

On examination of documents submitted by the assessee company during the course of assessment proceedings the following details has revealed.

| <i>Name of the Share Holders</i> | <i>No. of Shares</i> | <i>Face value</i> | <i>Premium amount</i> | <i>Total investment</i> | <i>Source of fund of the Share holder</i> |
|--|----------------------|-------------------|-----------------------|-------------------------|---|
| <i>Jai Hind Promoters Pvt. Ltd.</i> | <i>2,50,000</i> | <i>10/-</i> | <i>40/-</i> | <i>1,25,00,000/-</i> | <i>From sale of shares and refund of advances</i> |
| <i>Ninachal Barter Pvt. Ltd.</i> | <i>92,400</i> | <i>10/-</i> | <i>40/-</i> | <i>46,20,000/-</i> | <i>From sale of shares and refund of advances</i> |
| <i>Dynamo Infrastructures Pvt. Ltd.</i> | <i>1,76,000</i> | <i>10/-</i> | <i>40/-</i> | <i>88,00,000/-</i> | <i>From sale of shares and refund of advances</i> |
| <i>Dhanraksha Investment Consultants Pvt. Ltd.</i> | <i>10,000</i> | <i>10/-</i> | <i>40/-</i> | <i>5,00,000/-</i> | <i>The source of Investment is not properly explained</i> |

To cross examine the genuineness, creditworthiness and identity of the shareholders notice u/s 133(6) of the I. T. Act was issued to all the above four shareholders in the address provided by the assessee in his submission.

Summons u/s 131 was is used to Sri Sanjay Kumar Khemka, the signatory director for personal appearance along with to produce the investors/investors director along with the requisitioned documents. But in response to this Sri Sanjay Kumar Khemka the director of the assessee company had only filed the requisite documents which are seen and placed on file. It is seen that the director thwarted the process of furthering the investigation as neither the director of assessee company nor the subscriber company director appeared and also no proper reason has been explained for their non-appearance. In the absence of personal appearance of the director of the assessee company as well as the director of the subscriber company, the genuineness and creditworthiness remained unexplained. The onus that falls with the assessee to prove the genuineness, creditworthiness and the identity of the investors remains unexplained.”

2.1. The Assessing Officer on the ground that the identity, creditworthiness, of the subscriber companies and genuineness of the transactions is not proved, the entire share capital and share premium amount credited in the books of accounts, during the year under reference were added back u/s 68 of the Act. A disallowance u/s 14A of the Act, was also made of Rs.1,87,566/- by applying Rule 8D. Aggrieved, the assessee carried the matter in appeal. The Id. First Appellate Authority, deleted the addition u/s 68 of the Act. On the addition made u/s 14A, he restricted the same to Rs.900/-, as this was the exempt income disclosed by the assessee.

3. Aggrieved, the revenue is in appeal before us on the following grounds:-

“1. The ld. CIT(A), Kolkata erred in law as well as in fact by deleting the addition of Rs.2,64,20,000/- made u/s 68 of the Income Tax Act.

2. The ld. CIT(A), Kolkata erred in law as well as in fact by deleting the addition of Rs.1,87,566/- made u/s 14A of the Income Tax Act.

3. That the appellant craves the leave to add, alter, modify, include or delete any ground of appeal.”

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

4.1. The assessee is engaged in the business of trading in shares and securities. This is not a case of paper company. The premium charged i.e. Rs.40/- per share of face value of Rs.10/- each, is also not excessive or abnormal on the facts of this case. From the audited financial statements, it could be seen that the assessee has gross income of Rs.5,59,283/- and has shareholder funds of Rs.12,91,40,498/-. It had advanced long term loans and advances of Rs.4,73,00,140/-. The total assets are Rs.14,45,98,802/-. Thus, the premium charged per share cannot be said to be not genuine or exorbitant.

In this case, four companies are the share applicants. These are *Jai Hind Promoters Pvt. Ltd.*, *Ninachal Barter Pvt. Ltd.*, *Dynamo Infrastructures Pvt. Ltd.*, *Dhanraksha Investment Consultants Pvt. Ltd.* All these companies which have subscribed for the shares of the assessee company are also active companies. They are not paper companies. This is clear from the financial statements filed by them. In case of *Dhanraksha Investment Consultants Pvt. Ltd.*, the assets are about Rs.47.20 Lakhs and the investment in the assessee company is about Rs.5 Lakhs. In the case of *Dynamo Infrastructures Pvt. Ltd.*, the assets are to the extent of Rs.2,44,57,638/- and the investment in the assessee company is around Rs.88 Lakhs/-. In the case of *Jai Hind Promoters Pvt. Ltd.*, the total assets are to the tune of Rs.2,18,34,717/-, and the investment of the assessee company is around Rs.1,25,00,000/-. In the case of *Ninachal Barter Pvt. Ltd.*, the total assets are Rs.2,32,26,565/- and the investment in the assessee company is around Rs.46.20 Lakhs/-. As brought out by the ld. CIT(A), all these companies have given replies to the statutory notice u/s 133(6) of the Act. They have furnished copies of the income tax acknowledgements evidencing filing of the return of income by each one of them. Copy of the audited books of accounts including balance

sheet, wherein such investments are reflected etc. have been filed as evidence After taking all these facts into account, the Id. CIT(A) at para 4.12. as concluded as follows:-

“4.12. Considering the totality of the facts and circumstances of the case. I find substance in the arguments of the AR that the appellant has made its case that the identity of the share applicants are established beyond doubt and on enquiries made by the AO there was no adverse finding on this aspect. Admittedly, all the share applicants are existing assesseees under the Act and that some of them were subject to scrutiny assessment during the same period establishes the fact that the identity and authenticity of the share applicants were not in doubt. About the genuineness of the transactions, there is neither any adverse finding in the assessment order nor which is subversive to the facts brought on record by the appellant during the course of assessment proceeding to this effect. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by the submission their return, audited annual accounts, their bank statement and replies to notices u/s 133(6) of the Act as depicted in the foregoing. The net worth of such subscribers is in excess of the amount invested by each of them as explained hereinabove. The addition made by AO is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidences adduced during the course of the assessment proceedings by the appellant and the replies of the share applicants in respect of the share capital which does not warrant the inference that such share application monies received in unaccounted cash credit. Hence, I am inclined to accept the arguments tendered by the AR of the appellant in this respect. In view of the foregoing, I have no hesitation to hold that the impugned addition of Rs.2,64,20,000/- made by the AO u/s 68 of the Act is not justified in the circumstances and accordingly such addition is directed to be deleted in respect of the four shareholders. Therefore, Ground Nos. 3 to 6 of the appeal are accordingly allowed.”

4.2. The ground on which the addition has been made by the Assessing Officer is that there is not compliance to the summons issued to the share subscribers u/s 131 of the Act. The share applicant companies, as well as the assessee company, belong to the same group of companies, with a common director Mr. Sanjay Kumar Khemka. When all the information as required by law, is given, an addition cannot be made solely on the ground that the directors failed to appear in response to summons issued u/s 131 of the Act.

The Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Orissa Corporation Pvt. Ltd.* 159 ITR 78 SC and the Hon'ble Bombay High Court in the case of *Commissioner of Income Tax v. Orchid Industries Pvt. Ltd.* 397 ITR 136, have held that an addition cannot be made simply because a person has not appeared in compliance to notice u/s 131 of the Act, when all the other requirements of the notices u/s 133(6) of the Act, has been complied with. Similar are the decision of this Bench of the Tribunal in

the case of *Income Tax Officer vs. Wiz-Tech Solutions Pvt. Ltd.*, ITA No.1162/Kol/2015 and Hon'ble Jurisdictional High Court in the case of *Pr. CIT-1 vs. M/s. Steel Emporium Ltd.*, GA No. 3275 of 2016 in ITAT 354 of 2016.

This Bench of the Tribunal under identical circumstances, discussed the issue at length, in the case of *Five Star Vanijya Pvt. Ltd v. Deputy Commissioner of Income Tax, Circle-8, Kolkata* in ITA No. 1120/Kol/2015, Assessment Year: 2010-11, order dt. July 31st, 2018, and by relying upon a number of judgement of various Courts of law, held as follows:-

"5. After hearing rival contention, perusing the papers on record, orders of the authorities below as well as case-law cited, we hold as follows:-

The assessee in this case is not a paper company and is engaged in international and inland trading of iron ores and minerals. It has a turnover of about Rs.15 Crores during the year 31/03/2010. It has profits and taxation of about Rs.33.84 Lakhs. The share holders in this company are also not paper companies or Jamakharchi companies. They are individuals who are also the directors of the company.

*The assessee company has only three Directors and the said application money has been received from these three Directors. Hence, the identity of the payees is proved. The Directors have furnished their annual statement of accounts and explained their sources of funds for the investments in the share capital. When the Director are themselves the shareholders, and have confirmed the transaction, the proposition of law laid down by the Hon'ble Supreme Court in the case of *Lovely Exports Ltd. (supra)*, apply. The share holders are not paper companies or 'jamakharchi' companies as in other cases. The assessee company is a genuine company and the valuation of shares is supported by material. The shareholder/directors have explained their sources. On these facts we examine the case-law.*

6. The Hon'ble Supreme Court in the case of *CIT v. Lovely Exports Ltd.* 216 CTR 195 SC, held as follows:-

"Section 68 of the Income-tax Act, 1961 - Cash credit - If share application money is received by assessee-company from alleged bogus shareholders, whose names are given to Assessing Officer, then 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 under section 68 of assessee-company"

6.1. Just because the Directors did not appear to summons issued u/s 131 of the Act, no addition u/s 68 of the Act, can be made, when the Directors have otherwise confirmed the transaction to the Assessing Officer with evidence.

6.2. The Hon'ble Supreme Court in the case of *Commissioner Of Income-Tax, vs Orissa Corporation (P) Ltd* [1986] 159 ITR 78 (SC), held as follows:-

"In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were the income-tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such could arise."

6.3. Recently, the Hon'ble Jurisdictional High Court in the case of *Id. Pr. CIT-1, Kolkata vs. M/s. Steel Emporium Ltd. in GA NO.3275 OF 2016 WITH ITAT NO.354 OF 2016, 14th May, 2018, held as follows:-*

"The third ground is on account of share application money. The assessing officer found that several of the applicants for issuance of further shares in the assessee shared the same 12, Waterloo Street address as the assessee and that one individual had accepted notices under Section 133(6) of the Act, though different rubber stamps were used along with the signature. The Tribunal was satisfied that the identities of the applicants for shares in the assessee had been established. No legal question arises as a result of such finding."

6.4. The Hon'ble Delhi High Court in the case of *CIT vs. Kamdhenu Steel & Alloys Ltd. (2012) 248 ITR 33, held that once the assessee has prove identity of creditor share applicant, by either furnishing PAN or copy of their bank account, the addition under section 68 of the Act cannot be made without any material to support the same.*

6.5. The Hon'ble Delhi High Court in the case of [CIT vs. Gangeshwari Metal P. Ltd.](#) in ITA No.597/2012 judgment dated 21.1.2013 reported in 361 ITR 10 after considering its decisions in the case of *Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169* and judgment in the case of *CIT vs. Lovely Exports 319 ITR (Sat.5) (S.C.)* the Hon'ble High Court held as follows :

"As can be seen from the above extract, two types of cases have been indicated. One in which the Assessing Officer carries out the exercise which is required in law and the other in which the Assessing Officer (sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer after noting the facts, merely rejected the same. This would be apparent from the observations of the Assessing Officer in the assessment order to the following effect –

"Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000 may not be added to its income. In response, the assessee has submitted that there is no

such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000 and not Rs.1,11,50,000 as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000. The assessee has further tries to explain the source of this amount of Rs.55,50,000 by furnishing copies of share application money, balance sheet, etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.55,50,000 received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under [Section 271\(1\)\(c\)](#) are being initiated separately. "

The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case. However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under [Section 68](#) of the Income Tax Act, 1961.

Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law. "

6.6. In the case of CIT vs. Fair Finvest Ltd., (2013) 357 ITR 146 (Del.) at para 6 held as follows.

"6. This Court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income Tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the ROC in relation to the share application, affidavits for the directors, form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing Officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahes Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of S. 68 of the Income Tax Act, 1961.

6.7 The Hon'ble Calcutta High Court in the case of *CIT v. Roseberry Mercantile (P.) Ltd.* GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the questions raised before their lordships and decision rendered thereon is as under:—

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction."

Held

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of CIT v. M/s Lovely Exports Pvt Ltd, we are at one with the tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed."

6.8. The Hon'ble Andhra Pradesh High Court in the case *CIT vs. Lanco Industries Ltd.* [2000] 242 ITR 357 (Andhra Pradesh), held as follows:-

"Moreover, we fail to see how merely by reason of unsatisfactory explanation relating to the source of investment by the shareholders, the money invested on shares should be treated as income of the assessee. If the ostensible shareholders failed to explain the means of investment, that should have been treated as unexplained income in their hands. In order to add it to the income of the assessee there must be a further finding that in fact the shareholders were mere name-lenders and the money allegedly invested by them really belonged to the directors of the assessee-company. In the absence of a finding that the persons to whom the share certificates were issued on receipt of consideration as per the book entries were in fact dummies or stooges of the directors of the assessee-company, the same cannot be treated as unaccounted income of the assessee. There was no such finding by the assessing authority. In this view of the matter, the ultimate conclusion of the Tribunal cannot be faulted in any case. We, therefore, see no ground to admit this appeal as no substantial question of law arises for consideration. The income-tax Tribunal appeal is dismissed."

6.3. Applying the proposition of law laid down in the case law to the facts of this case, we find that the Assessing Officer has simply disbelieved the evidence filed by the assessee. He has not conducted any verification, let alone investigation, before coming to the conclusion that the confirmations and evidence filed by the Directors cannot be admitted as evidence. As the share applicants are the Directors of the assessee Company and have confirmed the transactions and have also filed their source of funds for the investment. When statement of final accounts were filed giving sources of funds for making the investment, the Assessing Officer has not given any reason as to why he is not able to accept the same. If at all the creditworthiness of the directors is not proved, then an addition can be made only in their hands and not in the hands of the company as held by the Hon'ble A.P. High Court in the case of *Lanco Industries Ltd.* (supra). No contrary evidence to controvert the evidence produced by the assessee, is brought on record. Simply because the directors/shareholders did not present themselves before the Assessing Officer, an addition u/s 68 of the Act, cannot be made. In view

of the above circumstances, we cannot uphold this addition made u/s 68 of the Act. Under these circumstances, we delete the addition and allow this appeal of the assessee.

7. *In the result, appeal of the assessee is allowed."*

5. In view of the above discussion, we uphold the order of the ld. First Appellate Authority and dismiss this appeal of the revenue.

6. In the result, appeal of the revenue is dismissed.

Kolkata, the 28th day of September, 2018.

Sd/-
[S.S. Viswanethra Ravi]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 28.09.2018
{SC SPS}

Copy of the order forwarded to:

1. M/s. Advent Stock Management Ltd
2nd Floor
Anand Lok Building
227, AJC Bose Road
Kolkata - 700 020

2. Income Tax Officer, Ward-6(3), Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches