आयकर अपीलीय अधीकरण, न्यायपीठ – "D" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**D**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.1770/Kol/2016 Assessment Year :2012-13

ACIT, Circle-10(2) P-7, Chowringhee Square, 3rd Floor, Kolkata-69	**V/s**.	M/s Aditya Polysack Pvt. Ltd., C/o S.N. Ghosh & Associate, Advocate, Seven Brothers' Lodge, P.O.Burashibtola, P.S. Chinsurah, Dist. Hooghly, Pin-712105 [**PAN No.AAGCA 9158 C**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri C.J. Singh, SR-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Somnath Ghosh, Advocate
सुनवाई की तारीख/Date of Hearing	25-10-2018
घोषणा की तारीख/Date of Pronouncement	16-11-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue's appeal for assessment year 2012-13 arises against the Commissioner of Income Tax (Appeals)-4, Kolkata's order dated 08.07.2016, passed in case No.376/CIT(A)-4/Cir.10(2)/Kol/15-16, in proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the sides. Case file perused.

2. The Revenue's sole substantive ground challenges correctness of the CIT(A)'s findings reversing Assessing Officer's action treating the taxpayer's share application / premium amount of ₹140,00,000/- vide following detailed discussion:-

> *"5. I have considered the issue in the assessment order framed by the AO in light of the arguments made by the appellant. The short issue for my*

consideration is that whether the share application monies along with premium in the aggregate of 71.40.00,0001- disclosed by the appellant invites the mischief of the provisions of s 68 of the Act or not. The provisions of s. 68 of the Act deal with cash credit which reads as under:

> "68. 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"

According to this section, if identity. creditworthiness of the creditor and genuineness of the transaction are not proved and the explanation offered by the assessee is not in the opinion of the Assessing Officer, satisfactory. the sum so credited may be charged to income-tax as income of the assessee of that previous year. In other words, providing of an opportunity is inherently embedded within the second limb of such provisions. Thus, it is a mandatory duty to call for an explanation in this respect. Admittedly the AO has never given any opportunity to the appellant to submit an explanation in terms of s 68 of the Act. The power of the Assessing Officer under section 68 not an absolute one. It is subject to his satisfaction where explanation is offered. The satisfaction with regard to explanation is in effect an in-built safeguard in section 68 to protect the interest of the assessee. It provides for an opportunity to the assessee to explain the nature and source of the funds. It was pointed out by the A/R that no opportunity was provided to the appellant to meet the assumption conceived in this respect. Admittedly, in the instant case. no opportunity was allowed to the appellant as per the second limb of the provisions of s 68 of the Act. In the case of Colonizers vs. ACIT (1992) 41 ITD 57 (Hyd) (SB). the issue before the Hon'ble Special Bench was whether the additions made by the Assessing Officer in violation the principles of natural justice should be set aside as void ab initio and thus deleted or should the case be restored to the ITO with directions for redoing? In this respect it was held as under:

> 'in regard to the second point of difference two segments of it existed. The first segment was as to whether the additions made in violation of the principles of natural justice should be set aside as void ab initio. The second segment was as to whether the addition should be deleted or should the case be restored to the ITO with a direction for re-doing. The rules of natural justice operate as implied mandatory requirement, non-observance of which amounts to arbitrariness and discrimination. The principles of natural justice have been elevated to the status of fundamental rights guaranteed in the Constitution as is evident from the decision of the Full Bench of the Supreme Court in the case of Union of India v. Tulsiram Patel AIR 1985 SC 1416 at p. 1460 holding that the principles of natural justice have thus come to be recognised as being a part of the guarantee contained in article 14 of the Constitution because of the new and dynamic interpretation given by the Supreme Court to the concept of equality which is the subject-matter of that article and that violation of principles of natural justice by a State action is a violation of article 14.

In fact, the principles of natural justice. in the realm of life and liberty. would ipso facto even be read into article 21 because any procedure which affected life or liberty had to be a just. fair and reasonable procedure which necessarily meant the observance of the principles of natural justice. That is why these principles have been called as part of the universal law. as part of the rule of law and have also been termed as fair play in action.

Audi alterarm partem is one of the fundamental principles of natural justice. A quasi-judicial or administrative decision rendered or an order made in violation of the rule of audi alteram partem is null and void and the order made in such a case can be struck down as Invalid on that score alone - Maneka Gandhi v. Union of India AIR 1978 SC 597. Gangadharan Pillai v. ACED [1980] 126 ITR 356 at pp. 365 to 367 (Ker.). In other words, the order which infringes the fundamental principle. passed in violation of audi alteram partem rule is a nullity. When a competent Court of authority holds such an order as invalid or sets It aside. the impugned order becomes null and void - Nawabkhan Abbaskhan v State of Gujarat AIR 1971 SC 1471 at p 1479 In the light of these decisions, the additions made by the Assessing Officer in violation of the principle» of natural justice had to be set aside as void only insofar as the additions by way of cash credits alone were concerned, which were separable from the other additions in the order that were not challenged. "

In view of such authoritative legal position. I am of the considered view that the well- settled principles of natural justice have not been followed by the AO The appellant was never given any opportunity to explain the nature and source of the share application monies received by it. In fact such affording of opportunity to tender an explanation is embraced within the second limb of the provision of s. 68 of the Act which the AO ought to have provided. Most respectfully, following the ratio laid down iii the case of Colonizers vs. ACIT [supra] as discussed above, the conclusion reached by the AO without adhering to the rule of audi alteram partem is ex-facie null arid ab initio void and the same is hereby struck down on this score alone.

5.1. Be that as it may. on merits also it is observed that the addition was made with the predetermined mindset that share application monies received by the appellant is not genuine as identity and creditworthiness of the shareholders were bogus in nature as if they did not exist and the transactions were an eyewash only for converting its black money into white without paying any tax to the revenue. In the instant case, the appellant had raised share capital in the aggregate sum of ₹1. 40,00,000/- by issuing 70,000 equity shares of the face value of ₹10 each at a premium of ₹190 per share. It is observed that the impugned addition was made with the predetermined mindset that share application monies received by the appellant is not genuine as identity and creditworthiness of the shareholders were bogus in nature as they did not exist and the transactions were an eyewash only for bringing its black money into circulation without paying any tax to the revenue. It is found that all the six share applicants are body corporates who had subscribed to the aforesaid share capital raised by the appellant and all the payments were made by each of them through a/c payee cheques drawn on their respective bankers. Each of the six share subscribers are regularly assessed to income tax and most

importantly, except M/s Mangalraj Merchants P. Ltd., all the five share applicants .are Non Banking Financial Companies registered with the Reserve Bank of India: and the investments made by each of them are duly and fully reflected In their audited books of accounts as well as their income tax return. The appellant had duly filed its return of total income u/s 139(1) of the Act in respect of the assessment year 2012-13. In the course of the assessment proceedings, the appellant in response to the requisitions made by the AO, from time to time, produced its audited books of accounts, filed copies of its audited annual accounts including various details and other documents as desired by the AO The details and documents so produced and filed with the AO included inter alia, full details of each of the six share applicants, who had subscribed to the aggregate share capital as well as share premium money raised by the appellant during the assessment year under appeal. The AO, on receipt of the aforesaid details from the appellant did not pursue the matter further. He solely doubted the genuineness of the said share capital and the creditworthiness of the share applicants in the teeth of the cast iron evidence to the contrary on mere presumption and added the sum of ₹1.40,00,000/- in respect of the share capital to the total income of the appellant in respect of the assessment year under appeal.

5.2 It is observed that the corporate share applicants are registered under the Companies Act. 1956 and are on the records of Registrar of Companies functioning under Ministry of Corporate Affairs, Government of India and are having independent Permanent Account Numbers. The appellant had provided the copies of the Permanent Account Numbers of the share subscribers along with the acknowledgment of submission of their return of income and audit report and financial statements which in my humble opinion proves their identities to the hilt. It is also observed that each of the share applicants maintained bank accounts; and copies of their respective back accounts from which they made payments to the appellant for subscribing to the shares issued to them, was filed by each of them before the AO. Further, from the balance sheet of the share applicants it is seen that they had subscribed to the shares issued by the appellant; and such transactions were duly reflected therein. It is axiomatic that the criteria mandatorily required to be satisfied by the appellant were categorically fulfilled. These facts, in my opinion, clearly prove the genuineness of the transactions. Thus, the evidence adduced on record by the appellant in respect of the share applicants, in my humble opinion, clearly prove their source of funds, and their capacity for making such payments and accordingly, the criteria of their creditworthiness is proved. The AO has not found any defect and/or deficiency in the evidence adduced on record by the appellant.

5.3 It is also observed that the appellant had provided the copies of the acknowledgments evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheet wherein such investments made by each of them in the subscription of shares issued by the appellant are duly reflected as also copies of their bank statements for the relevant period from which such subscription monies were paid by them respectively and copies of the allotment advise received by them from the appellant in respect of shares allotted to them in respect of every share

applicant. The annual return for the assessment year 2012-13 incorporating the allotments was filed by the appellant with the Registrar of Companies, Ministry of Corporate Affairs, which categorically proves the fact of allotment of shares to the share applicant. It is further observed that the net worth of each of the share applicant, as disclosed in their Balance Sheets, far exceed the amount of investments made by them in the shares of the appellant. It is found that the funds held by the shareholders were disclosed in the balance sheets of the share applicants viz. Sonali Suppliers Pvt. Ltd. is in a sum of ₹43,58,07,751/- as on 31.03.2012 and a sum ₹25,00,000/- was invested as share application money with the appellant. Nihon Impex Pvt. Ltd. is in a sum of ₹51,89,32,502/- as on 31.03.2012 and a sum of ₹25,00,000/- was invested as share application money with the appellant, Sivarpan Vanijya Pvt Ltd. is in a sum of ₹45,80,51,770/- as on 31.03.2012 and a sum of ₹25,00,000/- was invested as share application money with the appellant, Saurabh Management Pvt. Ltd. is in a sum of ₹5,79,75,856/- as on 31.03.2012 and a sum of ₹25,00,000/- was invested as share application money with the appellant, Jagajyoti Commodities Pvt. Ltd. is in a sum of ₹48,94,28,558/- as on 31.03.2012 and a sum of ₹25,00,000/- was invested as share application money with the appellant and Mangalraj Merchants Pvt. Ltd. is in a sum of ₹2,08,73,729/- as on 31 03.2012 and a sum of ₹15,00,000/- was invested as share application money with tile appellant. It is accordingly observed that these facts adequately prove the creditworthiness of the share applicants to make investment in the share capital of tile appellant. The aforesaid facts underlined by evidence clearly prove the identity of the share applicants, their capacity and source of funds, as well as the genuineness of the transactions in relation to the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant, in the impugned previous year relevant to the assessment year under appeal. as clearly evident from their respective balance sheet adduced on record by the appellant which were filed with the income tax authorities in relation to their own income tax assessments and as such, the genuinity of the sources of such funds are beyond reproach.

5.4. The AO had before him a plethora of evidence adduced on record by the appellant and it is well recognized that if he wished to act in a manner contrary to such proof, he had to disprove them first. At the same time, it is also a well established principle of law that in any matter, the burden is not a static one. The initial burden upon the appellant was duly discharged by it by providing the identity of share applicants by furnishing the copies of their returns along with audited report and financial statements, copies of bank accounts and proving the genuineness of the transactions by showing that money in the banks was debited by account payee cheques, and thereafter, the onus to disprove them shifted to the AO who grievously failed to discharge the same. It is observed that the AO had not issued summons u/s 131 of the Act or notices u/s 133(6) of the Act or made enquiries through Inspectors. It was the bounden duty of the AO to make enquiry about a particular receipt before drawing adverse conclusions to castigate the appellant. However. in the instant case, on receipt of such evidence, the AO did not pursue the issue

further. In the case of CIT vs. Orissa Corporation Ltd. (1986) 159 ITR 78 (SC) it was held as under:

> "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 assessees. 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."

The ratio laid down in the aforesaid case is squarely applicable to the case at hand. In the instant case, thus, the AO had not controverted these indisputable evidences adduced on record but acted on his whims and fancies in disregarding them. It is observed that the burden which lay on the appellant in relation to s. 68 of the Act has been duly discharged by it and nothing further remains to be proved by it on the issue. Since the conditions precedent for discharging of burden under the provisions of s. 68 of the Act are met with adequate evidence, the addition made under such pretext deserves to be deleted.

6 In this respect it is relevant to refer to the decision of the jurisdictional High Court in the case of CIT vs. Sagun Commercial P. Ltd. [ITA No, 54 of 2001 dated 17.02.2011] wherein it was held as under:

> "After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion.
>
> We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income-tax (Appeals) and the Tribunal below and answer the questions formulated by the Division Bench in the affirmative and against the Revenue The appeal is, thus, dismissed,"

6.1 Further. the Hon'ble jurisdictional High Court in the case of CIT vs, Gayatr. Portfolio Fund (P) Ltd [ITA No, 664 of 2004 dated 26,08,2014], it was observed as

"We find that the learned Tribunal has confirmed the order passed by the CIT who had overturned the order of the Assessing Officer by making the following observation:

'We find that the identity of the 5 parties investing in the share capital is not in doubt. They are body corporates and their complete addressees are or record This is the very first assessment in the life of the assessee company, The amounts were deposited by these 5 corporates per account payee cheques, These parties were not shareholders of the assessee company at the time when the case was reopened under section 147 or when the summons were issued to them. We find that the assessee has filed before the AO, copies of share application forms duly signed along with the complete addresses of the .investors along with their I.T file numbers, account payee cheque numbers and the assessee's bank statements disclosing the deposits of these amounts In these facts we find that the assessee has discharged its initial onus to prove the Identity of the Investors as well as their creditworthiness, It is not the case of the Revenue that the investor parties did not exist or that the money was not invested by them through banking channels, "

Having found such, the Tribunal had relied on the judgement in Hindusthan Tea Trading Co. Lid. v. CIT (Cal): 263 ITR 289 (Cal) to uphold the order of the CIT. in view of the findings above noted, no substantial question of law arises and therefore, the appeal and the application are dismissed"

*6.2 Again, the Hon'ble Jurisdictional High Court in the case of CIT vs, Sanchati Projects (P.) Ltd. [**ITAT 140 of 2011** dated 08.06.2011] it was observed as under*:

"It appears from record that the assessee company during the relevant assessment year under appeal raised its share capital by way of receiving share application money against 1,64.000 equity shares aggregating to Rs. 82, 00,0001- from 8 different parties The Assessing Officer however, treated the share application money of Rs, 45, 00, 0001- received from five different persons as unexplained cash credit in the hands of the assessee

According to the Assessing Officer, those parties had the same addresses as that of the assessee and they had no fixed assets and utilised their capitals in share application of the assessee company. The Assessing Officer, therefore, was of the view that the money ultimately went to the beneficiary through these companies and there was no advertisement even published by the assessee company inviting share application and no Registrar was engaged for such raising of share capital.

Being dissatisfied the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), however, set aside the said order of assessment and came to the conclusion that all the share applicant/companies were assessed to the tax and their PAN and acknowledgement of I.T. returns along with their audited balance sheets, bank statements showing transactions etc. were made available to the Assessing Officer. It was pointed out that there was no legal bar of more than one company being registered at the same address and thus according to the Commissioner of Income-tax (Appeals), the doubt raised by the Assessing Officer about all those companies at the same address did not hold good.

Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals).

After hearing Mr. Nizamuddin, learned advocate appearing on behalf of the appellant and after going through the aforesaid materials, we agree with the Tribunal below that the Assessing Officer failed to establish that the share 'applicants did not have the means to make investment and that such investment actually emanated from the coffers of the assessee company. The receipt of share capital money had been duly recorded in the books of the assessee company and the payment of share application money was also duly recorded in the audited account of each of the share applicants.

We, thus, find that both the authorities below on the basis of the aforesaid materials on record were quite justified in deleting the aforesaid addition of Rs. 45, 00, 000/- done by the Assessing Officer. We are of the view that the order Impugned does not suffer from any defect whatsoever and no question of substantial error of law arises justifying our interference.

The appeal is. thus. summarily dismissed. "

There is no evidence adduced on record to show that the identities of the share applicants are not proved and/or that the subscription made by them to the share capital of the appellant was not genuine and/or the source of investment was not fully explained to the satisfaction of the AO. Further, the Hon'ble Jurisdictional High Court in the case of CIT vs. Dataware Private Ltd. [**ITAT No. 263 of 2011** dated 21.09.2011] wherein while examining the issue of addition of share application money received by the assessee therein u/s. 68 of the Act. the Hon'ble Jurisdictional High Court held that after getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing Officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the assessing officer of the creditor cur instead of adopting such course, the Assessing Officer himself could not enter

into the return of the creditor and brand- the same as unworthy of credence. The Hon'ble High Court further held that so long as it is not established that the return submitted by the creditor (subscriber shareholder) has been rejected by its Assessing Officer, the Assessing Officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established. In the present case also, no evidence was adduced on record that the investments made with the appellant in the shape of share application monies disclosed in the returns of the share applicants were rejected by their respective Assessing Authorities and accordingly, the issue is set at rest by the decision of the jurisdictional High Court on the issue which is applicable in the present context.

7. In this respect, the AIR relied on the decision of CIT vs. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Del) wherein it was held as under:

> "A distillation of the precedents yields the following propositions of law in the context of section 68. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN Identity of the creditor/subscriber are furnished to the department along with copies of the shareholders register, share application forms, share transfer register, etc.. it would constitute acceptable proof or acceptable explanation by the assessee. Further, (1) the department would not be justified in drawing an adverse inference only because the creditor/subscriber: fails or neglects to respond to its notices; (2) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more evidence against the assessee; (3) the Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber, the genuineness of the transaction and the veracity of the repudiation. "

7.1 Further this decision of the hon'ble Delhi High Court was approved by the Hon'ble Supreme Court in CIT vs. Lovely Exports Ltd (2008) 216 CTR 195 (SC) wherein it was held as under

> "2. Can the amount of share money be regarded as undisclosed income under section 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. "

In other words, it is observed that if share application money is received by an assessee from subscribers, whose names are given to the AO. are allegedly bogus, then the Revenue is free to proceed to reopen their individual

assessments in accordance with law. The facts of the present are on a better footing to the one as decided above. In the instant case, the appellant had provided evidences in relation b) all the share applicants before the AO which were not disputed by him and as such. there was no basis for the AO to come to any adverse conclusion and accordingly, the entire amount received by the appellant on account of share application as well as share premium monies cannot be regarded as undisclosed income u/s. 68 of Act. Further the Hon'ble Delhi High Court in the case CIT vs. Kamdhenu Steel and Alloys Ltd. (2014) 361 ITR 220 (Del) held as under:

> "The important question which arises at this stage is as to whether on the basis of these facts, could it be said that it IS the assessee which has not been able to explain the source and receipt of money According to the assessee, he had given the required information to explain the source and was not obligated to prove source of the money. It is the submission of the assessee that even in case there is some doubt about the source of money in giving into coffers of the share applicants which they invested with the assessee, it would not automatically follow that the said money belongs to the assessee and becomes unaccounted money. The assessee appears to be correct on this aspect. Something more which was necessary and required to be done by the Assessing Officer was not done. The Assessing Officer failed to carry his suspicion to logical conclusion by further investigation. After the registered letters sent to the investing companies had been received back undelivered, the Assessing Officer presumed that these companies did not exist at the given address. No doubt. if the companies are not existing, i. e. they have only paper existence, one can draw the conclusion that the assessee had not been able to disclose the source of amount received and presumption under section 68 for the purpose of addition of amount at the hands of the assessee. But, it has to be conclusively established that the company is non-existence."

7.2. Further, in the case of CIT vs. Oasis Hospitalities P. Ltd. (2011) 333 ITR 119 (Del), the facts of which are identical to the one under consideration, it was held as under:

> "In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the Assessing Officer to prove his identity. If the creditor/subscriber is a company, then the details in the form of its registered address or PAN identity, etc. can be furnished. [Para 12] Genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it had come from the coffers of that very shareholder. When the money is received by cheque and is transmitted through banking or other indisputable channels. genuineness of the transaction would be proved. Other documents showing the genuineness of the transaction can be the copies of the shareholders' register, share application forms. share transfer register, etc. [Para 13]

> As far as the creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. Once these documents are produced. the assessee would have satisfactorily discharged the onus cast upon him. Thereafter. it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents, to probe the matter further. However. to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion. [Para 14]"

7.3. In identical circumstances the Hon'ble Madhya Pradesh High Court in the case of CIT vs. STL Extrusion P. Ltd. (2011) 333 ITR 269 (MP) has held as under:

> "The assessee having duly furnished the names, age, address, date of filing the application of share, number of shares of each subscriber there was no justification for the Assessing Officer for making the impugned addition because once the existence of the investors/share subscribers was proved, onus shift to the revenue to establish that either the share applicants were bogus or the impugned money belonged to the assessee itself"

7.4. The instant case is also supported by the decision of Hon'ble Bombay High Court in the case of CIT vs. Creative World Telefilms P. Ltd. (2011) 333 ITR 100 (Born). wherein their Lordship have held as under:

> "In the case in hand, it was not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number. name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement "**not traceable**". The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal could not be faulted. No substantial question of law was involved in the appeal"

7.5 The instant case is supported by the decision of Hon'ble Madras High Court in the case of CIT vs. Pranav Foundations Ltd. (2015) 229 Taxman 58 (Mad), wherein their Lordship has held as under:

> "In view of the fact that all the four parties who are subscribers of the shares, are limited companies and enquiries were made and received from the four companies and all the companies accepted their investment. Thus, the assessee has categorically established the nature and source of the said sum and discharged the onus that lies on it in terms of section 68. When the nature and source of the amount so

invested is known, it cannot be said to undisclosed income. Therefore. the addition of such subscriptions as unexplained credit under section 68 is unwarranted. "

7.6. The instant case is further supported by the decision. of Hon'ble Allahabad High Court in the case of CIT vs. Vacmet Packaging (India) (P.) ~td (2014) 367 ITR ?17 (All). wherein their Lordship has held as under:

"That apart, as regards genuineness of the transaction, the view which has been taken by the Tribunal is at least a possible view to take on the basis of the material on the record. The assessee undoubtedly had to discharge the onus of establishing the identity and creditworthiness of the applicant companies and of the genuineness of the transaction. In this regard, both the Commissioner (Appeals) and the Tribunal had noted that the assessee had established all the three aspects by producing, during the course of the assessment, necessary documentary material such as the share application forms, copies of bank accounts, income tax returns and balance sheets The view which was taken by the Commissioner (Appeals) and which was sustained by the Tribunal would thus have to be regarded as being, at least, a possible view to take in the circumstances of the case.

In the present case the assessee had discharged the onus of establishing the identity, creditworthiness and genuineness of the transactions which had formed the basis of the addition that was made under section 68. Ultimately whether the documentary materials which had been produced by the assessee were sufficient to displace the onus is a matter to be decided upon the facts of each case. Both the Commissioner (Appeals) and the Tribunal having held that the assessee had duly discharged the onus, no substantial question of law would arise."

7.7 The instant case is further supported by the decision of Hon'ble Gujarat High Court in the case of CIT vs. Namastey Chemicals (P.) Ltd. (2013) 217 Taxman 25 (Guj). wherein their Lordship has held as under:

"Where in respect of share application money received by assessee, it was apparent from records that large number of subscribers had responded to letters issued by Assessing Officer and submitted their affidavits. Tribunal was justified in deleting impugned addition made in respect of said amount. "

8. In the instant case, the doubts expressed in the reasoning of the AO in the instant case is on the premise that the apparent is not real which is based on the decisions of the Apex Court in the cases of CIT vs. Durga Prasad More 82 ITR 540 and Sumati Dayal vs. CIT 214 ITR 801 wherein it was expounded that Revenue authorities are also supposed to consider the surrounding circumstances and apply the test of human probability. In the case of Sumati Dayal (Supra), the assessee has claimed to have won substantial amount in horse races in two consecutive assessment years. When the matter reached the Settlement Commission, it was held by the majority view that the appellant did not really participate in any of the races, except purchasing the winning

tickets after the evens. The Chairman of the Settlement Commission expressed dissenting opinion and stated that the assessee has produced the evidence in support of the credits in the form of certificates from Racing Clubs. The Apex Court after considering the ratio of CIT vs. Durga Prasad More (Supra) upheld the majority view of the Settlement Commission and held at page 808 of the Report as under:

> "The observation by the Chairman of the Settlement Commission that "**fraudulent sale of winning tickets is not an usual practice but is very much of an unusual practice**" ignores the prevalent malpractice that was noticed by the Direct Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972, whereby the exemption from tax that was available in respect of winnings from lotteries. crossword puzzles. races. etc., was withdrawn. Similarly, the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality, The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering the surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winnings from races is not genuine. "

Thus, it is evident that the facts of the instant case are quite different from the facts in the case of CIT vs. Sumati Dayal (supra). In that case, there were claims for winning of substantial amounts in horse races in two consecutive years and the Hon'ble Supreme Court rejected the assessee's claim about her winnings from races as genuine and gave finding keeping in view the facts relating to that issue only. While In the case of the appellant, it had received share application monies and share premium monies from various corporates who were duly assessed to tax and have disclosed the transactions in their own records. Therefore, the ratio of decision r: the case of CIT vs. Sumati Dayal (supra) is not applicable to the case of the appellant. In this respect, it is observed that there was no ground to draw any adverse inference against the appellant in relation to the provisions contained in s. 68 of the said Act since the appellant had adduced all possible evidence in support of the share capital raised by it and there was nothing more for the director of the appellant to state in that respect. Thus, the justification sought to be construed by the AO in support of his adverse action fails on merit. It is observed that the nature and source of such money received from the share applicants were duly explained by the appellant. Therefore, in my considered opinion, the appellant has discharged its primary onus of proving the identity and creditworthiness of the share applicants and genuineness of the transactions,

more so when the share applicants had sufficient funds in their possession from which such investment in share subscriptions were made. Thus, the requirements of the provisions of s. 68 of the Act are duly met by the appellant and therefore, the AO was entirely in error in resorting to the impugned addition thereunder misconceiving the sweep and scope of the case of CIT vs. Sumati Dayal (supra)

8.1. Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AIR that the appellant has proved its case that the Identity of the share applicants are established beyond doubt and there is no adverse finding reached by the AO on this aspect Admittedly, all the share applicants are existing assessees under the Act and that some of them were subject to scrutiny assessment during the same period establish the identity and authenticity of the share applicants. About the genuineness of the transactions there is neither any adverse finding in the assessment order nor one which is contrary to the facts brought on record by the appellant during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by the source as apparent from their audited balance sheet return and bank statement. The net worth of such subscribers are in excess of the amounts invested by each of them with the appellant. 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 rejected the evidence adduced during the course of the assessment proceedings by the appellant out of hand, Thus, it is held that the investment by the share applicants in the share capital of the appellant do not warrant the inference that such share application monies received is unaccounted cash credit. There is no material brought on record to that effect and wild speculation of this genre cannot be passed off as gospel truth. Hence, I am inclined to accept the submissions made by the AR of the appellant in this respect. In view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances and accordingly, direct him to delete such addition of ₹1,40,00,000/- made on this count. Thus, Ground Nos. 1 to 4 of the appeal is allowed."

3. Learned Departmental Representative vehemently contends during the course of hearing that the Assessing Officer had rightly invoked the impugned addition in the nature of unexplained cash credits since the assessee had failed to satisfy three folded parameters of identity, genuineness and creditworthiness of the six investor parties having bare minimum assessed income. Case law *Sumati Dayal vs. CIT* (1995) 214 ITR 801 (SC) and *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC) is quoted in Assessing Officer's support that all these investors are in fact sham entities having no actual

business thereby ploughing taxpayer's own money back to the system through a well as executed layering exercising. And that the assessee's meagre income does not at all justify its exorbitant premium of ₹190/- per share by way of private placement. The Revenue accordingly prays for acceptance of its instant appeal.

4. We have given our thoughtful consideration to rival contentions against and in support of the CIT(A)'s findings reversing Assessing Officer's action making the impugned sec. 68 addition. There is no dispute about the assessee having claimed to have obtained share application / premium from six parties namely, Sonali Suppliers Pvt. Ltd., M/s Nihon Impex Pvt. Ltd., M/s Shivarapan Vanjiya Pvt. Ltd., M/s Saurabh Management Pvt. Ltd. M/s Jagajyoty Commodities Pvt. Ltd., & M/s Mangalraj Merchants Pvt. Ltd., involving sums of ₹25 lac in case of former ₹5 and ₹15 lac regarding last entity; respectively. We find that these former five investors are in fact Non-Banking Finance Companies (NBFCs) as per their respective registration certificates issued by the market regulator i.e. Reserve Bank of India under Banking Regulation Act. Learned Departmental Representative fails to dispute that registration of NBFC requires a long drawn process of compliance(s) and approval(s). All this takes care of the Revenue's argument terming these five an NBFCs as mere sham companies. We make it clear that the Assessing Officer nowhere issued sec. 131 or 133 process against all these investors. Relevant paper book comprising of 106 pages makes it clear that assessee had placed on record all share application / NBFC registrations certificates, bank statements, income-tax returns and audited accounts pertaining to its investors during the course of assessment. The Revenue's stand that this assessee was not carried out any business activity does have no substance in view of relevant raw materials stock of ₹94,53,816.5 work-in-progress of ₹283,74,528/- followed by other details of finished goods wastage and stores forming part of record before us. Its director's report at page 132 onwards suggests operational profits as on 31.03.2012 vis-à-vis in preceding assessment year. Its balance-sheet states sufficient current assets as on

31.03.2012. The assessee's revenue from operations as per its profit and loss account is ₹41,94,84,590/- as against ₹26,86,14,612/- in earlier assessment year.

5. Learned Departmental Representative at this stage submits that the assessee's sixth investor (supra) declared a meagre income of ₹1,200/- only. We find that its free reserves and surplus of ₹2,08,73,729/- are much more than investment in issue of ₹15 lac. We take into account all these facts and circumstances to affirm the CIT(A)'s findings extracted in detail that assessee has successfully proved all the three folded parameters of identity, genuineness and creditworthiness of its six investor parties. That being the case, we draw support from the tribunal's co-ordinate bench decision in *ITO vs. M/s Splendour Villa Makers Pvt Ltd*. in **ITA No.1768/Kol/2016** decided on 05.09.2018 has declared Revenue's arguments as follows:-

> 5. We have heard the rival submissions. It is not in dispute that the assessee had furnished all the details of the share subscribing companies that were sought for by the ld AO. Out of totally 7 share subscribing companies, notices u/s 133(6) of the Act were issued to all the shareholders. Out of which, 6 shareholders responded to notice u/s 133(6) of the Act directly by sending the requisite details to the ld AO. The brief facts of raising of shares capital are as under:-
>
> > The assessee had received share application for Rs. 1,80,00,000/- during the year under consideration. This capital was raised by way of issue of 95,000 shares of Rs. 10/- each out of which 10,000 shares were issued at a premium of Rs. 90% and balance 85,000 shares were issued at a premium of Rs. 190/- per share. These shares were issued to the following shareholders:

SN	Name	Address	PAN	Total Amount
1	Flower Distributors Pvt. Ltd.	61, Kali Krishna Tagore Street, 1st Floor, Kolkata-700007	AABCF6846M	25,00,000
2	Forever Vintrade Pvt. Ltd.	61, Kali Krishna Tagore Street, 1st Floor, Kolkata-700007	AABCF6844K	25,00,000
3	Capricorn Abasan Pvt. Ltd.	27, Weston Street, 5th Floor, Kolkata - 700012	AADCC0536H	10,00,000
4	Kavya Marketing Pvt. Ltd.	61, Kali Krishna Tagore Street, 1st Floor, Kolkata-700007	AAECK2547D	50,00,000
5	Mandira Suppliers Pvt. Ltd.	61, Kali Krishna Tagore Street, 1st Floor, Kolkata-700007	AAHCM0355J	30,00,000
6	Maximum Commosale Pvt. Ltd.	61, Kali Krishna Tagore Street, 1st Floor, Kolkata-700007	AAGCM5432M	20,00,000
7	Subhankar Mercantile Pvt. Ltd.	13F, Ramtanu Bose Lane, 1st Floor, Kolkata- 700005	AAMCS0780N	20,00,000
TOTAL				1,80,00,000

We find that 6 out of 7 shareholders had duly confirmed the transactions with the assessee company. The evidences which were filed before the ld AO with regard to this issue are as under:-

a) Income Tax Return of the shareholders
b) Certificate of incorporation of the shareholder companies.
c) Audited financial statements of shareholder companies.
d) Details of bank balances, loans and advances.
e) Share Allotment Letters
f) Copy of the bank account of the shareholders
g) Transactions with the assessee duly highlighted in the bank statement.
h) Copies of assessment orders for the Asst Year 2012-13 of the shareholder companies.
i) Evidences of source of source of the shareholders.

These evidences are enclosed in pages 57 to 226 of the paper book filed before us.

5.1. The assessee submitted the details of the transactions as under:-

a) Flower Distributors Pvt. Ltd.: This company invested a sum of Rs. 25,00,000/- in the appellant company. The share application was made by account payee cheque. This company was incorporated on 03.03.2011 and was having company identification number U52190WB2011PTC160152. This

company duly filed its return of income before ITO, Ward-1(2), Kolkata and was having PAN AABCF 6846 M. This company was having a paid up capital with free reserves and surplus of Rs. 4,34,79,170/- as on 31.03.2012 and Rs.55,84,414/- as on 31/03/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The copy of the assessment order passed u/s 143(3) of the Act for the AY 2012-13 is also available in the paper book. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 57-80 of the paper book.

(b) Forever Vintrade Private Limited: This Company invested a sum of Rs.25,00,000 in the appellant company. The share application was made by account payee cheque. This company was incorporated on 03/03/2011 and was having company identification number U52190WB2011PTC160160. This company duly filed its return of income before ITO Ward 1 (2). Kolkata and was having PAN AABCF6844K. This company was having a paid up capital with free reserves and surplus of Rs.4,64,80,934/- as on 31/03/2012 and Rs.90,74,585/- as on 31103/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The copy of the assessment order passed u/s 143(3) of the Act for the AY 2012-13 is also available in the paper book. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 81-105 of the paper book.

(c) Capricorn Abasan Private Limited: This Company invested a sum of Rs.10,00,000 in the appellant company. The share application was made by account payee cheque. This company was incorporated on 10/01/2007 and was having company identification number U45203WB2007PTC112505. This company duly filed its return of income before ITO Ward 1 (1). Kolkata and was having PAN AADCC0536H. This company was having a paid up capital with free reserves and surplus of Rs.2,24,71,1971- as on 31/03/2012 and Rs.2,24,23,903/- as on 31/03/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 106-122 of the paper book.

(d) Kavya Marketing Private Limited: This Company invested a sum of Rs.50,00,000 in the appellant company. The share application was made by account payee cheque. This company was incorporated on 03/03/2011 and was

having company identification number U521 00WB2011 PTC160161. This company duly filed its return of income before ITO Ward 1 (3), Kolkata and was having PAN AAECK2547D. This company was having a paid up capital with free reserves and surplus of Rs.4,50,79,092/- as on 31/03/2012 and Rs.90,74,585/- as on 31103/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The copy of the assessment order passed u/s 143(3) of the Act for the AY 2012-13 is also available in the paper book. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 123-148 of the paper book.

(e) Mandira Suppliers Private Limited: This Company invested a sum of Rs.30,00,000 in the appellant company. The share application was made by account payee cheque. This company was incorporated on 03/03/2011 and was having company identification number U52190WB2011 PTC160162. This company duly filed its return of income before ITO Ward 1 (2), Kolkata and was having PAN AAHCM0355J. This company was having a paid up capital with free reserves and surplus of Rs.4,93,81,014/- as on 31/03/2012 and Rs.55,84,484/- as on 31103/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The copy of the assessment order passed u/s 143(3) of the Act for the AY 2012-13 is also available in the paper book. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 149-173 of the paper book.

(f) Maximum Commosale Private Limited: This Company invested a sum of Rs.20,00,000 in the appellant company. The share application was made by account payee cheque. This company was incorporated on 19/05/2010 and was having company identification number U51909WB2010PTC148551. This company duly filed its return of income before ITO Ward 1 (3), Kolkata and was having PAN AAGCM54321\"1. This company was having a paid up capital with free reserves and surplus of Rs.3,51,89,013/- as on 31/03/2012 and Rs.1,00,958/- as on 31/03/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The copy of the assessment order passed u/s 144/143(3) of the Act for the AY 2012-13 is also available in the paper book. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 174-200 of the paper book.

(g) Subhankar Mercantile Private Limited: This Company invested a sum of Rs.20,00,000 in the appellant company. The share application was made by account payee cheque. This company was incorporated on 27105/2008 and was having company identification number U51909WB2008PTC126187. This company duly filed its return of income before ITO Ward 7(3), Kolkata and was having PAN AAMCS0780N. This company was having a paid up capital with free reserves and surplus of Rs.4,89,71,429/- as on 31/03/2012 and Rs.,4,09,19,363/- as on 31/03/2011 respectively. The copy of the bank statement of the Company is duly available in the paper book. On examination of the bank statement it will be seen that there is no deposit of cash. The details of source of funds from which this company had made the share application are also available in the paper book. All the relevant documents for this company are available on pages 201-220 of the paper book.

5.2. From the aforesaid details, we find that in case of all the share applicants –

a) The share application form and allotment letters are available.

b) The share applicants are income tax assessees and had filed their income tax returns regularly.
c) The investment in share application money were made out by account payee cheques.
d) The bank accounts of the share applicants reveal that there were no deposits of cash before issue of cheques to the assessee company.
e) The share applicants are having substantial creditworthiness in the form of free reserves and capital in their balance sheet.

5.3. As per the mandate of section 68 of the Act, the nature and source of credit in the books of the assessee company has been duly explained by the assessee. The credit is in the form of receipt of share capital from share applicants. The nature of receipt towards share capital is well established from the entries passed in the respective balance sheets of the companies as share capital and investments, as the case may be. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. The identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and income tax returns. With regard to the creditworthiness of share applicants, these companies are having capital in several crores of rupees and the investment made in the assessee company is a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants. By this, the creditworthiness of share applicants is also proved beyond doubt. With regard to genuineness of transactions, the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their respective bank accounts. We find that the assessee

had even proved the source of money deposited into the respective bank accounts of share applicants, which in turn had been used by them to subscribe to the assessee company as share application. Hence the source of source of source is also proved in the instant case though the same is not required to be done by the assessee as per law. The share applicants have confirmed the share application in response to notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.

5.4. It is not in dispute that the ld AO issued summons to the director of the assessee company who appeared in person before the ld AO on 16.2.2015 and a statement was recorded from Shri Hemand L Harkhani, director of assessee company. He explained the details that were sought for by the ld AO. Merely because he could not produce the directors of the share applicant companies, drawing an adverse inference against the assessee company to treat the receipt of share capital as bogus is unwarranted. Reliance in this regard is placed on the decision of the *Hon'ble Supreme Court in the case of Orissa Corporation P Ltd reported in 159 ITR 78 (SC) and Hon'ble Gujarat High Court in the case of DCIT vs Rohini Builders reported in 256 ITR 360 (Guj)* , wherein it was held that onus of the assessee (in whose books of account, the credit appears) stands fully discharged, if the identity of the creditor is establishd and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of 'cash deposited in the bank accounts of the creditors' , the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word 'may' in section 68 of the Act. Relevant observations of Hon'ble Gujarat High Court at pages 369 & 370 are as under :-

> *"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation (1986) 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non- compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.*

Further, we may point out that section 68 under which the addition has been made by the Assessing Officer reads as under:

> *"68. 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. "*
>
> *The phraseology of Section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words "**shall be charged to income tax as the income of the assessee of that previous year**". The Supreme Court while interpreting similar phraseology used in Section 69 has held that in creating the legal fiction the phraseology employs the word '**may**' and not '**shall**'. Thus the unsatisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of CIT vs. Smt. P.K. Noorjahan [1999] 237 I TR 570."*

It would be pertinent to note that against the said decision of Hon'ble Gujarat High Court, the Special Leave Petition (SLP in short) preferred by the revenue was dismissed by the Hon'ble Supreme Court.

5.5. Undisputedly the Share Applicants in this case are the bank account holder in their respective banks in their own name and are sole owner of the credits appearing in their bank account from where they issued cheques to the appellant. For the proposition that a Bank Account holder himself is the 'owner' of 'credits' appearing in his account (with the result that he himself is accountable to explain the source of such credits in whatever way and form, the same have emerged) support can be derived from section 4 of Bankers Book Evidence Act 1891 which reads as under:-

> *"4. Mode of proof of entries in bankers' books Subject to the provisions of this Act, a certified copy of any entry in a bankers' book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every cases where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."*

Following the said provisions, the co-ordinate bench of *Allahabad Tribunal in the case of Anand Prakash Agarwal reported in 6 DTR (All-Trib) 191* held as under:-

> *"The question that remains to be decided now is whether the subject matter of transfer was the asset belonging to the transferor/donors themselves. There is enough material on record which goes to show that there were various credits in the bank accounts of the donors, prior to the transaction of gifts, which*

> *undisputedly belonging to the respective donors themselves, in their own rights. No part of the credits in the said bank's accounts was generated from the appellant and/or from its associates, in any manner. The certificates issued by the banks are construable as evidence about the ownership of the transferors or their respective bank accounts, as per s.4 of the Bankers' Books evidence Act 1891, which read as under:*
>
> *"4. Where an extract of account was duly signed by the agent of the bank and implicit in its was a certificate that it was a true copy of an entry contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book was in the custody of the bank, it was held admissible in evidence. Radheshyam v. Safiyabai Ibrahim AIR 1988 Bom. 361 : 1987 Mah. 725: 1987 Bank J 552."*

In view of the position of law as discussed above, it is always open for a borrower to contend, that even the "creditworthiness" of the lender stands proved to the extent of credits appearing in his Bank Account and he should be held to be successful in this contention."

5.6. In the case of Nemi Chand Kothari vs CIT reported in 264 ITR 254 (Gau), the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of *onus* on assessee under section 68, by holding that the same should be decided by taking 5.6. In the case of Nemi Chand Kothari vs CIT reported in 264 ITR 254 (Gau), the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of *onus* on assessee under section 68, by holding that the same should be decided by taking into consideration the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the report are reproduced herein below:-

> *"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be*

read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:

"Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden) of proving that fact is upon him."

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What, thus, transpires from the above discussion is that white section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s)of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and IT is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been. eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the

assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub- creditors, for, these aspects may not be within the special knowledge of the assessee. "

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" ... If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor… "

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"In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee …."

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"Keeping in view the above position of law, when we turn to the factual matrix of the present case, we find that so far as the appellant is concerned, he has established the identity of the creditors, namely,

Nemichand Nahata and Sons (HUF) and Pawan Kumar Agarwalla. The appellant had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from. undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness."

5.7. We find that the *Hon'ble Jurisdictional High Court in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata reported in 347 ITR 347(Cal)* wherein the Court held as follows:

"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.

16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."

5.8. We find that the *Hon'ble Jurisdictional High Court in yet another case of Crystal Networks (P) Ltd vs CIT reported in 353 ITR 171 (Cal)* had held that when the basic evidences are on record, the mere failure of the creditor to appear before the Assessing Officer cannot be the basis to make addition. The relevant observations of the Hon'ble Court are as under:-

> *8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).*
>
> *9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of Udhavdas Kewalram v. CIT [19671 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.*
>
> *10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the*

Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:

> *"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "*

11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

12. Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed.

5.9. It is not in dispute that all the share applicant companies in the instant case before us are assessed to income tax and assessments framed on some of them by the revenue. We find that the assessee had duly proved the source of source of source in the instant case. Even if the creditworthiness of the share applicants are to be doubted , then it would be the duty of the ld AO of the assessee to make enquiries through the ld AO of the concerned share applicants. Once the relevant details are filed by the assessee before the ld AO to prove the creditworthiness of share applicants, then the same cannot be questioned / disputed by the ld AO of the assessee as the same would be travelling beyond his jurisdiction. In other words, the creditworthiness of the share applicant companies would have to be examined by the Assessing Officer of those companies and not by the Assessing Officer of the assessee herein. However, it would be incumbent on the part of the ld AO of the assessee herein, to trigger the said verification process on the side of the department. It

would be interesting to note in this regard that the *Hon'ble Jurisdictional High Court in the case of CIT Kolkata III vs M/s Dataware Private Limited in ITAT No. 263 of 2011 dated 21.9.2011* had held as under:-

> *"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.*
>
> *We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."*

5.10. We find that the *Hon'ble Jurisdictional High Court in the case of CIT vs Roseberry Mercantile (P) Ltd in ITAT No. 241 of 2010 dated 10.1.2011* , while relying on the Hon'ble Supreme Court in the case of Lovely Exports reported in 216 CTR 295 (SC) , had held :-

> *"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. "*
>
> *It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs.4,00,000/- and Rs.20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00,000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.*

On appeal the Learned CIT(A) by following the decision of the Supreme Court in the case of CIT. vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], 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.

5.11. We also find that the *Hon'ble Jurisdictional High Court in the case of CIT vs Leonard Commercial (P) Ltd in ITAT No. 114 of 2011 dated 13.6.2011* had held as under:-

"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.

In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under section 68 of the Income- tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

5.12. We also find that the co-ordinate bench of this tribunal in the case of *VSP Steel P Ltd (formerly M/s Tikmani Metal P Ltd) in ITA No. 741/Kol/2014 for Asst Year 2010-11* had held as under:-

"We have heard the rival submissions. We find that the ld DR argued that the assessee had not proved the source of source of share applicants who had invested share application monies in the assessee company and accordingly prayed that the addition has been rightly made u/s 68 of the Act. He also placed reliance on the decision of this tribunal in the case of Subhlakshmi Vanijya (P) Ltd vs CIT reported in (2015) 60 taxmann.com 60 (Kolkata – Trib.) dated 30.7.2015. In response to this, the ld AR argued that there is no mandate in law that the assessee has to prove the source of source of share applicants. He argued that in the instant case, the assessee had duly discharged its complete onus by furnishing the requisite details. In case if the ld AO has got some doubts, he should have verified the same from the AO of those share applicants. We find from the plain reading of section 68 of the Act, the duty cast on the assessee is to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share application money from five share applicants. The nature of receipt towards share application money is well established from the entries passed in the respective balance sheets of the companies as investments. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. In the instant case, we find that the identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, the ld AO himself states that the five share applicants had invested in assessee company's shares by taking money from some other companies. Hence the source of the share applicants for making investment in share application monies of assessee-company is also proved. By

this, the creditworthiness of the share applicants is also proved beyond doubt. Third ingredient is genuineness of the transactions. We find that the five share applicants had paid the monies to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts, which are quite evident from the bank statements enclosed in the paper book. We agree with the arguments of the ld AR that the source of source of share applicants need not be proved by the assessee herein. We hold that the decision rendered by this tribunal in Subhalakshmi Vanijya relied upon by the ld DR was rendered in the context of validity of revision proceedings u/s 263 of the Act and not on the merits of the case. This tribunal in that case decided the validity of invoking revisionary jurisdiction u/s 263 of the Act by the ld CIT and whether adequate enquiries were made by the ld AO in the facts and circumstances of that case. This tribunal in Subhalakshmi Vanijya case supra never had an occasion to look into the merits of the addition proposed to be made towards share capital in the facts and circumstances of that case and no decision was rendered thereon on merits of the issue. Hence the reliance placed thereon by the ld DR does not advance the case of the revenue. In the instant case, we find that the share applicants have not denied the fact of making investment in share application monies in assessee company, which is evident from the fact that they had confirmed in writing in response to notice issued u/s 133(6) of the Act which was admittedly done behind the back of the assessee. There is no whisper in the entire assessment order to doubt the veracity of the transactions and genuineness of share applicants and the transactions herein. In the instant case, the assessee had indeed proved the identity of the share applicants, creditworthiness of share applicants and genuineness of transactions beyond doubt. We find that the entire addition has been made by the ld AO based upon suspicion, surmises and conjectures and not upon proper evaluation and appraisal of the evidences and documents filed before him. We place reliance on the decision of the Hon'ble Apex Court in this regard in the case of Dhakeshwari Cotton Mills Ltd vs CIT reported in 26 ITR 775 (SC) wherein it has been held that no addition can be made without material and on mere suspicion.

In these facts and circumstances, there is no need to treat the receipt of share application money from five share applicants as unexplained u/s 68 of the Act. Hence we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed."

5.13. We find that the co-ordinate bench of this tribunal recently in the case of *ITO vs Wiz-Tech Solutions Pvt Ltd in* ***ITA No. 1162/Kol/2015*** *dated 14.6.2018* had held as under:-

28. From the details as aforesaid which emerges from the paper book filed before us as well as before the lower authorities, it is vivid that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income, (iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements, (vi) in none of the transactions the AO found deposit in cash

before issuing cheques to the assessee company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above.

29. As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share capital with premium from share applicants. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and investments. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. For proving the identity of share applicants, the assessee furnished the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, as we noted supra, these Companies are having capital in several crores of rupees and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants, so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application. Hence the source of source of source is proved by the assessee in the instant case though the same is not required to be done by the assessee as per law as it stood/ applicable in this assessment year. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.

*30. ******

*31. ******

32. We would like to reproduce the Hon'ble High Court order in CIT vs. Gangeshwari Metal P.Ltd. in ITA no. 597/2012 judgement dated 21.1.2013, the Hon'ble High Court after considering the decisions in the case of Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169 and judgement in the case of CIT vs. Lovely Exports 319 ITR (St) 5(SC) 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's*

its 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, balance4 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.5,50,000/- 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"

33. The case on hand clearly falls in the category where there is lack of enquiry on the part of the A. O. as in the case of Ganjeshwari Metals (supra).
b) In the case of Finlease Pvt Ltd. 342 ITR 169 (supra) in ITA 232/2012 judgement dt. 22.11.2012 at para 6 to 8/ it was 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 of 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. Mahesh 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 ofS.68 of the Income Tax Act 1961. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (supra).

The decision in this case is based on the peculiar facts which attract the ratio of Lovely Exports (supra). Where the assessee adduces evidence in support of the share application monies, it is open to the Assessing Officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators, such a link was shown to be present in the case of Nova Promoters & Finlease (P) Ltd. (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under Section the ratio of Lovely Exports (supra) is attracted, irrespective of the facts, evidence and material. "

34. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we hold that an addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to uphold the order of the Ld. Commissioner of Income Tax (Appeals)

35. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the

addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do not want to interfere in the impugned order of Ld. CIT(A) which is confirmed and consequently the appeal of Revenue is dismissed.

5.14. We find that the *Hon'ble Supreme Court in the case of M/s Earthmetal Electricals P Ltd vs CIT & Anr. reported in 2010 (7) TMI 1137 in Civil Appeal No. 21073 / 2009 dated 30.7.2010* arising from the order of Hon'ble Bombay High Court had held as under:-

ORDER

Delay condoned.
Leave granted.
Heard learned counsel on both sides.
We have examined the position. We find that the shareholders are genuine parties. They are not bogus and fictitious. Therefore, the impugned order is set aside.

The appeal is allowed accordingly.
No order as to costs.

In the instant case before us, the share subscribing companies are duly assessed to income tax and the ld AR had also placed on record a copy of the assessment order framed in the case of M/s Capricorn Abasan Pvt Ltd (one of the share subscribing company) u/s 143(3) of the Act dated 31.12.2015 for the Asst Year 2013-14 by the Income Tax Officer, Ward -1(1), Kolkata, which are enclosed in pages 221 to 226 of paper book filed before us. It is not in dispute that the share subscribing companies are in existence. It is not in dispute that the share subscribing companies are duly assessed to income tax and their income tax particulars together with the copies of respective income tax returns with their balance sheets are already on record. We also find that the ld CITA had categorically stated that the scrutiny assessments were framed on the share subscribing companies for the Asst Year 2012-13 which shows their existence is genuine and transactions carried out by them were the subject matter of examination by the income tax department in scrutiny proceedings. This fact is not controverted by the revenue before us. Hence it could be safely concluded that they are genuine shareholders and not bogus and fictitious. Accordingly, the ratio laid down by the Hon'ble Apex Court in the case of M/s Earthmetal Electricals P Ltd supra would be squarely applicable to the facts of the instant case.

5.15. We find that the director of the assessee company Shri Hemant L Harkhani had deposed before the ld AO while recording his statement in the course of assessment proceedings that the assessee company had huge prospects in future in real estate business and accordingly the receipt of share capital with premium was justified. The ld DR had filed written submissions before us reiterating the findings of the ld AO. We find that the reply of the

director of the assessee company for justification of premium has been summarily rejected by stating that the said explanation appears to be incorrect. We would like to add that receipt of share capital for a company is not a prohibited transaction, as that is one of the main source of raising funds for a company to run its intended activities. The ld CITA had categorically given a finding that the ld AO did not bring on record sufficient tangible and cogent material to support his conclusion that the amount credited in the assessee's books in the form of share capital and share premium actually represented assessee's undisclosed income. This factual finding remain uncontroverted by the revenue before us. Once the replies to notices issued u/s 133(6) of the Act were received from the share subscribing companies, if at all, the ld AO had any doubt that the details filed thereon warranted further examination, nothing prevented him from issuing summons u/s 131 of the Act to the directors of the share subscribing companies or carry out examination through the Assessing Officer of the share subscribing companies. Why should the director of the assessee company produce the directors of the share subscribing companies. The assessee could only furnish the relevant details to prove its primary onus. Thereafter the onus shifts to the revenue to decide whether to make further examination or not in the given set of facts and circumstances. The shifting of onus is like a pendulum clock between the assessee and the ld AO. The ld AO after carrying out the requisite verification on his part independently, should confront the assessee, if necessary, based on the materials gathered against the assessee and then the procedure of cross examination, if sought for by the assessee, needs to be provided in order to bring the entire enquiries and examination to the logical end. In the instant case, the ld AO had not followed the due process of law. He called for all the relevant details from the assessee which were duly provided in time. Even the director of the assessee company appeared before the ld AO and a statement was recorded from him in the course of assessment proceedings. Then the onus shifts to the ld AO. The ld AO without making any independent enquiries, if any, from his side, directed the assessee to produce the directors of the share subscribing companies, which remain uncomplied by the assessee company and which eventually led to the ld AO drawing adverse inference about the transaction of receipt of share capital and share premium by the assessee company. This process followed by the ld AO, in our considered opinion, is not in accordance with the due process of law. Even for one share subscribing company where the notice u/s 133(6) of the Act remain uncomplied with, the details were filed by the assessee such as ITR acknowledgement, certificate of incorporation of the said company, audited financial statements, details of bank balances, loans and advances, cash flow statement, share allotment advice, bank statements and certificate for source of source together with confirmation of having made the investment in shares at premium with the assessee company. It is not in dispute that 6 out of 7 share subscribing companies had duly complied with the notices issued u/s 133(6) of the Act which was done behind the back of the assessee and all those parties had duly confirmed the transactions with the assessee by furnishing the requisite details called for by the ld AO. The ld AO actually had taken adverse

view in respect of all the share subscribing companies in similar fashion, without bringing any cogent material on record against the assessee, which in our considered opinion, is not tenable as per law. We find that the reliance placed by the ld DR on the decision of Hon'ble Calcutta High Court in the case of Rajmandir Estates supra was distinguishable on facts as the said decision was rendered in the context of validity of revisionary jurisdiction u/s 263 of the Act by the Learned Administrative Commissioner. This fact has already been addressed by this tribunal in the case of VSP Steel P Ltd supra. No decision whatsoever was rendered by the Hon'ble Jurisdictional High Court in the case of Raj mandir Estates P ltd on merits of the addition and hence does not come to the rescue of the revenue in the facts of the instant case.

5.16. We also find that the *Hon'ble Apex Court recently in the case of Principal CIT vs Vaishnodevi Refoils & Solvex reported in (2018) 96 taxmann.com 469 (SC)* wherein the SLP of the Revenue has been dismissed by the Hon'ble Apex Court. The brief facts of that case were that the addition u/s 68 of the Act was made by the Assessing Officer in respect of capital contributed by the partner of the firm. The Hon'ble Gujarat High Court noted that when the concerned partner had confirmed before the Assessing Officer about his fact of making capital contribution in the firm and that the said investment is also reflected in his individual books of accounts, then no addition could be made u/s 68 of the Act. The decision of *Hon'ble Gujarat High Court is reported in (2018) 89 taxmann.com 80 (Guj HC)* . The SLP of the revenue against this judgment was dismissed by the Hon'ble Supreme Court.

5.17. To sum up, section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its income of the previous year in which the same was received. In the facts of the present case, both the nature & source of the share capital received with premium were fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed before the ld AO. Accordingly, all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction were placed before the ld AO and the onus shifted to the ld AO to disprove the materials placed before him. Without doing so, the addition made by the ld AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do not want to interfere in the impugned order of Ld. CIT(A) which is confirmed and consequently the ground no. 1 raised by the revenue is dismissed."

We adopt the above detailed reasoning *mutatis mutandis* to uphold the CIT(A)'s findings under challenge deleting the impugned sec. 68 addition of unexplained share capital / premium of ₹1,40,00,000/-. The Revenue fails in its sole substantive grievance.

6. This Revenue's appeal is dismissed.

Order pronounced in the open court 16/11/2018

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(Dr. A.L. Saini)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 16 /11/2018 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ACIT, Cir-10(2), P-7, Chowringhee Sq. 3rd Fl, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Aditya Polysack Pvt. Ltd., C/o S.N.Ghosh & Associates Advocate Seven Brothers' Lodge, P.O. Buroshibtala, P.S. Chinsurah, Dist. Hooghly, Pin-712105
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।