IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANDEEP GOSAIN, JM

ITA No.5151/Mum/2015

(**Assessment Year:2011-12**)

DCIT CIR 3(3)(2) R.No.609, 6th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Tulip Hotels Pvt.Ltd., Chandermukhi Building (Basement), Behind the Oberoi Nariman Point Mumbai – 400 021
PAN/GIR No.		**AAACT9446Q**
Appellant)	..	**Respondent**)

Assessee by	Shri Ram Tiwari
Revenue by	Shri Vijay Mehta
Date of Hearing	**05/01/2018**
Date of Pronouncement	**14/03/2018**

आदेश / O R D E R

***PER SANDEEP GOSAIN (J.M)*:**

This is an appeal filed by the revenue against the order of CIT(A) - 8, Mumbai dated 25/08/2015 for A.Y.2011-12 in the matter of order passed u/s.143(3) of the IT Act.

2. Brief facts of the case are that assessee is a company engaged in the business of operation, management and marketing of hotel properties owned by the third parties. The assessee filed the return of income for A.Y. 2011-12 on 29.09.2011, declaring business loss of Rs.4,30,68,890/-. The assessee's assessment was completed u/s. 143 (3) of the Income-tax Act, 1961 ('the Act') dated 15.03.2014, assessing an income of

Rs.61,16,28,856/-. The A.O. while completing the assessment made the following additions:-

1. Disallowance u/s.14A of the Act of Rs. 11,31,075/-

2. Non-acceptance of the assessee's claim of treating interest income of Rs.14,258/- as business income.

3. Disallowance of interest expenditure of Rs.2,91,66,665/-.

4. Disallowance of Rs.62,44,00,000/-in respect of FCCD issued

5. Disallowance of TDS credit of Rs.49,727/-.

3. Aggrieved by the order of AO, assessee preferred appeal before CIT(A) and CIT(A) after considering the case of the both the parties partly allowed the appeal.

4. Now, the revenue is in appeal before us on the grounds no.1,3 & 4 mentioned hereinabove.

5. Ground No.1 & 2 raised by the revenue are inter related and inter connected and relates to challenging the order of CIT(A) in deleting the disallowance made by AO u/s.14A r.w.r. 8D. Therefore, we thought it fit to dispose of the same through this present consolidated order.

6.We have heard the rival contentions from both the parties and we have also perused the material placed on record as well as orders passed by the Revenue authorities. Before we adjudicate the present grounds on merits, it is necessary to reiterate the submission made by assessee before CIT(A) while dealing with these grounds. The relevant portion of the order of CIT(A) is contained in para 4.1 to 4.14 which is reproduced as under:-

4.1 Ground No.1:
In this ground, the appellant has challenged the disallowance of Rs.11,31,075/-u/s.14A of the Act being 0.5% of the average investment of Rs.22,62,15,000/-calculated by the A.O. u/s.14A r.w.rule 8D.
4.1.1 In this regard, it was submitted that during the relevant assessment year under consideration, the appellant has not earned any dividend income. The appellant has therefore not claimed any dividend income exempt u/s.10 (34) of the Act. As there was no exempt income earned during the year, no related expenditure was incurred. Accordingly, no disallowance u/s.14A r. w. rule 8D was offered. The appellant has investments in M/s. Kalpatharu Resorts Pvt. Ltd.. M/s V Hotels Ltd. and Tulip Star Leisure & Health Resorts Ltd. in unquoted equity shares with the aim of either to gain the management control.

4.1.2 It was further submitted that the investments held by the appellant in various unquoted equity shares of subsidiary company and associates are for strategic purposes i.e. either to gain the management control or to have a synergy in business and not to earn dividend income. Hence, an ad-hoc disallowance of any expenditure u/s 14A of the Act is clearly unwarranted for the following specific reasons:

- *The said unquoted investments in subsidiaries have been made to gain the management control in the said companies;*
- *The investments in associates have been made with the view to synergize the business operations of the appellant company; and*
- *No infrastructure facilities is required to regulate the investment activities m the said share;*

4.1.3 Further it was emphasised that the company's primary business is operation, management and marketing of the hotel properties owned by third parties. The investment philosophy is to remain diversified in an assortment of asset class, with a view to build a portfolio of business that generates value. With the said motive, the appellant found it apt to invest in subsidiaries with a view to enhance its stake in the profits of the said unquoted companies.

4.1.4 In this regard, the appellant placed reliance on the decision of Hon'ble ITAT in the case of ACIT v. Spray Engineering Devices Ltd [ITA No. 646/Chd/2009] in which the Hon'ble ITAT held as under inter alia:

> *"The disallowance under section 14A was made by the Assessing Officer in relation to the investment made by the assessee in the shares totaling Rs. 3.01 crores. The explanation of the assessee vis-a-vis aforesaid investment was that it was engaged in the manufacturing of equipments for sugar industry. The assessee had made investment of Rs. 3.01 crores by way of shareholdings*

in B, which was sick sugar mill. The said investment was made by the assessee to test run its equipment in such sugar mill. The said investment was made in the earlier years and not during the year under consideration, The assessee has no intention to earn any dividend from the 'said Investment as the company In which the amount was invested was running into losses. Further, the assessee during the year under consideration had received no dividend income whatsoever. The first plank of argument of the assessee vis-a-vis the aforesaid investment was that no funds were borrowed for the said investment and further in any case, the investment having made in the course of business by the assessee out of its accruals, does not warrant any disallowance under section 14A. There is merit in the plea of the assessee that where a business strategy had been adopted by the assessee by way of investment in shares of sick company in order to take over the said company for widening its operation of business, it cannot be held to be investment per se. The decision making of a businessman by way of strategy planning in allied line of business is a decision made in the course of carrying on the business and the Assessing Officer cannot sit in judgment seat to comment upon the same. Once the assessee has been found to have made a business investment by way of shares in related line of business, the said investment though held by way of shares in the said company cannot be subjected to disallowance under section 14A of the Act, which in any case is relatable to disallowance of the expenditure out of the exempt income earned by the assessee, by way of its investment in shares of other company. In the facts of the present case the investment was purely of business nature as the company in which the amount was invested was a loss-making company and there was no question of earning any dividend income from such investment. In the totality of the facts and circumstances of the case there is no merit in the orders of the authorities below in disallowing any expenditure under the garb of section 14A"

4.1.5 The appellant further drew attention to the judgment of Mumbai ITAT decision in the case of Avshesh Mercantile Pvt. Ltd. in ITA No.5779/Mum/2006 which followed the judgment of the Hon'ble Mumbai High Court in the case of CIT vs. M/s. Delite Enterprises (ITA No. 110 of 2009} dated 26.02.2009 wherein it was held that no disallowance u/s. 14A is permitted if there is no tax - free income earned by the assessee for the year under consideration.

4.1.6 Further, in respect of disallowance as per Rule 8D(2)(iii) of the Rules, the appellant submitted that only those investments ought to be considered for the calculation of disallowance, the

income from which does not or shall not form part of the total income. In view of the above, it is submitted that no dividend were accrue to the assessee from its investment in M/S Kalpatharu Resorts Pvt. Ltd., M/S V Hotels Ltd., and Tulip Star Leisure & Health Resorts Ltd. Hence, it cannot be considered for the calculation of disallowance as per Rule 8D(2)(iii) of the Rules. " .

4.1.7 In respect of Rule 8D, the appellant further placed reliance on recent judgment of the Hon'ble Kolkata ITAT in the case of REI Agro Ltd vs DCIT and contended that it has been categorically held that while computing 14A disallowance as per Rule 8D(2)(ii) and Rule 8D(2)(iii), only those investments (and not all investments) should be considered, from which the assessee has earned exempt income during the year. Thus, the appellant pleaded to calculate disallowance u/s 14A considering only the shares on which it has earned dividend income.

4.1.8 It was argued that the method specified u/r 8D intends to cover all the expenditure pertaining to exempt income. Clause (i) of the above rule is meant to cover interest and other expenditure which are directly attributable to exempt income, whereas clause (ii) intends to cover other interest expenditure which is not directly attributable to any particular income or receipt and clause (iii) intends to disallow an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income. The appellant submitted that no borrowings were specifically made for the purpose of making investments and accordingly the question of direct disallowance and proportionate and notional disallowance on account interest does not apply.

4.1.9 It was contended that the provisions as laid down in Rule 8D requires three adjustments :

1. *Direct expenditure*
2. *Interest Expenditure Allocation*
3. *Other expenses allocation*

4.1.10 The appellant made submission in this regard as below:
"Direct Expenditure — It is submitted that there is no expenditure directly attributable to exempt income has been claimed by the assessee
Interest Expenditure Allocation - It is submitted that no nexus can be developed between the finance charges incurred and the investments by the assessee since no borrowings had been specifically made for the purpose of making investments.

Other Expenditure Allocation — During the year under consideration, the appellant company has incurred Rs. 1,49,54,719 as total operating expenses. On observing the nature of the said expenses, it will come to the notice of your Honour that the expenses do not include any interest expenditure and the same are basic expenses required to keep the company afloat- Therefore, the expenses are not allocable to earning the dividend income.

The above, clearly establishes that the assessee company has not incurred any expenses for earning exempt income and thus, no expenditure needs to be disallowed u/s. 14A of the Act."

4.1.11 As regards the allocation of other operating and administrative expenses to the earning of exempt income, the appellant asserted that it does not have to deploy any employees to administer and manage the dividend income. The same is evident from the profit and loss account which itself suggests that the assessee has incurred only those administrative expenses which are required to be incurred on daily basis for running its business irrespective of any investments made or dividend earned thereon.

Beside the above, all other expenses that have been incurred are in nature of administrative expense and are incurred on the day-to-day working of the company. These include general expense such as printing & stationery, depreciation, profession taxes, travelling and conveyance, etc. The appellant referred to the nature of expense incurred:

Sr. No.	*Particulars*	*Amount (Rs.)*
1	*Salaries*	*6,34,027*
2	*Company's Contribution to Provident Fund*	*61,233*
3	*Gratuity*	*59,685*
4	*Staff Welfare*	*3,23,034*
5	*Travelling & Conveyance*	*5,48,210*
6	*Printing & Stationery*	*5,05,994*
7	*Communication Expenses*	*3,91,724*
8	*Repairs and Maintenance*	*3,37,025*

9	*Vehicle Expenses*	*4,03,585*
10	*Legal & Professional Fees*	*1,09,79,702*
11	*Entertainment Expenses*	*42,743*
12	*Audit Fees*	*61,844*
13	*Advances Written Off*	*40,584*
14	*Rent, Rates and Taxes*	*22,002*
15	*Electricity Expenses*	*2, 76, 768*
16	*Office Expenses*	*78,969*
17	*Sundry Expenses*	*1,87,586*

4.1.12 It was contended that expenses mentioned above are out rightly incurred by the assessee for specific purposes and cannot be said to be incurred for dividend only. Out of these expenses, major expenses are in respect of Legal and Professional, panting and stationery and travel and conveyance amounting to Rs. 1,09,79,702, Rs.5.05.994 and Rs. 5,48,210 respectively have been incurred for the basic business of the assessee company. Hence, the same cannot be said to have been incurred for earning the dividend income.

4.1.13 It was argued that the assessee company has not earned any exempt income during the year under consideration. Hence no direct or indirect nexus can be established between the above expenses with the exempt income.

4.1.14 It was contended that the application of the provisions of Rule 8D read with section 14A of the Act is to be based on the facts and circumstances of each case and is not mandatory. Thus, in the view that merely because the assessee had long term investments, the application of said provisions mechanically is not justified. It was further argued that when the assessee has neither earned exempt income nor incurred any expenditure has been incurred on the strategic investments held in subsidiary. associate companies etc, the disallowance should be restricted to the actual expenditure and not notional expenditure and no disallowance u/s 14A of the Act is called for or warranted.

7. By the impugned order, CIT(A) deleted disallowance after observing as under:-

> *5.1.1 In this ground, the appellant has challenged the disallowance of Rs.11,31,075/-u/s.14A of the Act being 0.5% of the average investment of Rs.22,62,15,000/-calculated by the A.O. u/s.14A r.w. Rule 8D.*
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> *5.1.2 The A.O. has discussed this disallowance in para 5 of the assessment order. I have carefully considered the reasoning given in the assessment order and the contentions and submissions of the appellant on this ground of appeal.*
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> *5.1.3 I have also noted that a similar ground of appeal was raised by the appellant before my predecessor in its appeal for A.Y. 2010-11. My learned predecessor. Commissioner of Income Tax (Appeals) - 7, Mumbai in para 5, pg. 5 of his order no. ClT(A)-7/IT-6027DCIT-3(3)712-13 dt 08.10.2013 had followed the ratio in Siva Industries and Holding Ltd. v. CIT (2012) 54 SOT 49 (Chennai) wherein the Hon'ble ITAT Chennai had held, "even in the year where no exempt income is earned or received by the assesses, disallowance u/s 14A can be made." Based on this, my learned predecessor had upheld the disallowance u/s 14A.*
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> *5.1.4 However, I find that my learned predecessor had not discussed in detail the merits of applicability or otherwise of S. 14A of the Act in the facts of the appellant's case. Similarly, the framework of interpretation of applicability laid down by jurisdictional Bench of Hon'ble ITAT Mumbai and Bombay High Court have also not been examined in the said order.*
> *5.1.5 Essentially, the appellant's argument against ad-hoc disallowance of any expenditure u/s 14A of the Act is that during the relevant assessment year under consideration, it has not earned any dividend income exempt u/s. 10 (34) of the Act. As there was no exempt income earned during the year, no related expenditure was incurred.*
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> • *The said unquoted equity shares of subsidiary companies and associates, viz. M/s. Kalpatharu Resorts Pvt. Ltd., M/s V Hotels Ltd. and Tulip Star Leisure & Health Resorts Ltd. are for strategic purposes i.e. either to gain the management control or to have a synergy in business and not to earn dividend income.*
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> • *No infrastructure facilities is required to regulate the investment activities in the said share.*

5.1.6 Apart from contesting applicability of S. 14 A in their case, the appellant have also contested calculation of disallowance u/r 8D of Income Tax Rules by essentially asserting that its expenses are entirely and identifiably incurred for specific purposes and cannot be said to be incurred for earning of dividend. Moreover, no direct or indirect nexus can be established between the above expenses with the exempt income.

5.1.7 I have noted the case laws cited by the A.O. in pa'3 5.2 and 5.4 of his order, viz. Technopak Advisors Pvt. Ltd. (2012) 50 SOT 31 and Cheminvest Limited vs. ITO - 317 ITR 86 (AT) both of Hon'ble ITAT Delhi. However, my attention is drawn to several other judgements that lay down a guideline for applicability of s. 14 A in case there is no exempt income or no exempt income in a particular assessment year or, the investment is in subsidiary companies purely for purpose of furthering the business of the assessee or, there is no actual expenditure incurred on earning of exempt income.

5.1.8 I find guidance in CIT v Reliance Communication Infrastructure Ltd (Bombay H.C.) 207 Taxmann 219 wherein it was held that that investments made in subsidiary company and money advanced to related company were for furthering business of assessee, no disallowance of interest paid on borrowed capital could be made . Similarly, in EIH Hotels Ltd v. DCIT (Chennai ITAT) ITA 1503&1624/Mds/2012 it was held that the investments made by the assessee in the subsidiary company are not on account of investment for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. It was further held that the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investments made by the assessee in its subsidiary are not to be reckoned$_h$ for disallowance u/s. 14A r.w.r. 8D. "

5.1.9 Similarly, with respect to apportionment of expenses u/r 8D I find guidance in the following decisions:

(a) Wimco Seedlings Ltd. v. DCIT, 107 ITD 267 (Delhi) (TM) wherein it is has been held that section 14A cannot be extended to disallow expenditure which is assumed to have been incurred for purpose cf earning tax free income.

(b) Union Bank of India v. ACIT, ITA No. 5347/Mum/2007 wherein the Hon'ble Members following the decision in the case of Wimco Seedlincs Ltd. v. DCIT, 107 O 267 (Delhi) (TM), held that only expenditure, which has been proved t: have been incurred in relation to the earning of tax free income, can be disallowed, and the section cannot be extended disallow even expenditure which is

assumed to have been incurred for the purpose of earning the tax free income.

(c) B.S.E.S. Ltd. v. DCIT (Mum.), wherein the Hon'ble Members following the Special Bench decision in Punjab State Industrial Development Corporation Ltd. v. DCIT, 102 ITD 1, held that when the AO has not placed any material on record to controvert the contention of the assessee that no expenditure has been incurred for earning the exempt income, there is no justification to disallow proportionate business expenses on estimate basis.

(d) CIT vs. M/s. Hero Cycles Ltd. 323 ITR 518 wherein Hon'ble Punjab & Haryana High Court in case of has held that whether in a given situation any expenditure was incurred which was to be disallowed was a question of fact. The contention of the revenue that directly or indirectly some expenditure is always incurred which must be disallowed u/s 14A was not accepted. It was held that disallowance u/s 14A requires a finding of incurring of expenditure. If it is found that for earning exempted income no expenditure has been incurred, disallowance u/s 14A cannot stand.

(e) The Delhi Tribunal in the case of JINDAL PHOTO LTD. (ITA No. 4539/Del./2010 dated 22.12.2010) considered the issue of disallowance u/s 14A and the following principles have been laid down in this decision as well as other decisions:

*i) Disallowance u/s 14A even under Rule 8D, the onus to show **nexus** between expenditure & tax-free income is on the AO.*

ii) Rule 8D cannot be simply applied without pointing out any inaccuracy in the method of apportionment or allocation of expenses as adopted by the assessee.

iii) Rule 8D r.w.s. 14A(2) can be invoked only if the AO "having regard to the accounts of the assessee is not satisfied with the correctness of the claim of the assessee ;n respect of expenditure incurred" in relation to tax-free income.

iv) The onus was on the AO to establish that expenditure was incurred to earn tax-free income. Section 14A requires a clear finding of incurring of expenditure and no disallowance can be made on the basis of presumptions [GIT vs. Hero Cycles 323 ITR518(P&H).

***v)** The burden is on the AO to establish nexus of expenses incurred with the earning of exempt income, before making any disallowance u/s14A [ACIT vs. Eicher Ltd 101 TTJ (Del) 369].*

vi) Before making any disallowance u/s14A, the onus to establish the nexus of the same with the exempt income, is on the revenue [Maruti Udyog vs. DCIT 92 ITD 119 (Del)].

vii) There cannot be any presumption that the assessee must have incurred expenditure to earn tax free income [Wimco Seedlings vs. DCIT107 ITD267 (Del.(TM)].

> *5.1.10 I find that the A.O. has not disputed that the appellant had invested in unquoted shares of sister/subsidiary companies; he has also not disputed the assertion that this was in furtherance of appellant's business; the fact that the appellant has not earned or claimed any exempt income during the year is also not refuted; the assessment order is also silent on the claim of the appellant that it has not incurred any expenditure in relation to income which does not form part of the total income under the Act.*
> *5.1.11 Under these facts and circumstances of the case and in view of the guiding principles laid down by Hon'ble Bombay High Court, Mumbai Bench of ITAT and several other judicial authorities as mentioned above, the contention of the appellant has merit. This ground of appeal is allowed in favour of the appellant. The disallowance of Rs.11,31,075/- u/s.14A of the Act is therefore deleted.*

8. We have considered rival contentions and gone through the orders of the authorities below and found that CIT(A) has dealt with threadbare all the expenditure alleged to be pertaining to exempt income and thereafter applying various judicial pronouncements recorded a finding that no expenditure was incurred for earning exempt income. CIT(A) also recorded a finding of fact that assessee has not earned any exempt income during the year, therefore, no disallowance is warranted u/s.14A. The detailed finding so recorded by CIT(A) are as per material on record which has not been controverted by DR by bringing any positive material on record. We do not find any reason to interfere in the order of CIT(A).

9. Furthermore, we also found that during the year under consideration, assessee has not earned any exempt income, therefore, as per following judicial pronouncements, no disallowance u/s.14A is warranted.

1) *The Pr. CIT v. Ballarpur Industries Ltd. (Income-tax Appeal No. 51 of 2016 dated 13.10.2016) (Bombay High Court – Nagpur Bench)*
2) *Cheminvest Ltd. v. CIT [378 ITR 33 (Del) / 281 CTR 447 (Del)] **
3) *CIT v. Shivam Motors (P) Ltd. [272 CTR 277 (All)]*

4) CIT v. Corrtech Energy (P) Ltd. [272 CTR 262 (Guj)]
5) CIT v. Lakhani Marketing Incl. [272 CTR 265 (P&H)]
6) CIT v. Holcim India (P) Ltd. [272 CTR 282 (Del)]
7) CIT v. Delite Enterprises [ITA No. 110 of 2009 Bombay High Court)

10. Only strategic investments were made by assessee, therefore, same requires to be excluded from average investment and not be considered for disallowance u/s.14A in view of the following judicial pronouncements.

1) Cheminvest Ltd. v CIT [378 ITR 33 (Del)/ 281 CTR 447 (Del)]
2) CIT v. Holcim India (P) Ltd. [272 CTR 282 (Del)]
3) Garware Wall Ropes Limited v Addl. CIT (ITA No. 5408/Mum/2012)
4) M/s JM Financial Limited v Addl. CIT (ITA No. 4521/Mum/2012)
5) CIT v Oriental Structural Engineers Pvt Ltd (Delhi High Court)

11. On these facts CIT(A) has correctly deleted the disallowance made u/s.14A r.w.r.8D of the IT Act.

12. Ground No. 3:- This ground raised by revenue relates to challenging the order of CIT(A) in treating the interest of Rs.2,91,66,665/- paid to M/s. Cox & Kings (India) Ltd., for the purpose of business. Contention of assessee before the CIT(A) was as under and contained in para 4.3.1. to 4.3.5 which reads as under:-

4.3.1 In this ground, the appellant has challenged the disallowance of interest expenditure of Rs.2.91,66,665/- paid by the appellant company on loans outstanding in case of M/s.Cox & Kings (India) Ltd.

4.3.2 It was submitted that the A.O. while disallowing the said claim of interest expenditure has observed that the issue of payment of such interest cost in the name of M/s. Cox & Kings (India) Ltd. has been considered in earlier assessment years i.e. from A.Y. 2004-05 to A.Y. 2009-10 wherein the claim of said expenditure has been disallowed as the same is not wholly and exclusively incurred for the purpose of appellant's business. The A.O.'s further observation that the action of the A.O. has also been confirmed by the CIT(A) in the A.Y. 2004-05 and 2005-06. The A.O. further observed that the appellant has contested the decision of CIT(A) for the said assessment years before the ITAT which has allowed the appeal in favour of the appellant. However, the decision of the ITAT in those

assessment years has not been accepted by the Department and an appeal u/s.260A of the Act has been filed before the Hon'ble High Court which is pending. Since the issue has already been covered and sustained by the first appellate authority and an appeal on the issue is pending before the Hon'ble High Court, the same is not commented against for the sake of brevity. Thus, the expenditure claimed on account of interest cost in the name of M/s.Cox & Kings (India) Ltd. is not business expenditure and hence not allowable.

4.3.3 It was submitted by the appellant that from the observations of the A.O. in the assessment order, it can easily be gathered that the interest paid to M/s. Cox & Kings (India) Ltd. has also been allowed by the Hon'ble ITAT in the appellant's case vide ITA Order No.: 6490 & 6491/Mumbai/08 for A.Y. 2004-05 & 2005-06 dated April, 2009 While allowing the appellant's appeal, the Hon'ble ITAT in the said order in para 29.4 & 30, made the following observations: '

> *"29. 4 Copy of the order of the CIT(A) in the case of THSL, who after examining the issues in detail allowed the issue in favour of the THSL is placed at pages 154 to 182. Copy of the assessment order in the case of THSL by which similar addition was made is placed at page 183onwards. The figure of Rs.7,56,16,910/-disallowed by the AO in the case of THSL appearing at pages 33 of the assessment order and 215 of the paper book. After going through all these details, it is seen that the expenses were incurred on behalf of the THSL by CKIL and they were reimbursed through the assessee as the assessee being a group concern of THSL was an intermediatery. This is a normal practice in the business that where there are many group concerns, they obtain services of group concern for running ' ' of their business activity smoothly. In the present case. TSHL obtained services of the assessee who is a group concern of THSL and the assessee further availed the services of CKIL to provide services to THSL as per agreement clauses. Services are provided and thereafter bill was raised and the same was reimbursed through the assessee. Therefore, this is not a case of the department that the assessee has incurred expenses which are not assessable. Neither the assessee has claimed any expenses in its P&L account nor has shown income on account of these expenses because of the reason that bills raised by CKIL and THSL has reimbursed equal amount to CKIL, through assessee. There is only incoming and outgoing entries in the books and for this reason neither the assessee has shown in its P&L account any incoming entry/ income nor outgoing entry/ expenditure.*

> *30. In view of these facts and circumstances we hold that the authorities below were not justified in holding that these expenses were not allowable in the hands of the assessee therefore, we delete the disallowance of Rs. 7,56, 16,910/-. "*
> *4.3.4 It was further submitted that the above issue has also been adjudicated by CIT(A) 7 in the appellant's own case for A.Y. 2010-11 in favour of the appellant.*
>
> *4.3.5. It was, therefore, submitted that the facts of the interest expenditure of Rs. 2, 91,66,665/- incurred by the appellant by way of payment to M/s. Cox & Kings (India) Ltd during the year are similar to the facts prevailing in the A.Ys. 2004-05 & 2005-06 where the Hon'ble ITAT, Mumbai has decided the issue in favour of the appellant and also for the A.Y. 2010-11 where the Ld, CIT(A) has decided the issue in favour of the appellant following the ITAT's order on the same issue.*

13. After considering above contentions of assessee, by the impugned order, CIT(A) deleted the disallowance after observing as under:-

> *"5.3.1 In this ground, the appellant has challenged the disallowance of interest expenditure of Rs.2,91,66,665/- paid by the appellant company on loans outstanding in case of M/s.Cox & Kings (India) Ltd. The A.O. has discussed this disallowance in para 7 of the assessment order.*
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> *5.3.2 I find that identical issue was decided by my Ld. Predecessor vide order No.CIT(A)—7/IT-602/DCIT—3(3)/12-13 dated GS. 10.2013 for A.Y. 2010-11. The relevant extracts from CIT{A)'s order are reproduced hereunder:-*
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> *"The above issue has been decided in favour of the appellant by the Hon'ble ITAT 'E' Bench, Mumbai in the case of the appellant for the A. Y. 2004-05 and 2005-06 [ITA No. 6490 & 6491'/Mum/2008]*
> *The Hon'ble MP High Court in Agrawal Warehousing and Leasing Ltd. v. CIT 257 ITR 235 has held that the orders passed by :he tribunal are binding on all the tax authorities functioning under the jurisdiction of the tribunal. While so holding, it followed the decision of the Hon'ble Supreme Court in Uol v. Kamlakshi Finance Corporation Ltd. AIR 1992 SC 711, 712 which has ruled thus:*
>
> *"The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate*

authority is not 'acceptable' to the Department in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this hearty rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws."

5.3.3 In view of above, and the facts of the case being identical, the disallowance of interest expenditure of Rs.2,91.66.665/- paid by the appellant company on loans outstanding in case of M/s.Cox & Kings (India) Ltd is deleted."

14. We have considered rival contentions and found that issue under consideration is squarely covered by the order of the Tribunal in assessee's own case for the A.Y.2004-05 and 2005-06. Respectfully following the order of the Tribunal in assessee's own case vis-à-vis finding given by CIT(A) in his order, we do not find any reason to interfere in the order of CIT(A).

15. Ground No.4 : This ground raised by revenue challenging the addition of Rs.62.44 crore received during the year as application money. Contention of assessee before CIT(A) was reproduced by CIT(A) in para No.4.4.1 to 4.4.15 which reads as under:-

4.4.1 In this ground, the appellant has challenged the addition of Rs.62.44 crore received by the appellant during the year as application money towards Fully Compulsorily Convertible Debentures (FCCDS) u/s.68 of the Act.

4.4.2 It was submitted that during the period relevant to A.Y. 2011-12, the appellant company has received foreign inward remittance of Rs.62.44 crore from White Kite Investments Ltd., Mauritius towards subscription to FCCDs under the consolidated FDI policy effective from 01.04.2011 issued by Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India.

4.4.3 During the course of assessment proceedings, the A.O. made enquiries about this receipt. The appellant company vide letter dated 04.03.2014 submitted before the A.O, name and the complete address of the company who made the investments in FCCDs. the amount and copy of foreign inward remittance certificate from HSBC Bank reflecting the receipt of application money.

4.4.4 The A.O. after considering the appellant's reply raised further enquiries vide order sheet entry dated 04.03.2014. The appellant again vide letter dated 14.03.2014 submitted the reply to the A.O. which has been discussed by the A.O. in para 8.5 of the assessment order. In this reply, the appellant had submitted the following information about the receipt of Rs.62.44 crores. The relevant extracts from the appellant's reply are as under:- " .

> *"... During the year under consideration, the company has received an amount of Rs 62,44,00.000 towards application money for the issue of FCCD. The said application money was received by the assesses from White Kite Investments Limited (WKIL[1]), WKIL is a company registered under the laws of Mauritius. A copy of certificate of incorporation of WKIL is enclosed as Annexure 1. The registered address of the WKIL is as under.'*
>
> *Name and address*
> *Amount received*
>
White Kite Investment Limited C/o Globefin Management Services Ltd., Les Jamalacs Building, Vieux Conseil Street, Port Louis. Mauritius	*Rs 62,44,00,000*
>
> *A copy of the Forward inward Remittance Certificate from the bank reflecting the receipt of the application money from WK/L of Rs.52.4~ 00,000/- is enclosed as Annexure 2 .*

We further submit that the said amount was in the nature of application money and the FCCD's were allotted to WKIL on 12.09.2011. Please find enclosed Annexure 3, a copy of FCCD's issued by the assesses to WKIL The said amount is duly accounted in the books of accounts of WKIL. Please find enclosed as Annexure 4, the copy of the relevant pages of the audited financial statements of WKIL for the year ended December 31, 2012 dearly reflecting that WKIL has duly Accounted for the said amount in its books of accounts.

On perusal of the above, your goodself will note that the source and genuineness of the amount of Rs. 62,44,00,000 received by the assessee on account of application money for the issue of FOOD stands fully explained and the same ought not to be added by your goodself to the income of the assessee. Based on the above, we respectfully submit to your goodself that we have proved the source and genuineness of the amount received by the assessee".

4.4.5 The appellant contended that it is clear from the above reply, that the appellant company has furnished the complete information about the receipt of Rs.62.44 crore. Through the said submission of information, the identity of the investor, creditworthiness and nature of the transaction was fully discussed. However, the A.O. examined information submitted by the appellant company, but has not accepted the investments' in FCCDs as fully explained on the following grounds:-

1. White Kite Investments Ltd. as on 31.12.2011 has accumulated losses of USD 28,94,974 and as on 31.12.2012 the losses are USD 40,76,817 which reflects non-creditworthiness of the White Kite Investments Ltd.

2. Liabilities of White Kite Investments Ltd as on 31.12.2011 was USD 1,53,70,351 and USD 1,61,05,757 as on 31.12.2012

3. The schedule of fixed assets of the appellant company does not have anything except computer, vehicle, furniture fittings, electrical equipments, office equipments, air conditioners of which the total value in books as on 31.03.2010 is Rs.31,88,5687-. Even revenue generation is also quite meagre.
4. The A.O. has worked out the earning per share and at Rs.894 (-).
4.4.6 On the basis of the above observations, the A.O. came to the conclusion that neither the creditworthiness of investing company is established nor the appellant company has any assets or potential business which attracts any investments. Accordingly, the A.O. invoked section 68 of the Act and ft-her concluded that the explanation offered by the appellant in respect of receipt r Rs 62.44 crore is not satisfactorily explained and therefore, the A.O. finally conduce that the investment of Rs.62.44 crore remains as unexplained and needs to be added u/s.68 of the Act.
Accordingly, the A.O. added the sum of Rs.62.44 crore to the appellant's income as unexplained cash credit u/s.68 of the I.T.Act.
4.4.7 In this regard, it was submitted that there is no justification and reasonableness on the part of the A.O. to make an addition of Rs.62.44 crores to the appellant's income as unexplained credit.

The appellant during the course of assessment proceedings has submitted the relevant details inasmuch as that the complete address of White Kite Investments Ltd. has been furnished to the A.O. The incorporation certificate of this company was also furnished to the A.O. The details of receipt of amount of Rs.62.44 crore through banking channel have also been furnished before the A.O. The FCCDs were allotted to White Kite Investments Ltd on 12.09.2011. Copy of certificate of the same was also furnished to the A.O. This FCCD has duly been accounted by White Kite Investments Ltd. in its books of account as can be noted from the extract of Balance Sheet of White Kite Investment Ltd. which was submitted before the A.O. vide letter dated 14.03.2014. The value of the FCCD was based on a valuation report and a copy of the same was also made available to the A.O. though the A.O. has not taken cognizance of this report. It was strongly challenged that on the face of the above several evidences, how can one come to an illogical conclusion that the explanation submitted by the appellant with regard to the receipt of Rs.62.44 crore was not satisfactorily explained?

4.4.8 It is further submitted that one of the grounds for rejection of the appellant's contention is that White Kite investments Ltd has accumulated losses for the period ending on 31.12.2011 and 31.12.2012 and has also liabilities for the period ending on 31.12.2011 as well as 31.12.2012. The appellant argued that losses and liabilities in a business enterprise are normal phenomena and therefore, the same cannot lead to a definite and conclusive conclusion that if a company is incurring loss and having liabilities it cannot make further investments. It can be seen from the accounts of White Kite Investments Ltd that it had taken a loan of USD 1.40 crore for making investments in FCCDs. The A.O. further observed that the appellant company does not have much assets or business potential so as to attract any investments. The appellant averred this conclusion was patently incorrect as evident from vacation report.

4.4.9 It was submitted that there was no substance in the objections of the A.O. in rejecting the genuine claim that it has received an amount of Rs.62.44 crore by way of FCCDs from White Kite Investments Ltd. Almost all evidences were adduced before the A.O. and copies of the same are also being adduced during appellate proceedings. These evidences establish beyond doubt that the appellant has genuinely allotted FCCDs to the said company after the appellant company has got it approved from its Board of Directors. A copy of extracts from the minutes of the meeting of the Board of Directors was also submitted Paper Book.

4.4.10 With regard to the applicability of the provisions of se::ion 68 of the Act, it was submitted that the A.O. places reliance on the

Supreme Court. decision in the case of Sreelekha Banerjee V.CIT (1963) 49 ITR 112 SC, wherein the Hon'ble Supreme Court has held that unexplained cash credit is justified simply if the assessee fails to offer an explanation, or the explanation offered by the assessee is no: found to be satisfactory by the A.O.

4.4.11 The appellant contended that the ratio of the above judgment is applicable only to those cases where the assessee failed to either submit any explanation about the cash credit or explanation submitted by the assessee is found to be unsatisfactory by the A.O. In the case of the appellant, complete details of the receipt of Rs.62.44 crore had been furnished before the A.O. and the A.O. has not found any shortcomings in these details and therefore there is no justification on the par of the A.O. to hold that explanation submitted by the A.O. is not satisfactory and therefore, the receipt of Rs.62.44 crore is unexplained and attract section 68 of the /-:t. The A.O. has merely ignored the appellant's submissions on flimsy pretexts which :s incorrect and therefore, the A.O.'s reliance on the said Supreme Court judgment is a misplaced reliance.

4.4.12 It was further submitted that the A.O. has placed reliance on another decision of Hon'ble Bombay High Court in the case, of M/s 'Major Metals Ltd. vs. Union of India 207 Taxman 185 (Bom.). In this case, the assessee had taker loan from two companies in A.Ys. 2008-09 and 2009-10. The loan was subsequently squared up by issuing of shares of face value of Rs.10 at a premium of Rs.990 - per share. The addition was made which was challenged before the Bombay High Court and the Bombay High Court confirmed the addition. The ratio of this judgment is not applicable to the facts of the appellant's case as the facts of this case and the facts of the appellant's case are entirely different. In the said case the loans were taken which were squared up by allotting shares at a premium in the subsequent year whereas in the appellant's case, no loan was taken but there is a direct investment made by White Kite Investment Ltd, Mauritius in FCCDs for which complete details are available. The A.O.'s reliance on the said decision of the Hon'ble Bombay High Court is therefore a misplaced reliance.

4.4.13 It was further submitted that the facts of the appellant's case speak for itself. The appellant, as already stated, has submitted all the relevant and necessary details of the investments of Rs.62.44 crore made by White Kite Investments Ltd. The explanation so offered by the appellant company by no stretch of imagination can be termed as unsatisfactory so as to invoke provisions of section 68 of the Act. Thus, there is no applicability of the provisions of section 68 in the appellant's case.

4.4.14 The appellant placed further reliance on the following judgments in the context of the provisions of section 68 of the Act. The submissions of the appellant are summarised below:

(I) CIT-IV v. Shree Rama Multi Tech Ltd. [2013] 34 Taxmann.com 177 (Guj.). dated 28.01.2013

The Hon'ble High Court has decided the following ground in this judgment:

Section 68 of the Act - Cash credit (share application money) A.Y. 2005-06 whether where assessee company had furnished complete details of receipt of share application money along with share application forms, names, addresses. PAN and other relevant details of share applicants, share application money could not be added as cash credit u/s.68 - Held, yes. The extract of para 7 from the said judgment is reproduced as under:

> *"7. It can be noted from the submissions made by learned counsels as also from the material on record that both CIT (Appeals) as well as the Tribunal have duly considered issue and having found complete details of the receipt of share application money, along with the form names and addresses, PAN and other requisite details they found complete absence of the grounds noted for invoking the provision of section 68 of the Income tax Act Moreover, both rightly had applied the decision of Lovely exports (P) Ltd. (supra) to the case of the respondent assessee. We find no reason in absence of any illegality much less any perversity too to interfere with the order of both these authorities, who have concurrently held the due details having been proved. What of the assessee-company had noted to prove it had presented the necessary worth proof before both the authorities and it is not expected by the assessee company to further prove the source of the deceased. This tax appeal resultantly raises no question of law and therefore do not merit for the consideration and is dismissed."*

(ii) CIT vs. Gangeshwari Metal Pvt.Ltd. on 21.01.2013 in !TA 597/2012 (Delhi High Court)

In this decision, the Hon'ble High Court has decided the following issue

> *"Whether the Tribunal by the impugned order dated 19.12.2011 fell into error in upholding the order of the appellate commissioner which directed deletion of Rs.55,50,000/- added on account of unexplained share*

application, added by the A.O. in the case of the assessee u/s.68 of the Act?"

The Hon'ble High Court in the said decision held that the A.O. has nowhere been able to prove that the documents in support of the identity of the parties have not been placed on record or they were forged documents. The A.O. also has not brought any evidence on record regarding the facts that the. Share applicants were not creditworthy or genuine. The relevant paragraph from the above decision is reproduced hereunder-

'WP(C) 597/2012 Page 5 of 10 in the light of the various documents and evidences furnished by the assessee before the AO as well as before the id. C/T(A). The Id. DR has merely relied upon the A.O. as order to contend that since there was an information from the Investigation Wing that alt the share applicants were engaged in providing accommodation entries, the A.O. was justified in treating the credit entries as unexplained liable to be taxed in the hands of the assessee. However, neither the A.O. nor the Id. DR before us has been able to prove and establish that the various documents and evidences filed by the assessee are in any manner false and fabricated and assessee has not been able to discharge its initiation onus. Therefore, in the light of the details discussions made by the CIT(A) in his order and for the reasons given by him, we are in full agreement with him in ^deleting the addition of Rs. 55,50,000/-made by the A.O. after giving a finding by him that the A.O. has nowhere been able to prove that the document in support of the identity of the parties have not been placed on record or otherwise there were forged documents, and further the A.O. has also not brought any evidence on record regarding the fact that the share applicants v/ere not creditworthy or genuine despite the fact that their Pan and confirmatory affidavits and the details of the A.O, where the share applicants were assessed were submitted by the assessee along with copy of bank accounts of the share applicants, in this view of the matter, we, therefore, upheld the order of Id. CIT(A) and reject this ground raised by the revenue".

(iii) CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR (SC) 195
The Hon'ble Supreme Court in this case has held that in case the investor is allegedly a bogus shareholder then the Department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income u/s.68 of the assessee company. The relevant extract from the decision is reproduced as under-

> *"If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income u/s.68 of the assessee company".*

(iv) Russian Technology Centre (P.) Ltd. v. Dy. CIT (2013) 37 Taxmann.com 400/145 ITD 88/ 155'TTJ 316/25 ITR (Trib.) 521 (Delhi)

> *"If identity of non resident remitter is established and share application money has come in through banking channels, it cannot be treated as deemed income u/s 68or 69 "Share application moneys remitted by non-residents, whose identity is not in question, through their bank accounts outside India have to be held as capital receipts not exigible to tax, and cannot be treated as deemed income under section 68 or section 69."*

The appellant submitted that from the above discussion/ explanation, it is crystal clear that assessee company has furnished all the necessary details in respect of the investor of Rs.62.44 crore before the A.O. However, the A.O. has completely ignored these evidences and proceeded to add the amount of Rs.62.44 crore u/s.68 of the Act being an investment for which no satisfactory explanation has been furnished. However, the facts are totally contrary to the conclusion of the A.O. in as much as that the complete details/evidences are furnished which have been neither been rejected by the A.O. nor any flaw has been found' in these' evidences. Looking to the facts in totality of this issue, the assessee pleaded that the addition of Rs.62.44 crore is not at all sustainable and therefore, the same may be deleted."

16. After considering above contention of assessee and the judicial pronouncements so referred by assessee, the CIT(A) has deleted the addition after observing as under:-

> *"5.4.1 In this ground, the appellant has challenged the addition of Rs.62.44 crore received by the appellant during the year as application money towards Fully Compulsorily Convertible*

Debentures (FCCDS) u/s.68 of the Act. The A.O. has discussed this disallowance in para 8 of the assessment order.

5.4.2 During the course of appellate proceedings, the appellant placed certain new evidences on record and made an application for admitting additional evidence under Rule 46A of I-T Rules, 1962 vide letter dt. 20lh Oct. 2014. My Ld. Predecessor issued a letter to AO to seek a remand report u/s 250 (4) of the Act, vide letter no. CIT(A)-4/Addl.evidence/2014-15 dated 28.10.2014 on the additional evidences placed in the course of hearing. Para 2 of the said letter is reproduced here:

"The appellant vide letter filed on 20'h October, 2014, Inward No. 884 has furnished confirmation letter from SSG Capita! Partners, SSG Special Opportunity II Limited. Hong Kong, confirming that they had given a loan of USD 14,000,000 (Rs. 62.44 crores) to While Kite Investments (Pvt) Ltd., a non resident Mauritius based company who in turn had made investment in the appellant company. The appellant has furnished a copy of the said confirmation letter and also HSBC Bank account of While Kite investment (Pvt) Limited indicating the receipt of the said loan through banking channels. The appellant has furnished the aforesaid letter with a request to admit the same as additional evidence in terms of Rule 46A of 1962 while deciding the Ground No.4 of their appeal.

You are requested to furnish your comments/objections/report regarding the admissibility of additional evidence furnished by the appellant as narrated and enclosed in the appellant's application received on 20:n October, 2014 (copy enclosed)."

5.4.3 Rule 45A of the Income-tax Rule 1962, relates to appellate proceedings before the Commissioner, in the matter of production of additional evidence before the Deputy Commissioner of Appeals and the Commissioner (Appeals). Such production is conditioned by certain situations:

a) The assessee has to show that the Assessing Officer has refused to admit the evidence.

b) The assessee also has to show alternatively that he was prevented by sufficient cause from producing the evidence before the Assessing Officer.

c) Further, the assessee also has to show its relevancy to the grounds of appeal sought to be urged.

d) Lastly, the assessee also has to establish that the Assessing Officer did not afford him sufficient opportunity in regard thereto.

5.4.4, I have considered the facts of the case and the observation of the Assessing Officer in his assessment order which is dated 15/3/2014. In para 8.2, the Assessing Officer has referred to

submission of the appellant dated 4/3/2014 whereby foreign inward remittance certificate (FIRC) from HSBC bank reflecting the receipt of application money of Rs. 62.44 crores was submitted. Not satisfied with the evidence, the Assessing Officer asked for certain other details as indicated in para 8.3. Para 8.5 of the order refers to another submission of the appellant dated 14/3/2014. In response whereby copy of FIRC was filed that reflects receipt of application money from M/s. White Kite Investments Limited (WKIL) and copy of relevant pages of the audited financial statements of WKIL for the year in 31/12/2012 were filed reflecting that WKIL has accounted for the said amount in its' own books of account.

5.4.5 In para 8.6, the Assessing Officer has given his reasons for rejecting the submissions of evidences filed by the appellant. The same shall be dealt in greater detail later in this order.

5.4.6 Vide its letter dated 2010/2014, the appellant had submitted copy of confirmation from M/s. SSG Special Opportunity II Limited (SSG) dated 30/9/2014 confirming that they had given loan of USS 1,40,00,000 to WKIL on 30 March 2011. The appellant felt the: confirmation from the source of the source of funds with respect to the FCCD's would remove any doubts regarding the genuineness of the transaction.*

5.4.7 I find that the Assessing Officer has not required the appellant to produce evidence relating to source of funds for the lender WKIL and has determined "non creditworthiness" of WKIL based on certain general observations. It is also a fact that the assessment was completed on the very next day i.e. on 15/3/2014 without asking for any other details. Since, the Assessing Officer has not required production of any further evidence to establish availability of funds with WKIL or the source of those funds, the appellant could not have produced confirmation from SSG referred to above. Further, since the order was passed the very next day, there was not sufficient opportunity available for the appellant to adduce any further evidences relevant to this ground of appeal before the Assessing Officer. In my view, the confirmation from SSG is relevant in context to this ground of appeal. Therefore, in my opinion, circumstances mentioned under Rule 46A(c)& (d) apply to this case.

5.4.8 In admitting the application of the appellant u/r 46A, 1 place my reliance on Hon'ble Bombay High Court in the case of Smt. Prabhavati Shah vs. C./.T. (1998) 231 ITR 1. In this case, the summons issued by the ITO to confirm creditors had remained unserved and the amounts were added as bogus credit. The Hon'ble High Court observed:

"He was never informed by the Income-tax Officer that the creditors were not available _ or unidentifiable. If he had been informed by the

Income-tax Officer In the course of assessment proceedings that he was not inclined to accept the loans as genuine because of the non-availability of the creditors, he could have tried to satisfy him about the genuineness of the loan by producing other evidence. At the time of hearing of the appeal, the appellant tried to satisfy the Appellate Assistant Commissioner about the genuineness of one of the loans by producing material which he could collect in the meantime. This case, therefore, will fall under Clause (c) of Sub-rule (1) of Rule 46A of the Rules." '

5.4.9. I find the reasoning given by Hon'ble Bombay High Court in the above cited case applies fully to the instant case. In view of the above, the additional evidence submitted by the appellant u/r 46A was admitted.

5.4.10 The Assessing Officer submitted remand report in this matter vide letter No. DCIT3(3)/Addl.Evidence-46A-Tulip/2014-15 dated 7/11/2014. The Assessing Officer contested admissibility of admitting additional evidence under Rule 46A of income Tax Rules, 1962 in this case This objection of the Assessing Officer stands answered in view of the discussions in the preceding paras of this order.

5.4.11 As regards, the impact of the additional evidence on this ground of appeal, the remand report discusses the same in para 4.1 to 4 4. (page 2 to 4). To summarise the substance of the remand report, para 4.1 & 4.2 simply reiterate and summarise the observations made in the assessment order. In para 4.3, the remand report dismisses the evidentiary value of the confirmation from SSG with the following remarks :

"Now before your goodself, the assessee has furnished copy of confirmation of SSG Special Opportunity II Limited, Tortola. British Virgin Islands confirming that it had given a loan of USD 14000000 to White Kite Investments in India (the same appears to be a photocopy and the authentic of the same needs to be confirmed. A perusal of said confirmation reveals that said loan was disbursed by Castleman Management Limited on behalf of lender SSG Special Opportunity II Limited. A careful examination of the HSBC bank account statement of White Kite Investment Limited dated 31/3/2011 reveals that as the balance brought toward as on 28/2/2011 was Rs. Nil and the funds deposited were withdrawn immediately after such deposits leaving balance at the end of the year i.e. on 31/3/2011 at Rs. 5,006/-. This proves that White Kite Investment Limited is not creditworthy to make such huge investments in India and that too in a loss making company as that of the assessee as no prudent businessman would invest the borrowed funds in a loss making company, It may not be out of place to mention here that both White Kite Investment Limited as well as SSG are running from care of

addresses. Moreover, SSG is reportedly based at Tortola, British Virgin Islands, which is a tax haven/sham transfers and if the same was brought to notice of the Assessing Officer during the assessment proceedings, the Assessing Officer might have had referred the matter to the FT&TR for further investigation.

Further it is to submit that the additional information provided by the assessee now does not, in any way, prove the nature & genuineness of the transaction, which was the main reason for treating the entire FCCD as unexplained cash credits by the AO. The documents provided by the assessee now do not prove anything adverse with regard to the conclusions drawn by the AO. Therefore, the additional evidence provided by the assessee is of no help, but gives rise to further suspicion having involvement of British Virgin Island based party in the transaction in question. Hence, your goodself is requested, not to accept the same."

5.4.12 The remand report of the A.O. was duly forwarded to the appellant vide this office letter no. CIT(A)-8/Remand Report/2015-16 dated 13/05/2015. The appellant furnished its reply vide its letter dt. 08/07/2015. It is relevant to reproduce the relevant extract of the appellant's reply as below:

"1. <u>The contention of the AO that the assessee has availed the opportunity of being heard and the principles of natural justice has not been violated is not correct in the facts of the case.</u>

1.1. The AO in his remand report has submitted that the assessee had been given sufficient opportunity to file necessary evidences to substantiate its claim of receipt of FCCD. It is respectfully submitted that the Ld. AO at the fag end of the assessment proceedings vide order sheet noting dated 04.03.2015 has made further enquires in respect of application money received towards FCCD, which were replied to by the assessee vide letter dated 14.03.2015. These facts are evident from para 8.2 to para 8.5 of the assessment order.

1.2. Although the time limit for completion of asst. was 31.03.2015, the Ld. AO concluded the assessment on the very next day vide order dated 15.03.2015. Hence, action of the Ld. AO in making huge addition of Rs. 62.44 crores seems predetermined and contrary to principles of natural justice.

1.3. it is respectfully submitted that the Ld. AO has not properly appreciated the' facts of the case and concluded that the additional evidences produced falls outside the specified circumstances regarding admissibility under the l.T. Rules as interpreted by the Hon'ble High Court of Allahabad in the case of Ram Prasad Sharma

Vs. Commissioner of Income Tax in (1979) 2 Taxmann 469(AII). In the course of appeal proceedings the appellant has produced evidences, which support the contentions of the appellant. These evidences are clarificatory in nature and squarely meets the principles for admissibility laid down by the Hon'ble Bombay High Court in the case of Smt Prabhavati Shah vs. C.I.T. (1998) 231 ITR 1. These evidences were open for the Ld. AO to verify. Further, it is respectfully submitted that the appellant was never asked to produce the originals which could have been produced by it and any adverse inference drawn based on non-production of the originals is not tenable in law.

1.4. The observations made by the Ld. AO that both White Kite Investments Limited as well as SSG are running from care of addresses and that SSG is based out of Virgin Islands which are tax havens/sham transfers are merely generalized statements which cannot be upheld in appeal as the same does not appreciate the genuineness of the transaction, the efficacy of the banking system as well as the control mechanisms followed by the Reseve bank of India and the policies of the Government of India.

2. <u>The identity of the person making investment, genuineness of the transaction and creditworthiness of the investors have been fully explained.</u>

2.1. During relevant A.Y. 2011-12, the appellant company has received foreign inward remittance of Rs.62.44 crores from White Kite Investments Ltd., Mauritius (WKIL). The investor is a company incorporated in Mauritius which is evident from the Certificate of Incorporation of WKIL and thus the identity of the investor is established.

2.2. The amount was received towards subscription to FCCDs under the consolidated FD! policy effective from 01.04.2011 issued by Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India.

2.3. During the course of assessment proceedings the appellant submitted following information/documents:

I. Copy of certificate of incorporation of White Kite Investments Limited (WKIL) a company registered under the laws of Mauritius.

II. Copy of the Inward Remittance Certificate from the bank reflecting the receipt of the application money from WKIL of Rs.62.44,00,000/-.

III. Global Business License (Category' 1) issued by Financial Services Commission under the laws of Mauritius

iv. Copy ofFCCD's issued by the assessee to WKIL.

v. Copy of the relevant pages of the audited financial statements of WKIL for the

year ended December 31, 2012 clearly reflecting that WKIL has duly accounted for
the said amount in its books of accounts.
2.4. During appeal proceedings before Your Honour the appellant produced the following additional documents/information.
i. Confirmation letter from SSG Capital Partners, SSG Special Opportunity II Limited, Hong Kong, confirming that they had given a loan of USD 1,40,00,000 (Rs. 62.44 Crores) to WKIL, the borrower on 30.03.2011 for the purpose of making investments in India. They have further confirmed that the loan was disbursed by Castleman Management Limited on behalf of the lender. This is also evidenced by the Statement of account of JP Morgan Internationa! Bank Limited: Client account of Castleman Management Limited.
ii. Copy of HSBC Bank Account of WKIL, indicating the receipt of the said loan through banking channels.
3. The additional evidences produced arise out of the assessment order to corroborate the stand of the assessee and to rebut the wrong conclusions drawn by the Ld AO that White Kites Investments Limited (WKIL) did not have creditworthiness to make investments.
3.1. The Appellant was not aware of the fact that the creditworthiness of WKIL would be doubted.
3.2. WKIL has not made investments out of its own funds. It had obtained funds from SSG Capital Partners for the purpose of making investments in India. All these details have been submitted by the appellant in the course of appeal proceedings to rebut the stand of the Ld. AO.
4. In spite of the Ld AO being afforded an opportunity no evidence has been produced by him in rebuttal of the claim of the appellant and hence the conclusions drawn by him are bad in /aw.
4.1 Your Honour was pleased to send the additional evidences/ information for the comment of the Ld. AO. The Ld. AO examined the information/documents sent by Your Honour but did not accept the genuineness nor correctness of the transactions.
4.2. The Ld- AO has only reiterated the conclusions dravsn in the assessment order that the creditworthiness of investing company is not established. The conclusions drawn by the Ld. AO are not correct in facts and in law and were merely made in a prejudiced and biased manner to justify the additions made.

Further to the above, the appellant would submit that the additions made under Sec 68 of the I T. Act. 1961 are not correct in la- and in facts based on the submissions already made during appeal proceedings and also the following submissions.

1. It is submitted that one of the grounds for rejection of the appellant's contention is that White Kite Investments Ltd has accumulated losses for the period ending on 31.12.2011 and

31.12.2012 and has also liabilities for the period ending on 31.12.2011 as well as 31.12.2012. The losses and liabilities in a business enterprise are normal phenomena and therefore, the same cannot lead to a definite and conclusive conclusion that if a company is incurring loss and having liabilities cannot make further investments. It can be seen from the accounts of WKIL that it had taken a loan of USD 1.40 Crores for making investments in FCCDs. In view of this the creditworthiness of WKIL should not have been doubted. The Ld. AO further observed that the appellant company has no much assets or business potential so as to attract any investments which is patently incorrect as evident from valuation report which are not relevant in the facts and circumstances of the case.

2. Copies of all evidences which v/ere produced before the Ld. AO to establish the genuineness of the transaction have also been produced before your Honour for perusal. These evidences establish beyond doubt that the transactions between the appellant and WKIL are genuine and the appellant has properly allotted FCCDs to the said company after obtaining approval of its Board of Directors. A copy o^{r} extracts from the minutes of the meeting of the Board of Directors is also submitted in Paper Book.

3. Provisions of section 68 read as under:

3.1. "68. Where any sum is found credited in the books of an assessed 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 [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

94 [Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capita!, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless-

(a) The person, being a resident in whose name such credit is recorded in the books of such company a/so offers an explanation about the nature and source of such sum so credited: and
(b) Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:
Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capita! fund or a venture capita! company as referred to in clause (23FB) of section 10.

94. Inserted by the Finance Act, 2012, w.e.f, 1-4-2013.

3.2. It is respectfully submitted that the main provision of section 68 emphasizes the importance of two key words viz. 'nature ' and 'source ' of the amount found in the books of an appellant. The appellant has to explain the nature and source of this amount to the satisfaction of the AO. In case, the AO is not satisfied with the explanation about the nature and source of the amount recorded in the books of an assessee, addition can be effected under the provisions of section 68. Thus, satisfaction about the nature and source of the amount recorded in the books of the assessee or otherwise is the basis for acceptance or addition u/s 68 of the Act.

3.3. In the appellant's case, the nature of the transaction of Rs.62.44 crores is fully explained to the Ld. AO along with documentary evidences. Source of the receipt of the amount has also been fully explained with documentary evidences as detailed above. Hence, the appellant has fully explained the nature and source of this transaction to the Ld. AO as evident from the documentary evidences submitted.

3.4. Further the first proviso to section 68 has been introduced by the Finance Act, 2012 w.e.f. 01.04.2013 which is applicable to the assessment for A.Y. 2013-14 and onwards. This proviso introduces a deeming fiction of satisfaction in as much as that the person, being a resident and in whose name such credit is recorded in the books of such company also offered an explanation about the nature and source of such sum so credited and such explanation in the opinion of the AO are to be found satisfactory.

3.5. The first proviso therefore lays down the condition that the source of the credits in a company in the name of the residents is required to be explained to the satisfaction of the AO. In other words, the source of the source is to be satisfactorily explained before the AO. Such explanation is therefore required to be given only by a person being a resident only and not by a non-resident.

3.6. It may kindly be noted that said proviso is applicable to asst. year 2013-14 and onwards and is not applicable to the appellant's case as assessment involved is asst. year 2011-12. However, one can read the intention of the legislature in introducing the said proviso to section 68 of the Act. The intention of the legislature was to cover the resident only who require to explain about the nature and source of the funds and not the non-resident. In the appellant's case, since the funds have been received from a non-resident company, even the proviso to section 68 is not applicable, even though the assessee has

complied with by providing source of source. This proves bona fide of the appellant.

3.7. In this regard, we would also like to invite your attention towards IT AT. Delhi Bench decision in the case of Russia Technology Centre Pvt. Ltd. (145 ITD88) / (154 TTJ 316) Delhi where the Hon'ble Delhi ITAT has held that identity of nonresident remitter is established and share application money has come through banking channels, it cannot be treated as deemed income u/s 68 or 69, Share application money remitted by non- resident, whose identity is in question through their banking accounts outside India have to be held as capital receipt not exigible to tax and cannot be treated as deemed income u/s 68 or 69".

3.8, From the above, to sum-up, your Honour may kindly note that as per the provisions of section 68, in the appellant's case, the identity of non-resident has been established, the source of fund has also been established. Even source of source has been established. The nature and genuineness of transaction is fully explained. Money has been received through banking channels from outside India and therefore the receipt is a capital receipt and not exigible to tax.

3.9. With regard to the applicability of the provisions of section 68 of the Act, the Ld. AO has placed reliance on the Supreme Court decision in the case of Sreelekha Banerjee v. CIT (1963) 49 ITR 112 SC, wherein the Hon'ble Supreme Court has held that unexplained cash credit is justified simply if the assesses fails to offer an explanation or the explanation offered by the assesses is not found to be satisfactory by the A. O.

3.10. It is respectfully submitted that the ratio of the above judgment is applicable only to those cases where the assesses failed to either submit any explanation about the cash credit or explanation submitted by the assessee is found to be unsatisfactory by the AO. In the case of the appellant, complete details of the receipt of Rs. 62.44 Crores had been furnished before the Ld. AO and the Ld. AO has not found any shortcomings in these details The Ld. AO has ignored the appellant's submissions on assumptions, presumptions and surmises and therefore, the Ld. AO's reliance on the said Supreme Court judgment is a misplaced reliance.

3.11. The Ld. AO has also placed reliance on an another decision of Hon'ble Bombay High Court in the case of Major Metals Ltd. vs. Union of India 207 Taxman 185 (Bom.). In this case, the assessee had taken loan from two companies in A.Ys. 2008-09 and 2009-10. The loan was subsequently squared up by issuing of shares of face value of Rs. 10/- at a premium of Rs. 990/- per share. The addition was

made which was challenged before the Bombay High Court and the Bombay High Court confirmed the addition. The ratio of this judgment is not applicable to the facts of the appellant's case as the facts of this case and the facts of the appellant's case are entirely different. In the said case the loans were taken which were squared up by allotting shares at a premium in the subsequent year whereas in the appellant's case, no loan was taken but there is a direct investment made by WKIL in FCCDs for which complete details are available. The Ld. AOs reliance on the said decision of the Hon'ble Bombay High Court is therefore a misplaced.

4. The facts of the appellant's case speak for itself. The appellant, as already stated, has submitted all the relevant and necessary details related to the investments of Rs 62.44 Crores made by WKIL The explanation so offered by the appellant by no sketch of imagination can be termed as unsatisfactory so as to invoke provisions of section 68 of the Act.

5. The appellate wishes to place reliance on the following judgments which have been rendered in the context of the provisions of section 68 of the Act.

(i) CIT-IV v/s. Shree Rama A«/ Tec/7 Ltd. (34 Taxmann.com 177) (Guj.) dated 28.01.2013
The Hon'ble High Court has decided the following ground in this judgment:

Section 68 of the Act — Cash credit (share application money) A.Y. 2005-06 — whether where assessee company had furnished complete details of receipt of share application money along with share application forms, names, addresses, PAN and other relevant details of share applicants, share application money could not be added as[1] cash credit u/s 68 — Held, yes. The extract of para 7 from the said judgment is reproduced as under:
"7. It can be noted from the submissions made by Ld. counsels as also from the material on record that both CIT (Appeals) as well as the Tribunal have duly considered issue and having found complete details of the receipt of share application money, along with the form names and addresses, PAN and other requisite details they found complete absence of the grounds noted for invoking the provision of section 68 of the Income tax Act. Moreover, both rightly had applied the decision of Lovely exports (P) Ltd. (supra/ to the case of the respondent assessee. We find no reason in absence of any illegality much less any perversity too to interfere with the order of both these authorities, who have concurrently held the due details having been proved. What of the assessee-company had noted to prove it had presented the necessary worth proof before both the authorities and it

is not excepted by the assessee company to further prove the source of the deceased. This tax appeal resultantly raises no question of law and therefore do not merit for the consideration and is dismissed.'

(ii) Commissioner of Income Tax v/s Gangeshwari Metal PA. Ltd. on 21.01.2013 in lTA 597/2012 (Delhi HC)
In this decision, the Hon'ble High Court has decked the following issue.

'Whether the Tribunal by the impugned order dated 19.12.2011 fell into error in upholding the order of the appellate commissioner which direction deletion of Rs.55,50,000/- added on account of unexplained share application in the case of the assessee u/s.68 of the Act?"

The Hon'ble High Court in the said decision held that AO has nowhere been able to prove that the documents in support of the identity of the parties have not been placed on record or they were forged Documents. The AO also has not brought any evidence on record regarding the facts that the not creditworthy or genuine. The relevant paragraph form the above decision is reproduced hereunder:-

"WP(C) 597/2012 Page 5 of 10 in the light of the various documents and evidences furnished by the assessee before the AO as well as before the ld. CIT(A). The ld. DR has merely relied upon the A.O. as order to contend that since there was an information from the Investigation Wing that all the share applicants were engaged in providing accommodation entries, the A.O. was justified in treating the credit entries as unexplained liable to be taxed in the hands of the assessee. However neither the AO nor the Id. DR before us has been able to prove and establish that the various documents and evidences filed by the assesses are in any manner false and fabricated and assessee has not been able to discharge its initiation onus. Therefore, in the light of the details discussions made by the CIT(A) in his order and for the reasons given by him, we are in full agreement with him in deleting the addition of Rs.55,50,000/- made by the AO after giving a finding by him that the A.O. has nowhere been able to prove that the document in support of the identity of the parties have not been placed on record or otherwise there were forged documents, and further the A.O. has also not brought any evidence on record regarding the fact that the share applicants were not creditworthy or genuine despite the fact that their Pan and confirmatory affidavits and the details of the A.O, where the share applicants were assessed were submitted by the assessee along with copy of bank accounts of the share applicants. In this view of the matter, we, therefore, upheld the order of Id. CIT(A) and reject this ground raised by the revenue".

(Hi) CIT v. Lovely Exports (P.) Ltd (2008) (216 CTR (SC) 195)
The Hon'ble Supreme Court in this case has held that in case the investor is allegedly a bogus shareholder then the Department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income u/s.68 of the assessee company- The relevant extract from the decision is reproduced as under: -
"If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income u/s.68 of the assessee company".

From the above discussions/ explanation, it is abundantly clear that appellant company has furnished all the necessary details in respect of the investor of R$. 62.44 Crores before the Ld. AO which prove nature, genuineness and the source as well as source of the source and that the Ld. AO has neither found any flaw in these evidences which is legally tenable nor produced any evidence in its rebuttal.

Looking the facts of the case and position of law on the issue the appellant pleads that the addition of Rs. 62.44 Crores is not at all sustainable and, therefore, prays that the same may kindly be deleted.

5.4.13 Sections 68 of Income-tax Act. 1961 reads as under:-

"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 assessing officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year."
5.3.14 Thus, the conditions for applicability of section 68 are as under:-
(i) Existence of books of account; / (ii) A credit of sum in the books of account of an assessee; and
(iii) Absence of a satisfactory explanation or no explanation by the assessee .about the nature and source of the sum credited,
5.4.15 Clearly, in the instant case, the conditions at (i) and (ii) above are existing. It is on the third condition that the A.O, has made the addition. The reasoning for this is given at para 8.6 of the assessment order. To summarize, the A.O. has rejected the evidence and contentions of the appellant for following reasons: ;
i. WKIL has accumulated losses as on 31.12.2011 and 31.12.2012. Even the liabilities are "on the higher side".

ii. The assessee company has very few fixed assets,
iii. The revenue generated by assessee is "not so high".
iv. Earning per share is Rs. 894 as on 31.03.2010 and Rs. 864 as on 31.03.2011.
v. It has been making losses since many years.
vi. The company "do not have any capacity to offer any return against the investment made."
vii. There is no "justification for quantum of such money" (FCCD) therefore, the "nature" of FCCD is not proved.

5.4.16 The amounts and balances mentioned in the accounts of WKIL are not disputed nor the fact that these accounts were duly audited accounts. Similarly, neither small value of fixed assets nor "not so high" revenue generated by the assessee or the relatively low earning per share is under question. The AO has also not disputed that the amount was received towards subscription to FCCDs under the consolidated FDI policy effective from 01.04.2011 issued by Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India or the fact of Global Business License (Category 1) issued by Financial Services Commission under the laws of Mauritius to WKIL. The FIRC from HSBC clearly states the "purpose" as "INVESTMENT IN COMPULSORY CONVERTIBLE DEBENTURES IN TULIP HOTELS P LTD. UNDER AUTOMATIC ROUTS". It is also not disputed that the appellant actually issued FCCD to WKIL against the receipt. The Assessing Officer has also not deemed it fit not to offer the appellant any further opportunity of being heard to examine the weight of the additional evidence in form of confirmation from the source of source of the appellant.
5.4.17 The remand report reaches a conclusion that the appellant do not have any capacity of offering any return against the investment made and hence it is assumed that there is no justification for quantum of such money (FCCD receipt from WKIL). The remand report further expresses the generalised opinion that seems to state that British Virgin Islands as a tax haven. Hence, any fund originating from a company registered there is "sham transfer". It further opines that involvement of a party based in British Virgin Island "gives rise to further suspicion". Apart from expressing these grave concerns about reputation of British Virgin Island, the remand report does not give any cogent reasons for rejection of the confirmation from SSG.

5.4.18 From the details of facts available on records, it is noted that WKIL in a real company incorporated in Mauritius as is evident from the Certificate of Incorporation. The subscriptions of FCCD's of the appellant is as per the Government of India policy effective from 1/4/2011 . The amount has come through bank channels as is evident

form FIRC and HSBC. WKIL accounts have been audited. The lender of the entire amount to and bank statement of WKIL from has confirmed that USD 1,40,00,000 was given as loan to WKIL "for the purpose of making further investments in India. The appellant has also placed on record original confirmation from SSG and bank statement of WKIL from HSBC as corroborative evidences. Statement of account of JP Morgan International Bank Limited also establishes that SSG disbursed the loan through Castleman Management Limited i.e., through banking channel. It is also seen that the valuation report of FCCD was submitted before the Assessing Officer."

5.4.19 It is established through the above facts that the funds raised through FCCD originated in a duly registered company, passed through banking channels through another registered company whose audited accounts reflect the receipt of the fund and further loaned to the appellant and finally the fund was transferred to the appellant once again through transparent banking process.
5.4.20 It needs no elaboration that through a catena of decisions the Courts have laid down the following three fundamental tests which have to be established to discharge the burden under section 68 of the Act: "
• Identity of the creditor
• Creditworthiness of the creditor, and
• Genuineness of the transaction.

5.4.21 Various courts have discussed the aspects of burden of proof that lies on assessee. Inference can be drawn about the nature of evidence offered, the circumstances explaining the credit and the actions of an assessee that would constitute reasonable discharge of that burden of proof. Some of those cases are mentioned hereunder.

i. Supreme Court in case of CIT v. P. Mohanakala [2007] 291 ITR 278 / 161 Taxman 169 held that the expression "assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sum found credited in the books maintained by the assessee. It further held that the opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material & other attending circumstances available on record. The opinion of the AO is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion.

ii. CIT vs Daulat Ram Rawat Mull (87 ITR 349)(SC): It was held that assessee was not required to prove the source of the source.

iii. 190 ITR 396 (Bom): It was held that the assessee having discharged the initial burden, by giving complete name and address of the bankers and confirmation letters, it was for the Income-tax Officer to show that the explanation rendered by the assessee was not true.

iv. CIT v. Lovely Exports (P.) Ltd. [Appln No. 11993 of 2007, dated 11-1-2008]:

If the share application money is received by the assessee-company form 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, but it cannot be regarded as undisclosed income of the assessee-company.

v. CIT v. First Point Finance Ltd. [2006] 286 ITR 477 (Raj.), CIT v. Bhawani Oil Mills (P.) Ltd. 49 DTR 212:

Where it is found that the investors are genuinely existing persons, they have filed confirmations in respect of investments made by them and their statements are also recorded, amount of share application money cannot be treated as unexplained cash credit and no addition can be made under section 68.

vi. Shree Barkha Synthetics Ltd. v. Asstt CIT [2006] 283 ITR 377 / 155 Taxman 289 (Raj.), Uma Polymers (P.) Ltd. v. Dy. C/T [2006] 101 TTJ 124(Jodh.)(TM):

Where the share application money is received by the assessee-company through banking channel, the assessee has only to prove the existence of person in whose name share application money is received. Once the existence of investor is proved, it is no further burden of assessee to prove whether the person itself has invested the said money or some other person has made investment in name of that person. The burden then shifts on the Revenue to establish that such an investment has come from assessee-company itself.

vii. C/T v. Gangour Investment Ltd. [2009] 179 Taxman 1 (Delhi), CIT v. Victor Electrodes Ltd. [2010] 329 ITR 271 (Delhi), Dy. C/T v. Dolpnine Marbles (P.) Ltd. [2011] 129 !TD 163/ 10 taxmann.com 75 (Jab.)(TM), S/79rt/ Syntex Ltd. v. Dy. C/752 DTR 73 (Jp.):

Assessee-company filed letters of the share applicant companies wrote to the ACIT confirming that they had applied for shares in the assessee-company, giving details of draft, copies of resolutions passed by BOD of applicant-companies besides their bank statement/copies of acknowledgement of returns, certificates of incorporations and balance sheets of the applicant-companies wherein investment made in the assessee-company was shown, PAN, ROC certificate, it had discharged the onus which lay upon it under section 68 by establishing the identity and creditworthiness of each

shareholder and, therefore, no addition could be made under section 68. "

viii. CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78 /25 Taxman 80F (SC) :
In this case assessee gave the names and addresses of the creditors. It was in the knowledge of the Revenue that the creditors were income-tax assessees. The revenue apart from issuing notices under section 131 did not pursue the matter further. It did not examine the source of income of the alleged creditors to find out whether they were creditworthy. Therefore, it was held that in these circumstances, assessee could not do any further and it had discharged the burden laid on it.

ix. Dy. CIT v. Rohini Builders [2002] 256 ITR 360 /[2003] 127 Taxman 523 (Guj,): - - .
If the identity of the creditors is proved and the amounts are received by account-payee cheques, the initial burden of proving credit is discharged and the source of credits need not be proved.
x. CIT v. Samtel Color Ltd. 64 DTR 46: In this decision given by the Delhi High Court, it was held that by bringing on record every possible information regarding the depositors included in the application form which included particulars of applicant/depositor, telephone No., particulars of demand draft/cheque through which the deposit was made, tax status of applicant and other deposit with the assessee, if any, assessee had discharged the initial onus laid on it under section 68 and addition could not be made merely for the reason that no confirmation letters were filed in respect of some of the depositors.
5.4.22 In view of the discussions in the above paras and the plethora of judicial pronouncements, I find that in the facts and circumstances of the instant case, identity of creditors namely WKIL is established and in fact not disputed by the Assessing Officer. Since, there is hard evidence in form of FIRC and other bank statements, the transaction itself is established, The appellant is in the process of infusing more funds in its business of operation, management of hotel, properties owned by third parties availing of a Government policy and it is for investors to judge the potential of the business in future and decide to lend loans to the appellant. This purely a commercial/business decision and cannot be termed as justified or otherwise. It is also a settled law that it is the prerogative of the businessman to organize its affairs in a manner best suited to it and the revenue authority cannot step into the shoes of the businessman. The Assessing Officer has based his decision largely on a suspicion that any company registered in British Virgin Island is guilty of sham transaction. The Assessing Officer has also not rejected the transfer of funds from SSG to WKIL which clearly establishes that the funds were made available

> *to WKIL for a specific purpose and were invested in the appellant with a specific purpose as mentioned in FIRC. Therefore, in the facts and circumstances of this case, the identity and creditworthiness of the lender is established and the purpose of investment is evident through the line of fund flow from the source of the source, to the source and finally to the beneficiary appellant. The appellant has even issued the FCCD to WKIL which further supports that the money was received as genuine investment.*
> *5.4.23. In view of the above, this ground of appeal is allowed and the addition of Rs.62.44 crores u/s.68 of the Act is deleted.*

17. Against the above order of CIT(A), Revenue is in further appeal before us.

18. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that after calling a remand report, the CIT(A) has given detailed finding at para 5.4.12 to 5.4.23. The CIT(A) recorded a categorical finding after considering the evidences placed on record that nature of transaction of Rs.62.44 Crores is fully explained to the AO alongwith documentary evidences. Source of the amount received was also fully explained with documentary evidence. Hence, assessee has fully explained the nature and source of these transactions to the AO which is evident from the documentary evidences placed on record. The CIT(A) further observed that identity of the non-resident has been established, the source of fund has also been established and even sources of source has also been established. The nature and genuineness of transaction is fully explained. Money has been received through banking channels from outside India. He further observed that the balance mentioned in the accounts of WKIL is not disputed nor the fact that these accounts were duly audited accounts. The

AO has also not disputed that the amount was received towards subscription of FCCDs under head of FDI policy effective from 01/04/2011 issued by the Department of Industrial policy and promotion, Ministry of Commerce and Industry, Government of India. The CIT(A) further observed that FIRC from HSBC clearly states the "purpose" as "INVESTMENT IN COMPULSORY CONVERTIBLE DEBENTURES IN TULIP HOTELS P LTD. UNDER AUTOMATIC ROUTS". It is also not disputed that the assessee actually issued FCCD to WKIL against the receipt.

19. The CIT(A) also observed that from the details of facts available on records, it is noted that WKIL is a real company incorporated in Mauritius as is evident from the Certificate of Incorporation. The subscriptions of FCCD's of the assessee is as per the Government of India policy effective from 1/4/2011 . The amount has come through banking channels as is evident form FIRC and HSBC. WKIL accounts have been audited. The lender of the entire amount to and bank statement of WKIL from has confirmed that USD 1,40,00,000 was given as loan to WKIL “for the purpose of making further investments in India. The assessee has also placed on record original confirmation from SSG and bank statement of WKIL from HSBC as corroborative evidences. Statement of account of JP Morgan International Bank Limited also establishes that SSG disbursed the loan through Castleman Management Limited i.e., through banking channel. It is also observed by CIT(A) that the valuation report of FCCD was submitted before the Assessing Officer.

20. As per CIT(A), it is established through the above facts that the funds raised through FCCD originated in a duly registered company, passed through banking channels through another registered company whose audited accounts reflect the receipt of the fund and further loaned to the assessee and finally the fund was transferred to the assessee once again through transparent banking process. Thereafter, CIT(A) applied various judicial pronouncements to establish that not only identity and genuineness of transaction was established but also credit worthiness of the creditor has also been duly established in terms of documentary evidence placed before AO. The CIT(A) has also called for a remand report in respect of additional evidence and after considering the same and also rejoinder by the assessee rebutted each and every objection of the AO and held that the Assessing Officer has also not rejected the transfer of funds from SSG to WKIL which clearly establishes that the funds were made available to WKIL for a specific purpose and were invested in the assessee with a specific purpose as mentioned in FIRC. Therefore, in the facts and circumstances of this case, the identity of investor, genuineness of transaction and creditworthiness of the lender is established and the purpose of investment is evident through the line of fund flow from the source of the source, to the source and finally to the beneficiary assessee. The assessee has even issued the FCCD to WKIL which further supports that the money was received as genuine investment.

21. We found that while deciding the issue, CIT(A) has deliberated on the various judicial pronouncements and after applying the proposition of law laid down therein held that identity, creditworthiness and genuineness of transaction which are ingredients of Section 68 are fully established. Detailed findings so recoded by CIT(A) are as per materials on record which has not been controverted by DR by bringing any positive materials on record. We therefore, do not find any reason to interfere in the finding so recorded by CIT(A), which resulted into deletion of addition made in respect of FCCD.

22. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 14/03/2018

Sd/-	**Sd/-**
(R.C.SHARMA)	**(SANDEEP GOSAIN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 14/03/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai