

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH, "B" AT KOLKATA
(समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य
[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 2277/Kol/2016
Assessment Year: 2012-13

ITO, Ward 10(1), Kolkata	Vs.	M/s. Shivrashi Merchants Pvt. Ltd. [PAN: AARCS 1491 B
Appellant		Respondent

Date of Hearing	02.01.2019
Date of Pronouncement	01.02.2019
For the Appellant	Shri Satyajit Mondal, Addl. CIT, Sr. DR.
For the Respondent	Shri Akkal Dudhwewala, AR

ORDER

Per Shri A.T.Varkey, JM

This is an appeal preferred by the revenue against the order of Ld. CIT (Appeals), 4, Kolkata dated 04-10-2016 for the assessment year 2012-13.

2. The main grievance of the Revenue is against the action of the ld. CIT(A) deleting the addition made by the AO u/s. 68 of the Act in respect of addition made by the AO on share subscription money received during the year.

3. Briefly stated, the facts of the case are that the assessee company had filed its return of income for AY 2012-13 on 28.09.2012 showing NIL total income. Later, the case was selected for scrutiny and statutory notices were issued upon the assessee, which were duly complied with. The AO noted that summons was issued upon the assessee company to produce and justify the large share premium. According to AO there was no compliance by the Director of the assessee company and therefore he held that the identity, genuineness and creditworthiness of the share applicants could not be established. The AO stated that due to non-compliance by the assessee the details of the shareholders were not available and their identity was questionable. According to him once identity was not established then the question of establishing the creditworthiness of the applicants and genuineness of the transaction did not arise. Since no details were submitted before him, the AO added

back the share application monies amounting to Rs.3,05,90,240/- received during the year by way of unexplained cash credit u/s 68 of the Act. Aggrieved by the aforesaid order, the assessee preferred an appeal before the Ld. CIT(A) who deleted the impugned addition made by the AO. Being aggrieved by the Ld. CIT(A)'s order, the Revenue is now in appeal before us.

4. At the time of hearing the Ld. DR vehemently relied upon the order of the AO. He argued that since the share capital could not be verified due to non-compliance by the assessee, the addition made by the AO u/s 68 be upheld and therefore the order of the Ld. CIT(A) be reversed.

5. Per contra the Ld. AR appearing on behalf of the assessee supported the order of the Ld. CIT(A). The Ld. AR further drew our attention to the paper book, specifically Pages 14 to 68, and submitted that the AO had made independent enquiries from the share subscribers u/s 133(6) and that all the notices issued were complied with by the share subscribers. He therefore argued that the Ld. AO's finding that no details were furnished before him and therefore the identity and creditworthiness of the share applicants remained un-verified was factually perverse. He further drew our attention to the letter received by the AO on 20/03/2015, which was furnished by the Director of the assessee company in response to the notice issued u/s 131 upon him dated 09/03/2015. In that letter the Director had provided details and explanation in response to the specific points as raised in the said questionnaire. The Ld. AR thus submitted that the findings recorded by the AO in the assessment order that no details were available before him and that the notices issued went un-complied with were factually incorrect and in that view of the matter the basis of making addition u/s 68 was unsustainable on facts and in law. The Ld A/R submitted that when this material misstatement in AO's order was noted, the Ld CIT(A) objectively appraised the evidence which the AO had gathered by issuing notices u/s 133(6) and came to conclusion that the share subscriptions received could not be considered as unexplained cash credit and hence deleted the addition. He further submitted that the Ld D/R in his submissions was not able to controvert the Ld. CIT(A)'s findings. He therefore urged that the order of the Ld. CIT(A) be upheld.

6. We have considered the submissions of the rival parties and perused the material placed on record. It is noted that the assessee company had raised share capital from three bodies corporate aggregating to Rs.3,06,00,000/-. Before the AO the assessee company had furnished the details of the share capital raised along with Form No. 2 filed with the ROC and also the complete details of the share applicants. Based on the information gathered from the assessee, the AO had made independent enquiries from the share applicants by exercising powers vested u/s 133(6). Notices dated 26/02/2015 were issued to all the three bodies corporate requiring them to furnish relevant details to substantiate the genuineness the share application monies contributed by them. All the notices were served on the share subscribers. From the material in the paper book, it is noted that each of the bodies corporate had complied with the notices u/s 133(6) and the office of the AO duly acknowledged their replies. It is noted that each of the share subscriber had furnished the following details before the AO :

- (a) Income Tax Return;
- (b) Audited Accounts including P&L and B/S;
- (c) Relevant address proofs by way Form 18 filed by the applicants with ROC;
- (d) ID and address proof of the Directors;
- (e) Copies of Bank Statements;
- (f) Explanation regarding source of funds;
- (g) List of Investments held;
- (f) Form 20B along with Annual Return filed with ROC;

7. In view of the above jurisdictional facts we find substantial force in the contention of the Ld. AR that the finding of the AO in his order u/s 143(3) that no details regarding the share capital raised by the assessee were furnished before him was factually incorrect. Not only did the assessee company furnish the details of the share subscription monies raised but the AO had also independently enquired from the share applicants regarding their source of funds. In the circumstances we hold that the AO's allegation that the identity of the share subscribers remained unestablished and therefore creditworthiness of the applicants and genuineness of the transaction remained un-verified is wholly untenable on facts.

8. Another reason given by the AO justify the impugned addition u/s 68 was that he had issued summons to the Director of the company requiring him clarify certain points, which remained un-complied with. We however note that the Director of the appellant had furnished his response to the notice u/s 131 which was received by the office of the AO on 20/03/2015 i.e. prior to the completion of the income-tax assessment wherein he had provided his relevant personal details as requisitioned by the AO and clarified that the copy of bank statement and source of funds of the share applicants had already been submitted in the office of the AO on earlier occasion in response to notice u/s 142(1). It is therefore noted that this is not a case where the documents sought by the AO from the assessee company were not available before the AO.

9. We note that the Ld. CIT(A) appreciated the foregoing facts which were available on the AO's record and thereafter verifying the details so furnished by the share applicants in response to notices issued u/s 133(6), he found that their identity & creditworthiness were established and the genuineness of the transaction was also proved. The relevant findings of the Ld. CIT(A) are as follows:

“4.2 I have considered the issue raised in the assessment order in light of the arguments made by the appellant. The only issue involved is whether the share capital along with share premium money received amounting to Rs.3,05,90,240/- on issue of equity shares invite the mischief of the provisions of s. 68 of the Act or not. I find from record that during the year the assessee company raised Share Capital of as well as share premium of Rs.3,05,90,240/- from various share subscribers who are corporate entities. The AO has discussed this issue at page 1, 2 & 3 of the assessment order. For the sake of brevity section 68 of the Act is reproduced as follows:-

‘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 explanations 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.’

4.3 According to this section, if identity, creditworthiness of the creditor and genuineness of the transaction is not proved or 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 the instant case, the appellant had disclosed receipt of share capital money including share premium money of Rs.3,05,90,240/- from various share subscribers who are Corporate Bodies. It is observed that the addition was made with the predetermined mindset that share premium received by the appellant is not genuine and there is no justification for

such high share premium. The AO also held that creditworthiness of the shareholders did not exist and the transactions were an eyewash only for bringing its black money into circulation without paying any tax to the revenue. I find that each of the share subscribers are regularly assessed to income tax; and the investments made by each of them are duly and fully reflected in their audited accounts as well as their income tax return filed in the paper book. 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 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 conduct any enquiry.

4.4 It is further observed that the corporate share subscribers 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 the individuals are having Permanent Account Numbers. In fact, the details filed before the AO included, their Permanent Account Numbers along with the acknowledgment of submission of their return of income and furnished audited financial statements which in my humble opinion proves their identities. It is also observed that each of the share applicants maintained bank accounts. Further, each of the share subscriber has duly discussed the fact that such transactions were duly reflected in their respective books of accounts, as well as in their audited Balance Sheets. These facts, in my opinion, clearly prove the genuineness of the transactions also.

4.5 The evidences furnished on record by the appellant, in my opinion, clearly prove their source of funds, and their capacity for making such payments and accordingly, the criteria of their creditworthiness is also proved. It is also observed that the appellant has filed for all the share subscriber copies of their income tax acknowledgments evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheets wherein such investments made by each of them in the subscription of share capital 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 copy of the allotment advise received by them from the appellant in respect of shares allotted to them. The return of allotment as well as the annual return for the assessment year 2012-13 filed by the appellant with the Registrar of Companies, Ministry of Corporate Affairs, further categorically proves the fact of allotment of shares to the share applicants. It is further observed that the net worth of the each of the share applicants, as disclosed in their Balance Sheets, far exceeded the amount of investments made by them in the shares of the appellant company. It is accordingly observed that it adequately prove their creditworthiness to make investment in the share capital of the appellant. The aforesaid facts underlined by evidences 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. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. 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. There is no evidence on record to show that the identities of the share applicants are not proved and/or that the introduction of share capital by them was not genuine and/or the source of investment was not fully explained to the satisfaction of the AO. 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.

4.6 A close perusal of observations and findings recorded in the assessment order does not show that documents filed by the appellant to establish identity and creditworthiness of share subscribers as well as genuineness of transactions are bogus or incorrect, the AO has not been able to disprove these documents after enquiry.

4.7 A close perusal of observations and findings recorded in the assessment order does not show that documents filed by the appellant to establish identity and creditworthiness of share subscribers as well as genuineness of transactions are bogus or incorrect, the AO has not been able to disprove these documents after enquiry.

4.8 Further the Hon'ble Supreme Court in CIT vs. Lovely Exports Ltd. (2008) 216 CTR 195 (SC) wherein has held as under:

'2. Can the amount of share money be regarded as undisclosed income under section 68 of the 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 assessment in accordance with law.'

In other words, it is observed that if share capital 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, all the share applicants had confirmed their investment with the appellant 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 the Act.

4.9 Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AR that the appellant has made its case that the

identity of the share applicants are established beyond doubt and on enquiries made by the AO there is no adverse finding reached on this aspect. Admittedly, all the share applicants are existing assesses under the Act which establish the identity and authenticity of the share applicants. About the genuineness of the transactions there is no any adverse finding I the assessment order which is distinct 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 submission of their return, audited annual accounts, their bank statement filed by the appellant. The net worth of such subscribers is in excess of the amount invested by each of them as explained hereinabove. The addition made by AO is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidence adduced during the course of the assessment proceedings by the appellant and the replies of the share applicants in respect of the share capital do not warrant the inference that such share application monies received is unaccounted cash credit. Hence, I am inclined to accept the arguments tendered by the AR of the appellant in this respect. In view of the above, I have no hesitation to hold that the impugned addition made by the invoking the provisions of s. 68 by the AO is not justified in the circumstances. Accordingly, I direct deletion of addition of Rs. 3,05,90,240/- made on account of share premium u/s 68 of the Act. Thus, these grounds are allowed.”

10. The Ld. DR appearing on behalf of the Revenue was unable to controvert the above facts of the case. He was also unable to pin point any specific infirmity or defect in the details furnished by the share applicants in response to the respective notices issued u/s 133(6) of the Act. We therefore find merit in the Ld A/R' submissions that the addition made by the AO u/s 68 was based on mere suspicion and conjecture, lacking any cogent basis.

11. We find that all the three shareholders had confirmed the transactions with the assessee company. The evidences which were filed before the AO have been discussed earlier. From the aforesaid details, we find that in each case the share applicants are income tax assesseees and had filed their income tax returns regularly. The investment in share application monies was made out by account payee cheques. The share applicants are having substantial investible funds in the form of free reserves and capital in their balance sheet. 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 and share premium 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 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 and the 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 bank balances available in their respective bank accounts. The share applicants have confirmed the fact of investment in share capital and share premium 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. We therefore note that the three ingredients required to be satisfied u/s 68 has been duly substantiated in the instant case.

12. We find that the Hon'ble Supreme Court in the case of M/s Earth Metal 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.”

13. In this regard we may gainfully refer to the judgment in the case of Pr. CIT Vs Paradise Inland Shipping (P) Ltd (84 taxmann.com 58) wherein the Bombay High Court had deleted similar addition on similar set of facts made on account of unexplained cash credits

and the SLP filed by the Revenue against the judgment has been dismissed by the Hon'ble Supreme Court. The relevant extracts of the judgment is as follows:

"5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus :

"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :

1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-

Date of Registration 09/05/1995

6. On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies.

7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot re-appreciate the evidence to come to any contrary evidence. Considering that the authorities have rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial question of law which arises in the present Appeal for consideration.

14. 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.

15. We further find that the decision of the Hon'ble Delhi High Court in the case of CIT Vs Gangeshwari Metal (P) Ltd (ITA No. 597 of 2012) dated 21.01.2012 is of much relevance in the facts of the assessee's case. In this case the assessee had received share application money of Rs.55.50 lacs during the year in question. The assessee filed the complete names, addresses of the share applicants, confirmatory letters from them, copies of bank statements of both the company as well as the share applicants and copies of share application forms. In spite of the aforesaid documentary evidences the AO held the explanation to be unacceptable and treated the share application as unexplained cash credit thereby making addition under Section 68 of the Income-tax Act, 1961. On appeal the CIT(Appeals) deleted the aforesaid addition holding that the identity of the share applicants stood established beyond doubt, all the payments were through account payee cheques and the share applicants were regular income-tax assessees. The CIT(Appeals) further held that the Revenue did not bring any evidence on record to suggest that the share application had been received by the assessee from its own undisclosed sources nor any material was brought on record to show that the applicants were bogus. The Revenue was neither able to controvert the documentary evidences filed by the appellant nor prove that the share application were ingenuine or the applicants were non-creditworthy. The findings of the CIT(Appeals) were upheld by the Income-tax Appellate Tribunal. On appeal to the High Court, the Revenue placed reliance on the decision of another coordinate Bench of the same Court in the" case of CIT Vs Novo Promoters &Finlease (P) Ltd (342 ITR 169). The High Court however held that the aforesaid judgment was distinguishable from the facts of the present case. The Court observed that in that judgment the Assessing Officer had brought on record enough corroborative evidence to show that the assessee had routed unaccounted monies into its books through medium of share subscription. The share applicants had confessed that they were "accommodation entry providers". The Assessing Officer in the latter case was able to prove with enough material that the share subscription was a pre-meditated plan to route unaccounted monies. In the present case however the Department was unable to bring any material whatsoever shows that share application was in the nature

of accommodation entries. The Court observed that the appellant had filed sufficient documentary evidences to establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. The AO however chose to sit back with folded hands till the assessee exhausted all the evidence in his possession and then merely reject the same without conducting any inquiry or verification whatsoever. The Court thus held that the decision of CIT Vs Novo Promoters & Finlease (P) Ltd (342 ITR 169) was not applicable to the facts of the case. Instead it was held that the issue in hands was on the lines of the decision of the Supreme Court in the case of CIT Vs Lovely Exports Pvt Ltd (319 ITR 5). Accordingly the addition made under Section 68 on account of share application was deleted. The relevant extracts of the judgment is as follows:-

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

"Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tries to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance sheet etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income/ penalty proceedings under Section 271(1)(c) are being initiated separately.

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

16. Further, in the decision of the Hon'ble Delhi High Court in the case of CIT v. Kamdhenu Steel & Alloys Ltd. [2012] 19 taxmann.com 26/206 Taxman 254/[2014] 361 ITR 220 is also relevant, wherein it was held as under :

"Once adequate evidence/material is given, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has "created" evidence, the Revenue is supposed to make thorough probe before it could nail the assessee and fasten the assessee with such a liability under s.68; A.O. failed to carry his suspicion to logical conclusion by further investigation and therefore addition under s.68 was not sustainable."

17. The SLP filed against the above decision has been dismissed by the Hon'ble Supreme Court.

18. 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. Mahes Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of S.68 of the Income Tax Act 1961. 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. "

19. It is not in dispute that all the share applicant companies in the instant case before us are assessed to income tax. We find that the assessee had duly proved the source of funds in the instant case. Even if the creditworthiness of the share applicants are to be doubted, then it would be the duty of the AO of the assessee to make enquiries through the AO of the concerned share applicants. Once the relevant details are filed by the assessee before the AO to prove the creditworthiness of share applicants, then the same cannot be questioned / disputed by the 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 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."

20. 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 Cl. T. 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.

21. 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.

22. 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.”

23. 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 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer after noting the facts, merely rejected the same. This would be apparent from the observations of the Assessing Officer in the assessment order to the following effect:-

"Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tries to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance sheet etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.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 FinleasePvt Ltd. 342 ITR 169 (supra) in ITA 232/2012 judgementdt. 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.MaheshGarg 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.

24. 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 by each of the share subscribers on the AO's record. The addition made by the AO was based on conjectures and surmises, which 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).

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

Order is pronounced in the open court on 01 February, 2019

Sd/-

(Dr. A. L. Saini)
Accountant Member

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated : 01 February, 2019

Biswajit (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. ITO, Ward 10(1), P-7, Chowringhee Square, Kolkata – 69.
2. Respondent – M/s. Shivrashi Merchants Pvt. Ltd., 31, Elgin Road, Kolkata – 20.
3. The CIT(A),
4. CIT ,
5. DR,

/True Copy,

By order,

Assistant Registrar/H.O.O

ITAT, Kolkata