITR 100 (Bom)] the Hon'ble Bombay High Court sustained the deletion of the addition made u/s. 68 of the Act in respect of the share application money by observing that "The question sought to be raised in the appeal was also raised before the Tribunal and the Tribunal was pleased to follow the judgment of the apex court in the case of CIT v. Lovely Exports P. Ltd. [2008] 216 CTR 195; [2009] 319ITR (St.) 5, wherein the apex court 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. In the case in hand, it is

not disputed that the assessee had given the details of name and address of the shareholder, their PAN/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.

- In *Arceli Reality Limited vs. ITO for A.Y. 2007-08* in ITA No. 6492/Mum/2016 dated 21.04.2017 the tenability or otherwise of addition made u/s. 68 of the Act in respect of share application money received was the subject-matter for consideration. The Hon'ble Tribunal, after taking note of and relying upon the aforesaid rulings in *CIT v. Gagandeep Infrastructure P. Ltd.* (394 ITR 680) and *CIT v. Creative World Telefilms Ltd.* (333 ITR 100), was pleased to delete the disputed addition.
- In the case of *Lalitha Jewellery Mart P. Ltd. vs. DCIT* (399 ITR 425 (Mad)) the Hon'ble Madras High Court held that the assessee cannot upon its investors to disclose all such business transactions they carried on in the immediate past and as to how much they made from their respective business enterprises. The assessee cannot call upon its investors to prove their good business sense in investing in the assessee-company, as such investors cannot gain any controlling stake.
- In the case of *Orchid Industries Pvt. Ltd. vs. DCIT* in ITA No. 1867/Mum/2013 dated 07.02.2014 the Coordinate Bench of this

Tribunal held that merely because the cheques were deposited in the respective accounts would not lead to the conclusion that these cheques money was the assessee's own money routed through these parties until and unless it is found in the enquiry and substantiated with the facts and material.In view of the above discussion as well as facts and circumstances of the case, we are of the considered opinion that the addition made by the AO under Section 68 of the Act is not justified and the same is hereby deleted.

The above decision of the Coordinate Bench has been upheld by the Hon'ble Jurisdictional High Court in the case of CIT vs. Orchid Pvt. Ltd. in ITA No. 1433 of 2014 dated 05.07.2017.

- In the case of Principle CIT vs. M/s. Paradise Inland Shipping Pvt. Ltd. In Tax appeal No. 66 of 2016 dated 10.04.2017 the Hon'ble Jurisdictional High Court observed that once the assessee has produced documentary evidence to establish the existence of such companies, the burden would shift on the Revenue-Appellant herein to establish their case. There no infirmity in the findings arrived at by the ITAT as well as CIT Appeals on the contentions raised by the Appellant-Revenue in the present case and, as such, the question of interference by this Court in the present proceedings under Sections 260A of the Income Tax Act would not at be justified.

10. We find that the decisions relied upon by the learned D.R. to support the decisions of the First Appellate Authority were clearly distinguishable as explained in the ensuing paragraphs. In the case of Sreelekha Banerjee (supra) the issue for verification was of the source of very high denomination notes. The assessee explained that the high denomination notes represented the cash out of the cash withdrawal from the bank which not accepted by the AO on the ground that the assessee did not mention the account for withdrawal of cash and the books of account maintained and produced before him did not reflect the bank account and the AO noticed discrepancies in the statement filed by the

assessee. In the case of ITO vs. Zara Trading Pvt. Ltd. and Khushara Real Estate Pvt. Ltd. (supra) the reasonableness of share premium in the light of various parameters like information from Investigation Wing of Income Tax Department about the assessee having taken accommodation entries and non-compliance by the Directors/Investor company in the proceedings and non furnishing of documentary evidences to establish identity of share applicant, etc. whereas in the present case is identification of the source.

- In the case of Major Metal Ltd. (supra) the addition on account of share capital was confirmed by Hon'ble ITAT as well by the Hon'ble High Court because the share appellant-companies categorically admitted that they had given accommodation entries by accepting cash against cheques issued and charged commission. The Directors of these share appellant companies were also cross-examined by the assessee whereas in the present case the facts are different.
- In the case of Bisaka Shares Pvt. Ltd. (supra) the Hon'ble Tribunal confirmed the order passed under Section 263 by CIT because the AO did not conduct any enquiry about the genuineness of share application and simply accepted the return filed by the assessee in the assessment completed under Section 143(3) r.w.s. 147 of the Act whereas this not the fact in the present case.
- In the case of Durga Prasad More (supra) it was held by the Hon'ble Supreme Court that though apparent must be considered real unless it was shown that there were reasons to believe that the apparent was not real, in a case where a party relied on self-serving recitals in documents it was for that party to establish the truth of those recitals, and that the taxing authorities were entitled to look into surrounding circumstances to find out reality of the recitals. The documents considered by the Hon'ble Court in this ruling were a deed of conveyance and another deed of settlement in respect of a property situated in Calcutta.

- In the case of Shankar Industries (supra) the finding recorded by the Hon'ble Court was that the assessee was required to produce proof of identity of the creditor, capacity of the creditor and the genuineness of the transaction. It was only for the reason that except the identity of the creditor nothing was produced by the assessee in support of a cash credit that the ruling of the Hon'ble Court went against it. But in this case all the evidences were produced by the assessee before the AO.
- In the case Kant & Co. (supra) the ratio laid down was that in case of a cash credit entry, it is necessary for the assessee to prove not only the identity of the creditors but also the capacity of the creditors and the genuineness of the transaction about which there can be no dispute. The facts of the present case are different.
- In the case of Prakash Textile Agency (supra) the assessee could establish only the existence and identity of the creditor and, hence, the decision of the Hon'ble Court went against it but in this case assessee could prove all the evidences.
- In Oriental Wire Industries P. Ltd. (supra) the proposition laid down was that in case of a credit appearing in the books, it is for the assessee to prove the source of the loan, capacity of the creditor and the fact that the loan was in fact given by the person concerned whereas the facts of the present case are different.
- In United Commercial & Industries Co. (supra) it is held that it is necessary for the assessee to prove prima facie the identity of his creditors, the capacity of such creditors and the genuineness of the transaction. In the present case assessee has proved all these facts.
- In the case of M.A. Unneeri Kutti (supra) only the identity of the creditor was established. In other words, the creditworthiness and the genuineness of the transactions were not proved where as in the present case identify, genuineness and creditworthiness were proved.

- In Precision Finance Pvt. Ltd. (supra) it is held that it is for the assessee to prove the identity of the creditors, their creditworthiness and genuineness of the transaction about which there can be no quarrel, which has been duly complied with by the assessee in the present case.
- In the case of Nova Promoters & Finlease Pvt. Ltd. (supra) the AO had received information from Investigation Wing about 16 entry operators who had given accommodation entries to several persons including the assessee. Upon examination, the Assessing Officer found that the material available showed link between the entry providers and the assessee-company. Besides, out of the 22 companies whose names figured in the information given by them to the Investigation Wing, 15 companies had provided share subscription monies to the assessee.
- In Independent Media (P) Ltd. (supra) the alleged shareholders had confessed that they had provided entry against receipt of cash. The facts of the present case are different.
- In Focus Exports Pvt. Ltd. (supra) the assessee was not cooperative and did not furnish complete details/particulars in respect of the share application money received. In fact, the assessee had 'absconded' as a result of which the assessment was completed ex-parte whereas in the present case the facts are different.
- In N R Portfolio Pvt. Ltd. (supra) not only the share applicants did not attend the proceedings despite summons issued u/s.131 of the Act but also most of the notices were received back unserved whereas in the present the investor provided information in response to notice under section 133(6).

11. In the light of the above facts and the ratio laid down by various decisions, we are of the view that the order of the CIT(A) confirming the order of the AO on the ground that the share capital and share premium are non genuine and suspicious is not correct and therefore cannot be

sustained. In the present case the identity, creditworthiness and genuineness are proved by filing the necessary evidences. We, therefore, set aside and reverse the order of the CIT(A) and direct the AO to delete the addition.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 8th February, 2018.

Sd/-
(Joginer Singh)
Judicial Member

Sd/-
(Rajesh Kumar)
Accountant Member

Mumbai, Dated: 8th February, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -12, Mumbai*
4. *The Pr. CIT - 6, Mumbai*
5. *The DR, "J" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.