

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI O.P. MEENA, HON'BLE ACCOUNTANT MEMBER**

ITA NO.2888/MUM/2017 (A.Y: 2012-13)

I.T.O. – 13(3)(3) Room No. 227, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	v.	M/s. Viswa Vyapar Trading Pvt. Ltd., 607, 6 th Floor, Central Plaza Daftari Road, Shivaji Chowk Malad (E), Mumbai - 400 097 PAN: AADCV 9568 L
(Appellant)		(Respondent)

Assessee by : Shri Neelkanth Khandelwal

Department by : Shri Rajeev Gubgotra

Date of Hearing : 13.02.2019

Date of Pronouncement : 05.04.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)–21, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 07.02.2017 for the Assessment Year 2012-13 in deleting the addition made u/s. 68 of the Act towards unexplained cash credit in respect of share premium received by assessee.

2. Briefly stated the facts are that, pursuant to search/survey action in the case of Shri Praveen Kumar Jain [for short "PKJ"] and based on the

information received from the DGIT(Inv.), that the assessee is one of the beneficiary of the accommodation entries provided by various entities being operated by PKJ, the Assessing Officer in the course of the assessment proceedings required the assessee to prove the genuineness, identity and creditworthiness of the creditors who have invested their share capital along with premium in the assessee company and why share capital and premium should not be treated as unexplained cash credit u/s. 68 of the Act. Assessee during the course of the assessment proceedings filed various details of shareholders along with confirmations, ITR acknowledgement and copy of return, declaration from shareholders, audited financial statements of the shareholders, share application forms of the parties. Assessee submitted that all the transactions of share application money and share premium are genuine as the entire amount of share application money has been paid by the concerned parties through their banking channels, all the parties have confirmed the investment in equity shares of the assessee company and given declarations by them. It was therefore contended that all these evidences goes to show the identity, creditworthiness and genuineness of the transactions and therefore no question of treating the share premium received from parties as unexplained cash credit.

3. The Assessing Officer in the course of the assessment proceedings also issued notices u/s. 133(6) of the Act to all the shareholders to verify the identity, creditworthiness of the parties and genuineness of the transaction. In response to the said notice one shareholder Smt Lalitha Ranka received the said notice and submitted the information required by the Assessing Officer through her letter dated 16.02.2015. The other notices, issued to other four shareholders were returned unserved with the Postal Authorities endorsement "LEFT". When this was brought to the notice of the assessee the assessee furnished new addresses of the parties. The Assessing Officer issued notice u/s. 133(6) of the Act to the new addresses of the parties calling for information and the shareholders furnished requisite information in response to the said notices u/s. 133(6) of the Act. In the course of the assessment proceedings, assessee also requested the Assessing Officer to furnish the copy of the statements recorded from PKJ. Assessee also furnished an affidavit of PKJ dated 15.05.2014 wherein he has retracted all his statements recorded by the Revenue. The Assessing Officer appears to have not provided cross examination of the party on whose statement he is relying on. Therefore, the submissions of the assessee that the transactions were genuine, the identity of the shareholders, creditworthiness and the genuineness of the transaction was proved, was not accepted by the Assessing Officer, in

view of the statement from PKJ and accordingly the Assessing Officer treated the share premium received from the shareholders as unexplained cash credit u/s. 68 of the Act. On appeal the Ld.CIT(A) considering the evidences furnished by the assessee and also the submissions and various decisions deleted the addition made u/s. 68 of the Act.

4. Ld. DR vehemently supported the orders of the Assessing Officer. He further submitted that, based on the information received by the investigation wing and the submissions recorded in the course of search in the case of PKJ who have categorically stated that they have provided only accommodation entries, the Assessing Officer is quite justified in treating the said transactions as non-genuine and bringing the same to tax u/s. 68 of the Act. He strongly placed reliance on the decision of the Hon'ble Delhi High Court in the case of PCIT v. NDR Promoters Pvt. Ltd., [102 taxmann.com 182].

5. On the other hand, Ld. Counsel for the assessee submits that the assessee has filed all the details necessary in respect of the share capital and premium received from the shareholders. The details of the share capital and premium received from the shareholders is as under: -

Sr.N O.	Received From	PAN	No. of shares applied for	Amount	Toward Face Value of ₹.10 @ ₹.2.50 per share	Toward Premium @ ₹. 122.50
1.	M/s. Atharva Business Pvt. Ltd.,	AAACF9430A	40,000	5,000,000	100,000	49,00,000

Sr.N O.	Received From	PAN	No. of shares applied for	Amount	Toward Face Value of ₹.10 @ ₹.2.50 per share	Toward Premium @ ₹. 122.50
2.	M/s. Josh Trading Pvt. Ltd	AAACJ4233H	40000	5,000,000	100,000	49,00,000
3.	M/s. Sumukh Commercial Pvt. Ltd	AACCC7400M	20000	2,500,000	50,000	2450000
4.	M/s. Viraj Mercantile Pvt., Ltd	AADCV3852H	40000	5,000,000	100,000	4,900,000
5.	Smt. Lalitha Ranka	AAEPR2310J	1000000	10,000,000	10,000,000	Nil
Total			11,40,000	27,500,000	10,350,000	1,71,50,000

6. It has been submitted that, share capital and premium been received through banking channels, confirmations from the concerned shareholders were also furnished, ITR acknowledgement and copy of return, declaration from shareholders, audited financial statements of the shareholders, share application forms of shareholders were furnished. Ld. Counsel for the assessee submitted that the shareholders have responded to the notices issued u/s. 133(6) of the Act by filing confirmations, acknowledgment computation of income in proof of filing return, PAN details, annual report, extracted bank statements reflecting the transactions with the assessee. Ld. Counsel for the assessee further submits that, the Assessing Officer added only the premium received from four shareholders except Smt Lalitha Ranka and the face value of the shareholders subscribed by all these shareholders have been accepted and this was not doubted by the Assessing Officer.

7. Referring to the Page No. 16 of the Paper Book which is the letter addressed to the Assessing Officer in the course of the assessment proceedings the Ld. Counsel for the assessee submits that assessee furnished certified copy of transaction ledger, date of allotment of shares, copies of Board Resolution, details of ROC compliances to the Assessing Officer, therefore, Ld. Counsel for the assessee submits that all these evidence prove that the transactions are genuine. Ld. Counsel for the assessee referring to Page No. 94 of the Paper Book requested for copies of the statements and opportunity for cross examination of PKJ and the Assessing Officer never provided for any cross examination of the PKJ on whose statements he is relying on.

8. It has been argued that the assessee has established the identity, genuineness and creditworthiness of the shareholders and primary onus cast on the assessee has been discharged. It is further submitted that the Assessing Officer disregarded all the evidences and proofs furnished by the assessee and merely relied on the statements of PKJ which had already retracted by him and only the share premium received from other four parties except the shareholder Smt Lalitha Ranka was considered as unexplained cash credit and treated as addition u/s. 68 of the Act.

9. Ld. Counsel for the assessee submits that on identical situation this Tribunal has deleted the addition made by the Assessing Officer in the

case of ACIT v. Shreedham Builders in ITA.No. 5589/Mum/2017 dated 22.06.2018. Ld. Counsel for the assessee also further placed reliance on the on the decision of the Hon'ble Jurisdictional High Court in the case of CIT v Gangandee Infrastructure (P) Ltd., [394 ITR 680] wherein it has been held that, if the department took the view that the amount of share application money had been received from bogus shareholders then it was for the assessing authority to proceed by reopening the assessment of such shareholders and assess them to tax. It was also held that department is not entitled to add the money received by the assessee as its income and as unexplained cash credit.

10. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the Assessment Order, we find that Assessing Officer made addition u/s. 68 of the Act stating that assessee has obtained accommodation entries for increase in share capital along with premium. On a perusal of the assessment order, we see that the Assessing Officer based only on the statement purportedly given by PKJ in the course of the search/survey proceedings concluded that the assessee has obtained only accommodation entries from PKJ and in view of such evidence, the Assessing Officer treated only the share premium as unexplained cash credit u/s. 68 of the Act though the assessee has

filed various evidences to prove its claim that there cannot be any addition u/s. 68 of the Act.

11. In the course of the assessment proceedings the assessee furnished the following details:

- a. Confirmations*
- b. ITR acknowledgement and copy of return*
- c. declaration from shareholders*
- d. audited financial statements of the shareholders*
- e. share application forms of shareholders*
- f. Certified copy of transaction ledger*
- g. date of allotment of shares*
- h. copies of Board Resolution*
- i. details of ROC compliances*

12. In response to notices issued u/s. 133(6) of the Act to the shareholders, they have filed the requisite information as called for by Assessing Officer to substantiate the transactions entered into by them with the assessee. The Assessing Officer completely ignoring all the evidences and proceeded to treat the transactions as non-genuine solely based on the statement said to have been recorded from PKJ. We also notice that the Assessing Officer not provided the statements to the assessee on which he is placing reliance for treating these transactions as non-genuine. We also find that no cross examination has been provided by the Assessing Officer to the assessee on the third party statements on which he is relying on.

13. We find from Page No. 97 of the Paper Book that PKJ had in fact retracted his earlier statement given to the Income-tax Department stating as under in his affidavit dated 15.05.2014:

“My statements recorded by the income Tax Authorities at the time of search are hereby retracted and I once again totally deny the contents. The said statements be treated as null and void and as have never been made by me.”

14. We find that all these submissions and evidences were considered by the Ld.CIT(A) and deleted the addition observing as under: -

“12. I have examined the contentions of the appellant as well as the assessment order and the remand report carefully. A perusal of the assessment order shows that though the conclusions of the investigation wing has been reproduced in the assessment order, there are no specific reference to the appellant company. There are no evidences brought on record to show that there is any cash trail in respect of the amounts received by the appellant company from the investors. Though the AO was specifically asked to furnish specific incriminating evidences, it is noted that the AO has not been able to pin point the specific evidences which would clearly show that the share application money has been received in lieu of cash. In the assessment order the assessing officer has referred to the statement of Shri Pravin Jain recorded at the time of search in which Shri Praveen Jain had confirmed that he was a director in M/s Sumukh Commercial P. Ltd. and that other companies controlled and managed by his associates were M/s Atharva Business P. Ltd., M/s Josh Trading P. Ltd. and M/s Viraj Mercantile P. Ltd. However, in the proceedings, in response to summons u/s 131 Shri Praveen Jain in his letter dated 19.10.2016 has stated that in his personal capacity, no transactions has been carried out with the appellant company. Hence there was no question of his producing any books of accounts in respect of transaction carried out with the appellant company. It was further stated that statement recorded at the time of search was under undue pressure and that such statements had been retracted. Similar was the reply of Shri Dinesh Choudhary.

13. The fact remains that the investor companies are assessed to tax and have filed their returns of income. Summons u/s 131 were served on the investors and therefore it cannot be said that the parties did not exist at their addresses. Copy of bank statement, ledger account, income tax return and audited accounts of the investor companies have been filed before the assessing officer and also in the appellate proceedings.

14. From further details called from the appellant for subsequent period, it is noted that the shares subscribed to by these four investor companies were subsequently sold/transferred to Colorunion International P. Ltd., Idani Trading P. Ltd., Bhuvaneshwari Securities P. Ltd. and Prajan Trading P. Ltd. These new investor companies paid up the balance 75 % of face value and premium i.e. Rs 7,50 towards share capital and Rs 367.50 towards share premium per share. Thus a total of Rs 525,00,000 was paid up by these four investor companies in respect of the partly paid up shares. These further payments were examined and accepted by the assessing officer for AY 2013-14 in the assessment order u/s 143(3) dated 23.3.2016 and no addition u/s 68 was made. The premium thus has been accepted by the same assessing officer in the subsequent year.

15. I do not find any merit in the contention of the appellant that the investment being a share capital is a capital receipt and therefore cannot be considered as income in the hands of the appellant. The credits fall within the scope of section 68 which is a deeming provision. Several case laws including those of the Apex Court and High Court have considered credits made to capital account of the assessee's to be covered under the provisions of section 68 and therefore deemed income. The rule for application of section 68 is that the identity and credit worthiness of the investor/lender /creditor has to be established and the genuineness of the transaction has to be established.

16. The Apex Court upheld the addition u/s 68 in the case of credits as share capital in the case of N. Tarika Property Invest. (P.) Ltd. v. Commissioner of Income-tax [2014] 51 taxmann.com 387 (SC) by dismissing the SLP filed by the appellant.

17. It can be seen from the observation of the Assessing Officer that he has only referred to the information related to the outcome of search in the case of Shri Pravin Kumar Jain Group who were providing accommodation entries but the Ld. Assessing Officer has failed to demonstrate any such evidence that the appellant has in reality obtained any accommodation entries. There is no direct specific mention of the appellant by the director or key persons of the investor company. There is no evidence of cash deposits linked to the investors. The assessing officer did not bring specific incriminating evidence linking the investor to the appellant. The only link is that the investors have invested in appellant company. That the appellant has given cash to the investors in lieu of entry is merely alleged but not demonstrated. Opportunity for cross examination is not provided to the appellant. Papers/evidence found in the search action raises presumption but the same is available in the case of person searched but not in the case of third parties unless proved and corroborated. Similarly, retraction may be rejected as motivated, but the same can be considered only against the person who has retracted in his assessment. Such statement in the case of another person loses its sanctity unless opportunity of cross examination is granted and /or is corroborated with other evidences. When the investor company is filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possession. Over such issue there are plethora of judgements to support the appellant. Some of them are discussed here below: -

"(i) The Hon'ble Supreme Court in the case of CIT V/s Lovely Exports 6 DTR 308 has held as under:

"If the share application money is received by the assessee company from alleged bogus shareholders who's name are given to the Assessing Officer then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company".

"(ii) The Hon'ble Bombay High Court in the case of CIT v/s Creative World Telefilms Ltd 333 ITR 100 has held as under:

"If the share application money is received by -the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department can always proceed against them and if necessary reopen their individual assessments.

Held, dismissing the appeal, that there was no dispute that the assessee had given the details of names and addresses of the shareholders, their PAN/ GIR numbers and had also given the cheque numbers, name of the bankers. The Assessing Officer

ought to have found out their details through PAN cards, bank reholders. Thus, the view taken by the Tribunal could not be faulted.

(iii) The Hon'ble Supreme Court of India in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC) has held as under:

"That in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessee's. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, 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 are creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the Respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence".

Reliance is also placed on **the** following decisions:

- i Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Value Capital Services P.Ltd. (2008) 307 ITR 334 (Delhi).
- ii Hon'ble Punjab and Haryana High Court in the case of Commissioner of Income Tax v/s. GP International Ltd. (2010) 325 ITR 25 (P&H).
- iii. Hon'ble Madras High Court in the case of Commissioner of Income Tax v/s. Electro Polychem Ltd (2007) 294 ITR 661 (Mad).
- iv. Hon'ble Rajasthan High Court in case of Commissioner of Income Tax v/s. AKJ Granites P.Ltd. (2008) 301 ITR 298 (Raj.)
- v. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Oasis Hospitalities (Pvt.) Ltd. (2011) 51 DTR 74 (Delhi).

Sec. 69 places the burden of proof on the tax payer to explain the nature and source of any credit found in the books. But, when assessee proves or submit the basic information like identification, genuineness of transactions and creditworthiness of the creditors, onus is discharged by him and if Assessing Officer disbelieve the genuineness of the same, he has to prove otherwise, merely, doubting or pointing out some discrepancy is not the foundation for discarding the genuineness of the deposit or share money or substance of the matter, held by the Hon'ble Supreme Court in the case of CIT v. Gujarat Heavy Chemicals Ltd. (2002) 256 ITR 795 (SC).

In view of the above the question of making any addition u/s. 68 of the Act does not arise."

18. Further, Hon'ble jurisdictional ITAT in the case of ITO-10(2)(3) vs. M/s J.J. Multitrade Pvt. Ltd. ITA No. 2158 & 2159/Mum/2014 order dated 11.03.2015 has deleted additions on similar facts. Further, the Hon'ble jurisdictional ITAT in the

case of *M/s S.D.B. Estate Pvt. Ltd. vs ITO-5(3)(2) ITA No.584/M/2015* has deleted similar addition made u/s 68 of the I.T. Act. The Hon'ble ITAT (Jaipur Bench) in the case of *Bharti Syntex Ltd. vs. DCIT ITA Nos.172 & 173/Jp/2010* has held in para 24.4 as under:-

"24.4 In this case also no cross examination was allowed to the assessee. Therefore, adverse inference cannot be drawn only on the statement of Shri MukeshChoksi. We further noted that all other necessary details have been filed before AG. Amounts were received through account payee cheque. Both the companies are assessed to tax in Mumbai. Confirmation along with copies of share certificate, bank statement, memorandum of articles, copy of share application money, audited balance sheet and P&L a/c of these parties were filed. These are similar details as were filed in case of three other companies for asst. yr. 2005-06. We have already disposed of the appeal for asst. yr. 2005-06 whereby we have held that the assessee has discharged its onus by filing necessary details and further have relied on the decisions of Hon'ble Supreme Court and Hon'ble Delhi High Court alongwith various other decisions of Tribunal and have held that addition cannot be made under S. 68 in the hands of the assessee company. Therefore, in view of the same reasoning, we cancel the entire addition made and confirmed by the lower authorities here also.

The above decision of ITAT also related to Mr.MukeshChoksi's case of investment in share application money. On perusal of above case it is clear that if a bogus shareholder has invested the money and if appellant receives such money as share application money and appellant during assessment proceedings provides the details like name & address of the corporate entity, PAN No., ROC No. then ITAT held that this may be referred to the concerned A.O for proceeding against such bogus shareholders instead of adding the amount u/s. 68 of the IT. Act in the name of the company."

19. It is noted that no specific incriminating material linking investor to the appellant or showing the investment to be bogus is provided. Also opportunity for cross examination also was not provided to the appellant. The assessing officer has not been able to bring on record any direct or corroborative evidence that the share application money received is unexplained as covered u/s 68 even after opportunity was given in the remand proceedings. The original statement of Shri Praveen Jain does not name the appellant specifically. He has subsequently retracted even that original statement. In any case, it is cardinal principle of natural justice, that before conclusions are drawn against a person based on statement of a third party, he must be allowed an opportunity for cross examination. This has not been provided. **In this fact matrix, and the judicial decisions covering the scope of section 68, the addition made of Rs 1,71,50,000/- u/s 68 in the case of the appellant is deleted. The grounds of appeal is allowed as above."**

15. None of the above findings have been controverted with evidences.

16. The Hon'ble Delhi High Court in the case of *MOD Creations Pvt. Ltd., v. ITO [354 ITR 282]* held as under: -

"13. In the light of the above principle, let us examine as to what the authorities below found vis-à-vis the genuineness of the transactions and the creditworthiness of their creditors.

(i) *The fact that there was sufficient balance available with the creditors when cheques have been issued to the assessee company was established.*

(ii) *It was also established that the funds available at the relevant point in time were not infused into the bank accounts of the creditors by way of cash but were in fact credited to their account again by way of cheques largely on account of commissions received by them save and except two transactions of ` 1 lac each received by two creditors from verifiable donors.*

(iii) *The bank accounts as well as returns filed by the creditors who were assessable to tax alongwith their PANs" were also available with the A.O.*

(iv) *The assessee in turn had received the monies by way of cheques in respect of which credits were made in their books of accounts.*

(v) *The creditors had also placed on record receipts of commission as well as the gift deeds in respect of gifts made to the donors.*

(vi) *The identity and addresses of sub creditors was also available.*

14. *With this material on record in our view as far as the assessee was concerned, it had discharged initial onus placed on it. In the event the revenue still had a doubt with regard to the genuineness of the transactions in issue, or as regards the credit worthiness of the creditors, it would have had to discharge the onus which had shifted on to it. A bald assertion by the A.O. that the credits were a circular route adopted by the assessee to plough back its own undisclosed income into its accounts, can be of no avail. The revenue was required to prove this allegation. An allegation by itself which is based on assumption will not pass muster in law. The revenue would be required to bridge the gap between the suspicions and proof in order to bring home this allegation. The ITAT, in our view, without adverting to the aforementioned principle laid stress on the fact that despite opportunities, the assessee and/or the creditors had not proved the genuineness of the transaction. Based on this the ITAT construed the intentions of the assessee as being malafide. In our view the ITAT ought to have analyzed the material rather than be burdened by the fact that some of the creditors had chosen not to make a personal appearance before the A.O. If the A.O. had any doubt about the material placed on record, which was largely bank statements of the creditors and their income tax returns, it could gather the necessary information from the sources to which the said information was attributable to. No such exercise had been conducted by the A.O. In any event what both the A.O. and the ITAT lost track of was that it was dealing with the assessment of the company, i.e., the recipient of the loan and not that of its directors and shareholders or that of the sub-creditors. If it had any doubts with regard to their credit worthiness, the revenue could always bring it to tax in the hands of the creditors and/or sub-creditors. [See CIT Vs. Divine Leasing & Finance Ltd., (2008) 299 ITR 268 (Delhi) and CIT Vs. M/s. Lovely Exports (P) Ltd. (2008) 216 CTR 195 (SC)].*

17. In the case of ACIT v. Shri Ramesh Ramswarupdas Jindal in ITA.No. 3091 to 3096/Mum/2017 dated 15.11.2017 the Coordinate Bench held as under: -

"9. We have heard the rival submissions, perused the orders of the authorities below, the case laws relied on and the material furnished before us. The only issue involved in this appeal relates to the deletion of addition of ₹.20 lakhs made by the Assessing Officer towards unexplained unsecured loans and interest thereon amounting to ₹.2,35,246/. Search and seizure action u/s. 132 of the Act has been conducted in the case of Shri Pravin

Kumar Jain and statements were recorded from him and he is said to have been deposed that he is providing only accommodation entries through various concerns. On the basis of this information received from DGIT (investigation), Mumbai the Assessing Officer noted that assessee was one of the beneficiaries of accommodation entries given by Shri Pravin Kumar Jain. Assessee was required to explain the unsecured loans obtained in the name of M/s Mohit International and M/s. Natasha enterprises of ₹.10 lakhs each and prove the genuineness of the transactions. Assessee furnished information in respect of the above transactions i.e. copy of Loan confirmation and Affidavit establishing identity of the lender, copy of ledger giving detail towards loan taken during the year and subsequent repayments and Copy of ITR – V filed establishing Creditworthiness of the Lender. However, Assessing Officer did not accept the evidences furnished by the assessee and also the retraction statement of Shri Pravin Kumar Jain, ignoring all the evidences Assessing Officer concluded that the assessee has not explained the transactions as genuine and therefore he has added the unsecured loans as unexplained income of the assessee. Correspondingly he has also disallowed the interest thereon. Before the Ld.CIT(A) assessee furnished all the information regarding the unsecured loans as mentioned above. The Ld.CIT(A) considering the submissions and the findings furnished by the assessee deleted the additions observing as under: -

“6.2 **HELD:** - I have carefully perused the Assessment Order, written arguments of the appellant, counter arguments of the Id. AR and have considered the evidences on record and assessment record called for during the appellate proceedings. I find that the Ld. Assessing Officer has merely doubted the loans taken by the appellant from (1) Mohit International amount to ₹.10,00,000/- and (2) Natsha Enterprises amounting to Rs.10,00,000/- aggregating at Rs. 20,00,000/-. I find force in the argument of the Ld. AR. It is very important to mention here that the appellant has discharged his onus and the Ld. Assessing officer has not proved otherwise than doubting the loans. Apparently, Ld. Assessing officer has not substantiated his presumption, his doubt with any verifiable documents. He has merely described the statement of Shri. Pravin Kumar Jain and as communicated by the investigation wing. Thus, it is very evident that the Ld. Assessing officer has not made any independent enquiry in order to establish the in-genuineness of loans if any, with contrary evidence. The statements referred to and relied upon by the assessing officer have never been disclosed to the appellant opportunity for cross examination was also not given, hence such statement could not be utilized against the appellant without giving full and proper opportunity of cross examination as has been held vide Mahesh Gulabral Joshi Vs. CIT(A) (2005) 95 ITD 300 Mumbai ITAT and Hon'ble Supreme Court decision in the case of KishanchandChellaram Vs. CIT (125 ITR 713 (SC)).

6.3. Further during the course of assessment proceedings, the appellant has produced copy of a comprehensive Affidavit of Shri. Pravin Kumar Jain dated 25.04.2014 retracting, the statements made before the Investigation Wing. Assessing officer has not given opportunity to the appellant for cross examination of Shri Pravin Kumar Jain. Going by the discussion contained above, it is obvious that the inference drawn by the Assessing officer against the appellant is not sustainable for the simple reason that the principles of natural justice have not been followed. First and foremost, the appellant has not been given any access to the material (reports, intimations, statement etc.) used against it. Secondly, by withholding the said material the assessing officer has denied to the appellant an opportunity to refute the evidence by cross examining the witnesses, statements, if any made by whom, incriminated the appellant. On both counts, the impugned assessment order fails squarely.

6.4. It has to be said that the appellant had done everything in its power to prove the three ingredients required to prove the satisfactory nature of the loan transactions. He has submitted confirmation from the parties. filed Audit Reports of the parties alongwith copy of their ITR, and bank statements. In these circumstances, the onus had shifted to the assessing officer. If the assessing officer was still not satisfied, he had the option of making enquiries from the alleged lenders by

summoning them. However as seen from the assessment order, he did not do any such thing. Further, if the assessing officer was satisfied with what had been given to him by the appellant, he was duty bound to specify what more material he wanted from the appellant to furnish. The assessing officer never asked for any further material. This leads to the inescapable conclusion that the Assessing Officer could not think of any further material to ask for and proceeded to reject the appellant's claims, relying upon the information/ material, which he never even brought to the notice of the appellant for any rebuttal. The unequivocal conclusion is that all the three ingredients having been satisfied.

6.5. The AO did not consider the evidences provided by the appellant as satisfactory. According to him, submissions and statements given by Sh. Pravin Kumar Jain confirmed that they had issued only bogus bills/accommodation entries to the interested parties. However, he did not bring out the relevant extract from the statement where they have admitted that they have given accommodation entries to the appellant. Moreover, he had just referred to the statement of Shri Pravin Kumar Jain Group without giving specific details as to who is the person who is giving the statement and what exactly did he admit. Instead of stating that the party did not exist, he should have summoned the party and recorded the statement. As the AO, has not brought anything in record to show that the evidences filed by the appellant are false, the loan received and repaid by the appellant cannot be treated as bogus. The addition cannot be made merely on the basis of suspicion, surmises and conjectures. There has to be some concrete evidence whether direct or circumstantial. In this case, no such evidence is present. On the contrary, the appellant is showing from the record that he has received loan through account payee cheques from above TWO PARTIES. He has shown that the loans have been repaid through account payee cheque and as long as he was holding the loan, he has paid the interest after deducting TDS. With regard to the disallowance of interest on loans taken from afore-mentioned parties, the appellant submitted that the AO has also ignored the fact that the said interest expenses were incurred wholly, exclusively & necessarily for business of the Appellant. The interest paid on loans was subject to TDS. During the present proceedings, the appellant also submitted the details of the TDS made on the loans wherever it is applicable and the details of amount of TDS paid into the Government account. In the appellant case the addition made towards the said loans is deleted after discussing the issue in detail in the above paragraphs.

6.6. Thus, above discussion and various explanations leads to the conclusions that the Ld. Assessing officer has made addition of ₹.20,00,000/- and interest given to the parties, disregarding the evidence on record and without discharging his onus and without establishing anything to the contrary to the submissions of the appellant and without verifying the bank account, existence of entities who have extended loans to the appellant and without making fruitful investigation. Therefore, the Assessing officer is directed to delete the addition made of Rs.20,00,000/- on account of unexplained unsecured loans and ₹.2,35,246/- made on account interest on the same. The grounds of appeal are allowed.

10. On a plain reading of the Assessment Order, we find that the Assessing Officer has gone only by the statement recorded from Shri Pravin Kumar Jain who said to have been deposed that he is only providing accommodation entries and no real business is carried on by the entities. The Assessing Officer has not made any efforts to make independent enquiries with the lender companies. We also observe from the Assessment Order that the Assessing Officer has not provided the statements of Shri Pravin Kumar Jain to the assessee for its rebuttal. Nothing is placed on record to suggest that the information furnished by the assessee in the form of copy of affidavit, establishing identify of the lender, copy of the ledger giving details of loans confirmation taken and also repayment in subsequent years, copy of bank statement highlighting the natures of loan taken and repayment in subsequent years to establish the genuineness of the transactions copy of ITR-V filed establishing creditworthiness of the lender are non-genuine. It was also noted by the Ld.CIT(A) that the assessee has provided the identity creditworthiness as well as the

genuineness of the transactions. The Ld.CIT(A) also elaborately considered the submissions and the averments made by the Assessing Officer in the Assessment Order and the evidence furnished by the assessee and concluded that the assessee has discharged its primary onus on providing complete details in respect of the loan transactions and the Assessing Officer failed to carry out any fruitful investigation. Therefore, no addition can be made towards unexplained unsecured loans, this finding in our view is completely justified in view of the facts and circumstances of the assessee's case."

18. In the case ACIT v. M/s. H.K. Pujara Builders in ITA.No. 930/Mum/2017 dated 31.10.2018, the Coordinate Bench held as under: -

6. We have heard the rival submissions, perused the orders of the authorities below. Assessing Officer made addition by placing reliance merely on the statements of Shri Praveen Kumar Jain Group and Shri Bhanwarlal Jain Group which were recorded u/s. 132(4) of the Act. No independent enquiry was carried out by the Assessing Officer, he has not brought any corroborative evidence to substantiate that the transactions are non-genuine. Assessee provided various evidences to establish that the transactions are genuine, creditors are identifiable and credit worthiness is proved. Following information is furnished by the assessee.

- (1) Confirmation of A/c. by the parties.*
- (2) Income tax returns of the parties for A.Y.2012-13.*
- (3) Bank Statements of the parties showing the loan transactions.*

7. By providing all this information to the Assessing Officer the assessee has discharged the initial onus of proving genuineness of the transactions u/s. 68 of the Act. Even the assessee requested Assessing Officer for issue of notices u/s. 133(6) of the Act to the lenders to find out the genuineness of the transactions with the assessee. Therefore, once the initial onus is discharged by the assessee the burden shifts to the Revenue to disprove the claim of the assessee. We notice that all the loans were taken through banking channels and the repayments for the same was also made through banking channels. The Assessing Officer ignored the documentary evidences submitted by the assessee and has exclusively relied on statements of third party in making the addition. In spite of request by the assessee the Assessing Officer did not provide any cross-examination of the parties who have made the submissions. All these aspects have been considered by the Ld.CIT(A) and deleted the addition observing as under:

"5.9. From the assessment order, it transpires that the AO has solely relied upon the statement of Mr. Pravin Kumar Jain and did not carry out any worthwhile independent inquiry in the matter. He has totally ignored the documentary evidences submitted by the appellant. The AO in the assessment order has admitted existence of these details. The AO has not pointed out any defect in the above mentioned documentary evidences submitted during assessment proceedings. Without pointing out any lacuna in the evidences submitted by the appellant, the sources and the genuineness of transaction cannot be doubted. Once evidences related to a transaction is submitted before the A.O., the onus shifts on him to prove these as non-genuine. The A.O. has not discharged the onus casted on him. In my opinion, merely based on the statement of a third person without any corroborative evidence will not make the loan transactions, in question, as accommodation entries. As such, in the absence of any contrary evidence placed on record, the transaction cannot be treated as accommodation entries.

5.10. As far as the question of validity of the transaction done through JPK Trading (I) Pvt. Ltd and New Planet Trading Co. Pvt. Ltd are concerned, even if some of the transactions entered into by Shri.Pravin Kumar Jain are found to be not genuine, it does not lead to the conclusion that all the transactions were non-

genuine including the transactions related to the appellant. There is no evidence brought in the assessment order to prove the above conclusion, by the AO. The outcome of investigation carried out in the case of Mr.Pravin Kumar Jain the conclusions drawn therein cannot be applied ipso facto to all other cases. Simply relying on the report of the DGIT(Inv), Mumbai and statement the AO cannot conclude that all transactions are accommodation entries.

5.11. The case of the appellant is covered by the decision of ITAT, T Bench, Mumbai, in the case of Satish N. Doshi HUF Vs. ITO, Ward 21(2)(4), Mumbai in ITA No-2329/Mum/2009 and the decision of ITAT, 'E' Bench, Mumbai in the case of Shaf Broadcast Pvt. Ltd Vs. ACIT, Cir-9(3), Mumbai in ITA No.1819/Mum/2012. Both the cases relate to re-opening of assessment on the basis of statements of Mr. Mukesh Choksi and Mr. I.C. Choksi and associated brokerage companies. The Hon'ble ITAT on the analysis of the findings made in the assessment orders has reached to the conclusion that the re-opening itself is bad in law and quashed the orders accordingly. The ratio of these judgments is applicable to the facts of the instant case. This is confirmed by the Delhi Bench of the Income Tax Appellate Tribunal in the case of DCIT v. Nipun Builders & Developers P. Ltd. (ITA No.557/DEL/2010) wherein the Tribunal dismissed the Revenue appeal by holding that the Assessing Officer has primarily relied upon the Report of the Investigation wing which cannot conclusively prove that assessee's own money was invested in the form of share application money.

5.12. Further, in the recent judgment of Shri.Jafferali K Rattonsej V. DCIT reported in 5068/Mum/209, the Mumbai Bench of the Income Tax Appellate Tribunal has also held that the mere statement of a person cannot be a deciding factor for rejecting the genuineness of the purchase of shares by the assessee specially when all other supporting evidences filed by the assessee were neither proved to be false or untrue. The Hon'ble ITAT Mumbai in the case of ITO vs Anand Shelters Pvt.Ltd. (2012) 20 Taxmann.com 153 has enumerated certain principles which would be extremely useful in understanding the issue in hand. It has been stated in the said judgment that over the years, law regarding cash credits have evolved and has taken a definite shape. A few aspects of law u/s.68 can be enumerated.

- 1. Sec. 68 can be invoked when there is a credit of amounts in the books maintained by the assessee, such credit is a sum of money during the previous year and either the assessee offers no explanation about the nature and source of such credits or the explanation by the assessee in the opinion of the AO is not satisfactory.*
- 2. The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be formed objectively with reference to the material on record.*
- 3. Courts are of the firm view that the evidence produced by the assessee cannot be brushed aside in a casual manner.*
- 4. The onus of proof is not static. The initial burden lies on the assessee to establish the identity and the credit worthiness of the creditor as well as the genuineness of transaction.*
- 5. The identity of creditors can be established by either furnishing their PANs or assessment orders. The genuineness of the transaction can be proved if it was shown that the money was received by Account payee Cheque. Creditworthiness of the lender can be established by attending circumstances.*

5.13. During the assessment proceedings, the appellant has submitted Loan Confirmations, Copy of Acknowledgement and Copies of the Bank Statements of these two parties. If the above referred principles are applied to the facts of the

case under consideration, it can be seen that the identity of the creditors has been established as they are having PAN and they are regularly filing return of income. The genuineness of the transaction is established from the fact that both the acceptance and repayment of loan has been through banking channels. The creditworthiness of the lenders can be established from the statements. In the assessment order, the A.O. did not at all discuss the merit of submission made by the appellant and casually brushed aside the details filed by the appellant. Further, the appellant has stated that he had furnished all the relevant details during the course of the assessment proceedings and accordingly had duly discharged its onus by furnishing the identity and address of the parties. Further, the source of receipt through banking channels to substantiate the genuineness of the credits reflected in its books of Account.

5.14. Further, it may be pointed 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.

5.15. 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 v. Smt. P. K. Noorjahan [1999] 237 ITR 570.

5.16. After considering the totality of facts, the rival submissions, the applicable law and on the basis of discussions mentioned above, I have come to the conclusion that nature and source of credit in the books of account of appellant stands explained. Consequently, addition u/s. 68 cannot be sustained. Therefore, A.O. is directed to delete the addition of Rs.1,27,50,000/-. This ground of appeal is allowed."

8. On a careful reading of the order of the Ld.CIT(A), we do not find any infirmity in the order passed in deleting the addition made u/s. 68 of the Act and the consequential interest on the credits. Thus, we sustain the order of the Ld.CIT(A) and reject the grounds raised by the Revenue."

19. In the case of DCIT v. Bairaga Builders Pvt. Ltd., reported in [2017]

51 CCH 107 in ITA.No. 4691 and 4692/Mum/2015 dated 14.09.2017

wherein the Coordinate Bench held as under: -

"6. We have heard the rival submissions along with the orders of the tax authorities below. We noted that during the impugned assessment year, the assessee had taken unsecured loans from the following two parties:

Sr. No	Name of the Party and Address	PAN	Loan taken(Rs.)	Rate of Interest
1.	Javda India Impex Limited CS-1, Silver Anklet, Yari Road, Versova, Mumbai 400 061	AAACA7065L	20,00,000	9%
2.	Lexus Infotech Ltd. 626, Panchratna, Opera House, Mumbai 400 002	AAACL4646G	20,00,000	9%

When the Assessing Officer asked the assessee to prove the genuineness of these loans, the assessee submitted the following documents:

- a. Copy of acknowledgment of income tax return filed for A.Y. 2007-08.
- b. Copy of PAN of the parties
- c. Copy of bank statement of the parties from where the cheque is issued.
- d. List of directors of the parties
- e. Copy of annual report of the parties for financial year 2006-07.
- f. Copy of loan confirmation from the parties.

The Assessing Officer treated these loans to be non-genuine and made addition u/s 68 of the I.T Act on the basis of the statement of Shri Nilesh Parmar, one of the associate of Shri Praveen Kumar Jam, Director of Mohit International and one of the dummy Director of some of the companies of Shri Praveen Kumar Jam. Although said statement has been immediately retracted by him by filing an affidavit with the CBDT, the CIT(A) has deleted the said addition as in his opinion the assessee has duly discharged his onus as laid down on it u/s. 68 of the I.T.Act. It was also noted by the CIT(A) that the assessee has proved the identity, credit worthiness as well as genuineness of the transactions and, therefore, no addition u/s. 68 can be made.

7. The learned AR before us relied on the order of the CIT(A) and has also pointed out that the loan received by the assessee has been returned to the respective parties through cheques and in none of the case the respective party has deposited any cash. He relied on the following Tribunal decisions:

- Arceli Realty Ltd vs. ITO [ITA No.6492/Mum/2016 dated 21.04.2017 (Mumbai)]
- M/s Komal Agrotech Pvt. Ltd. vs. ITO [ITA No.437/Hyd/2016 dated 25.11.2016 (Hyderabad)]
- Sudhanshu Suresh Pandhare vs. ITO [ITA No.5185/Mum/2012 dated 05.10.2016 (Mumbai)]
- Dilsa Distributors Combines vs. ITO [ITA No.5849/Mum/2011 dated 06.09.2013 (Mumbai)]
- Aim Properties & Investments Pvt. Ltd vs. Income Tax Officer [ITA No.7426/Mum/2012 dated 04.12.2013 (Mumbai)]

He further placed reliance on the following judgments:

- Nemi Chand Kothari vs. CIT [2004] 136 Taxman 213 (Gau)
Vijay Kumar Talwar vs. CIT [2011]330 ITR 1 (SC)

8. The learned DR, on the other hand, relied on the decisions of the Hon'ble Delhi High Court in the case of Principal CIT vs. Bikram Singh ITA.No. 55/2017 & CIT vs. Jansampark Advertising & Marketing Pvt. Ltd. in ITA.No.525/2014.

9. We have gone through the orders relied upon by the learned DR. We noted that the decision of the Delhi High Court in the case of Bikram Singh, the assessee

could not discharge the onus as laid down by section 68 of the Act. Similarly, in the case of CIT vs. Jansampark Advertising & Marketing Pvt. Ltd. (supra), the additions have been made u/s. 68 in respect of the share capital received by the assessee from various companies and during the course of investigation, it was found that the share capital has been received from three entry operators, who are allegedly in the business of providing accommodation entries. Notices issued u/s. 131 to these parties were returned undelivered by the postal authorities with the remark "left"/ "no such person". Under these circumstances, the Hon'ble High Court took a view that the assessee failed to discharge the burden to prove the credit worthiness as well as the genuineness of the transactions.

10. But in the impugned case, we noted that the assessee has submitted all the evidences including the confirmation of the creditors. This is not a case where the creditors have not given confirmations rather they have duly confirmed to giving loan to the assessee, the loans were received and returned through banking channels. The assessee has also submitted copies of bank accounts. The lender has not deposited cash into bank account. The assessee has duly discharged the onus with regard to identity of the lender, credit worthiness of the party and all supporting evidences as required u/s. 68 of the I.T.Act. Therefore, in our opinion the decisions relied upon by the DR does not assist the Revenue to the facts of the present case.

11. We have also gone through the decisions relied upon by the learned AR. We noted that this Tribunal in similar circumstances in the case of Komal Agrotech Pvt. Ltd. vs. ITO in ITA No. 437/Hyd/2016 vide its order dated 25.11.2016 has held as under:

A plain reading of the assessment order demonstrates that the AO merely went by the Investigation done by the office of D G. I T (Investigation), Mumbai. No enquiries or investigation was carried out. No evidence to controvert the claims of the Assessee was brought on the record by the AO. Even the statement of Shri Praveen Kumar was supplied. Nothing is on record about the result If investigations done by DGIT (Inv), Mumbai. The papers filed by the assessee do demonstrate the identity, creditworthiness and genuineness of the transaction. The addition is made merely on surmises and conjectures.

In view of the above, we hold that the addition made under section 68 of the Act is bad in law.

We noted that in the said case also loan had been received from Javda India Impex Ltd.

12. Being consistent with the view taken by this co-ordinate Bench in the case of Komal Agrotech Pvt. Ltd. (supra), and in view of the facts and circumstances, we do not find any illegality or infirmity in the orders of the CIT(A). It is accordingly, confirmed for both the years under appeal.

13. In the result, the appeals filed by the Revenue are dismissed."

20. In the case of M/s. Shree Laxmi Estate Pvt Ltd., v. ITO in ITA.No. 5954/Mum/2016 and M/s. Shree Laxmi Developers v. ITO in ITA.No. 2562/Mum/2017 dated 29.12.2017 held that once the assessee has

discharged his initial burden the burden shifts to the Assessing Officer to prove otherwise. The Coordinate Bench considered the submissions as well as the material placed before the lower authorities concluded that when once the assessee furnished all the details in respect of the loan transactions assessee has discharged its initial burden and the burden shifts to the assessee. It was held that no addition can be made only on the basis of information received from the investigation wing without there being any evidences to disprove the loan transactions from the creditors.

While holding so, it has been observed as under: -

"4. The first issue that came up for our consideration is addition made by the AO towards unsecured loan u/s 68 of the Act. The AO made addition towards unsecured loans alongwith interest thereon received from Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd on the ground that these are bogus accommodation entries received from group companies of Shri Pravinkumar Jain. According to the AO, the assessee is the beneficiary of accommodation entries provided by Shri Pravinkumar Jain from his bogus companies. The AO further observed that though the assessee has furnished details of identity, failed to prove genuineness of transactions and creditworthiness of the parties in the backdrop of clear findings of Investigation Wing that Shri Pravinkumar Jain has admitted that he was indulging in providing accommodation entries. This fact has been further confirmed by Shri Dinesh Choudhary, broker involved in arranging accommodation entries with Shri Pravinkumar Jain, who stated that Shri Pravinkumar Jain is indulging in providing accommodation entries, therefore, the AO opined that unsecured loans stated to be received from those companies are unexplained credit and hence made addition u/s 68 of the Act. It is the contention of the assessee that loans received from Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd are supported by valid documents. The assessee further submitted that it has furnished confirmation letters alongwith copies of their bank statement and acknowledgement of IT returns showing the above transactions. The assessee further contended that in response to notices u/s 133(6) issued by AO, the above parties replied alongwith documents mentioned in the notice, therefore, there is no reason for the AO to doubt the transactions only on the basis of information received from Investigation Wing that too, without providing any opportunity of cross examination of the parties. In this regard, he relied upon plethora of judgements including the judgement of Hon'ble Bombay High Court in the case of CIT vs Gagandeep Infrastructure Pvt Ltd 394 ITR 680 (Bom) and Hon'ble Supreme Court in the case of Lovely Exports Pvt Ltd vs CIT 216 CTR 295(SC).

"5. We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The AO made addition towards unsecured loans received from Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd on the basis of information received from Investigation Wing which revealed that the assessee is the beneficiary of bogus accommodation entries provided by Shri Praveenkumar Jain through his bogus companies. The AO has made additions u/s 68 of the Income-tax Act, 1961 on the ground that though the assessee has furnished necessary evidences to prove identity of the

parties, but failed to establish genuineness of transactions and creditworthiness of parties in the backdrop of clear findings of Investigation Wing that those companies are hawala companies involved in providing accommodation entries. The AO has brought out facts in the light of statement of Shri Pravinkumar Jain deposed before the Investigation Wing to make addition. Except this, there is no contrary evidence in the possession of the AO to disprove the loan transactions from Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd. On the other hand, the assessee has furnished various details including confirmation letters from the parties, their bank statements alongwith their financial statements to prove identity, genuineness of transactions and creditworthiness of the parties. The assessee also furnished evidences to prove that the parties have responded to the notices issued u/s 133(6) by AO by filing various details. The assessee also filed bank statements to prove that the said unsecured loans have been repaid in the subsequent financial years. Therefore, we are of the view that there is no reason for the AO to doubt the genuineness of transactions despite furnishing necessary evidences including their financial statements, bank statements and IT returns.

6. The AO has made addition u/s 68 of the Act, on the ground that the unsecured loans are bogus accommodation entries provided by Shri Pravinkumar Jain through his hawala companies. The provisions of section 68 deal with cases where any sum found credited in the books of account of the assessee in any financial 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 AO, satisfactory, then sum so credited may be charged to income-tax as the income of the assessee of that previous year. A plain reading of section 68 makes it clear that the initial burden of proof lies on the assessee. It is well settled legal position that the assessee has to discharge 3 main ingredients in order to discharge the initial burden of proof, i.e. the identity of the creditor, the genuineness of transaction and creditworthiness of the creditors. Once the assessee discharges initial burden placed upon him, then the burden to prove the said claim shifts upon the AO. In this case, the assessee has discharged his onus cast u/s 68 by filing identity of the creditors, genuineness of transactions and creditworthiness of the parties which is evident from the fact that the assessee has furnished financial statements of the creditors wherein the said transaction has been disclosed in the relevant financial years. We further notice that the assessee also filed financial statements of the creditors which are enclosed in paper book filed. On perusal of the financial statements filed by the assessee, we find that both the companies are active in the website of Ministry of Corporate Affairs. This fact has been further supported by the letter of AO wherein the AO has accepted that both companies, viz. Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd are active in MCA website. We further notice that both the companies have filed financial statements for the year ending 31-03-2006. Therefore, we are of the considered view that the assessee has discharged its initial burden cast u/s 68 by filing identity, genuineness of transaction and creditworthiness of the parties. Once, the assessee has discharged its initial burden, the burden shifts to the AO to prove otherwise. In this case, the AO made addition only on the basis of information received from Investigation Wing, but not based on any evidence to disprove the loan transaction from above companies are ingenuine. Therefore, we are of the view that there is no reason for the AO to treat loans from above 2 companies as unexplained credits u/s 68 of the Act.

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....

11. In this view of the matter and considering the ratio of the case laws discussed above, we are of the considered view that the assessee has discharged identity, genuineness of transactions and creditworthiness of the parties. Therefore, there is no reason for the AO to make addition towards loan u/s 68 of the Act. Hence,

we direct the AO to delete addition made towards loans alongwith interest u/s 68 of the Act."

21. Similar view has been taken by the Coordinate Bench in the case of M/s. Shree Laxmi Developers v. JCIT in ITA.No. 6090/Mum/2017 dated 07.03.2018, wherein it has been held as under: -

"8. The next issue relates to the addition of loan of ₹.10.00 Lakhs taken from M/s. Falak Trading company P. Ltd, a company belonging to Praveen Kumar Jain who has confessed that he had provided only accommodation entries. A perusal of the record would show that the AO had issued notices u/s. 133(6) of the Act to the above said company and it has also furnished all the details, viz., confirmation, copies of financial statements, copies of income tax returns filed by it etc. and thus has confirmed the loan transactions. Thus, we notice that the assessee has also furnished the relevant details to prove the cash credits and the same has also been confirmed by the lender also in response to the notice issued by the AO U/s. 133(6) of the Act.

9. The assessee had taken loan from two of Praveen Kumar Jain's group companies viz., M/s. Josh Trading Co P Ltd and M/s Viraj Mercantile Ltd in the year relevant to AY 2012-13. The AO had assessed the loan amounts on identical reasoning. We notice that the Coordinate Bench of ITAT has deleted the additions vide its order dated 239.12.2017 passed in ITA.No. 5954/Mum/2016, with the following observations: -

...

...

Since the facts surrounding the present issue being identical with that examined by the Coordinate Bench in A.Y. 2012-13, consistent with the view taken therein, we set aside the order passed by Ld.CIT(A) on this issue and direct the AO to delete the addition of ₹.10.00 lakhs."

22. In the case on hand also, the assessee has discharged its initial onus of proving the identity, genuineness and creditworthiness of the creditors by providing all necessary details and thus the assessee has discharged identity, genuineness and creditworthiness of the parties.

23. The Hon'ble Delhi High court in the case of CIT v. Laxman Industrial Resources Ltd. in ITA No.169 of 2017, held as under: -

"The Income Tax Appellate Tribunal's (ITAT) order upholding the Appellate Commissioner's opinion that the additions made in the course of reassessments were

unsustainable, were challenged by the Revenue. The reassessment notice was issued to the assessee for AY 2002-03 on the ground that information received from the Investigation Wing pointed to its being the beneficiary of the accommodation entries that were subjected to addition under Section 68. The Assessing Officer (AO), in the reassessment proceedings, added a sum of 70,77,290/-. Upon appeal, the CIT(A) took note of the materials filed by the assessee and provided an opportunity to the AO to remand proceedings. The AO merely objected to the materials furnished but did not undertake any verification. The CIT(A), found favour with the assessee, and directed that the amounts brought to tax should be deleted *inter alia* observing as follows:

Reliance is placed on the following decisions of the Apex Court and the jurisdictional High Court of Delhi:-

- (i) *CIT v. Lovely Exports (P) Ltd. 2008 (216) CTR (SC) 195:*
- (ii) *CIT v. Divine Leasing & Finance Ltd. 2007 (299) ITR 268 (Del). Hon'ble Delhi High Court in paras 13 & 16 has held as under:-*

"13. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of sections 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessee: if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company.

16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the Income Tax act. 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. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or

neglects to respond to its notices: (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assess cc nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assess cc. (7) 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.

(iii) *CIT vs. Value Capital Services Ltd. (2008) 307 ITR 334 (Dd.)* — Hon'ble Delhi High Court has held as under:-

"5. While setting aside the order of the Commissioner of Income-tax (Appeals), the Tribunal relied upon two decisions of this court, namely *CIT v. Stellar Investment Ltd. [1991J 192 ITR 287]* and a Full Bench decision in *CIT v. Sophia Finance Ltd [1994] 205 ITR 98*. Several other decisions have been rendered by this Court following the above two decisions. The principle that has been laid down by the various decisions rendered by this Court from time to time is that if the existence of the applicant is proved, normally no further inquiry is necessary.

6. Learned counsel for the Revenue submits that the creditworthiness of the applicants can nevertheless be examined by the Assessing Officer. It is quite obvious that it is very difficult for the assessee to show the credit-worthiness of strangers. If the Revenue has any doubt with regard to their ability to make the investment. Their returns may be reopened by the Department.

6. In any case what is clinching is the additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assess cc. This has not been done in so far as the present case is concerned and that has been noted by the Tribunal also.

7. Under the circumstances, we are of the view that the Tribunal has not committed any error in deleting the addition.

8. No substantial question of law arises "

(iv) *CIT vs. TDI Marketing Pvt. Ltd. (2009) 26 DTR (Del.) 358*, and

(v) *Bhav Shakti Steel Mines (P) Ltd. v. CIT (2009) 179 Taxman 25*. wherein the Hon 'ble Delhi High Court has observed as under: -

"In any event we also note that the Supreme Court in the case of *CIT v. Lovely Exports (F) Ltd. [2008] 216 CTR 195* considered the question as to whether the share application money can be regarded as undisclosed income under Section 68 of the Income Tax Act, 1961. The Supreme Court dismissing the SLP observed that if the share money is received by the assessee company from alleged bogus shareholders whose names are given to the Assessing Officer, then the Department is free to proceed to assess them individually in accordance with law. The Supreme Court did not find any infirmity with the impugned judgment of the High Court which was a common order along with the decision in *CIT v. Divine Leasing & Finance Ltd. [2008] 299 ITR 268 (Delhi)*. Since the Commissioner of Income-tax (A) has not only found that the identity of each of the shareholders stood established, but has also

examined the fact that each of them were income-tax assesses and had disclosed the share application money in their accounts which were duly reflected in their Income-tax return as well as in their balance sheets. In these circumstances we see merit in what the learned counsel for the appellant has submitted and we feel that the Tribunal was unjustified in coming to the conclusion that the CIT(A) had not considered the matter in the right perspective. Consequently, we decide the question in favor of the assessee and set aside the order passed by the Tribunal."

5.4 In the present case the assessee can be said to have discharged its onus under section 68 of the Act. The appellant has given all the necessary details in order to establish the identity of the share applicants. After considering the entire material placed on record, it is fair to conclude that the share applicants were existing parties and the payments were made through banking channels, It is also observed that the Assessing Officer could not point out any discrepancy in the evidences relied upon by the assessee, He has neither brought out any direct or inferential evidence to contradict the contention of the assessee. It is further observed that even though A. O. has vast powers u/s 131 and 133(6) of the Act, he has not used any of his powers to verify the genuineness of the claim of the assessee by verifying the documents furnished by it. If A. O. had doubted the impugned transaction after receiving the evidences (in the remand proceedings in terms of Rule 46A(3) of the Income-tax Rules, 1962) which had been produced by the assessee in support of its claim it was very much open to the A. O. to do his independent enquiry and verification, This has not been done by the A.O. Though, the share-applicants could not be examined by the A O, since they were existing on the file of the Income Tax Department and their income-tax details were made available to the AO, it was equally the duty of the AO to have taken steps to verify their assessment records and if necessary to also have them examined by the respective A Os having jurisdiction over them (share-applicants), which has not been done by him.

5.5 The A O has also given a finding that all the share-applicants were entry operators as per the information available on the basis of the investigation conducted by the Investigation Wing of the Income Tax Department. As contended on behalf of the appellant, the Id. Assessing Officer did not provide any such information to the assess cc to rebut the adverse material if any and he did not afford any opportunity of cross examination of all the adverse material on the basis of which impugned addition has been made in the assessment order. It is settled proposition of law that the information gathered behind the back of the assessee cannot be used against him unless until an opportunity of rebutting the same is given to the assessee, It is against the principle of natural justice. Reliance is placed on the decision of Hon'ble Supreme Court in case of Prakash Chand Nahta v. Union of India 12001J 247 ITR 274 in support of the proposition that cross-examination of the witness is must, before the AO relies on the statement of the witness for making addition. Reliance is also placed on the decision of Allahabad High Court in the case of Nathu Rain Prmchand v. CIT [1963] 49 ITR 561, wherein the Hon'ble Court explained that it was the duty of the Assessing Officer to enforce the attendance of a witness. if his witness is material in exercise of his powers under order 16. Rule 10 of CPC and where the Officer does not do so, no inference can be drawn against the assessee. Reliance is also placed on the decision of the jurisdictional High Court, i.e. Delhi High Court in CIT

v. Pradeep' Kumar Gupta and- Vijay Gupta (2008) 303 ITR 95 (Del) wherein it was held that reopening of assessment is not permissible on mere adverse statements from others. Such statement by itself does not constitute information, unless the Assessing Of has made enquiries thereon and inferred understatement or Income. Iain therefore inclined to agree with the submissions made on behalf of the appellant to the effect that the information, if any, gathered behind the back of the assessee without being subjected to cross examination cannot be fully admitted as evidence against the assessee.

5.6 Under the facts and circumstances of the case stated above, it is held that the addition of Rs. 70,00,000/- cannot be sustained and accordingly, the same is directed to be deleted. The consequential addition on account of commission of Rs. 70,000/- for obtaining the said accommodation entries is also directed to be deleted. As a result, grounds no.5,6, 7,8 and 9 are allowed."

The ITAT confirmed *the* opinion of the CIT(A).

It is argued by the Revenue that the ITAT should have taken appropriate steps and remitted the matter, not merely confirming the CIT(A)'s opinion since the Investigation Wing's report confirmed *unequivocally* that the assessee was beneficiary to bogus transactions whereby the genuineness of identity of the shareholders, the genuineness and identity of the share applicants and the genuineness of transactions was suspect.

This Court notices that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. It was not a case where the share applicants are merely provided confirmation letters. They had provided their particulars, PAN details, assessment particulars, mode of payment for share application money, i.e. through banks, bank statements, cheque numbers in question, copies of minutes of resolutions authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the assessee as well as their master debt with ROC particulars. The AO strangely failed to conduct any scrutiny of documents and rested content by placing reliance merely on a report of the Investigation Wing. This reveals spectacular disregard to an AO's duties in the remand proceedings which the Revenue seeks to inflict upon the assessee in this case. No substantial question of law arises. The appeal is dismissed."

24. Hon'ble Rajasthan High Court in Supertech Diamond Tools (P) Ltd.

(44 taxman.com 460)(Rajasthan) observed/held as under:-

"By way of this appeal under Section 260A of the Income-tax Act, 1961 ('the Act'), the Revenue seeks to question the order dated 19.01.2012 passed by the Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur ('ITAT') in ITA No.211/Jodh/2009 for the Assessment Year 2004-05 whereby, the ITAT has affirmed the order dated 09.02.2009 passed by the Commissioner of Income Tax (Appeals), Central, Jaipur

[CIT(A)] partly allowing the appeal preferred by the assessee and deleting the additions made by the Assessing Officer ('AO') in the assessment order dated 28.12.2007 to the tune of Rs. 79,80,000/- on account of unexplained share capital contribution and Rs. 19,950/- on account of unexplained expenditure on commission for getting accommodation entries.

2. Put in brief, the relevant background aspects of the matter are as follows: The respondent Company is engaged in manufacturing of the segments used in the marble sawing. The Company came into existence on 16.06.2003. Thus, the previous year related with the Assessment Year 2004-05 had been the first year of the business of the assessee company. In the original return filed on 01.11.2004 under Section 139 of the Act, the assessee Company declared a loss of Rs.3,88,740/-. It appears that search and seizure operation under Section 132 of the Act were carried out on 23.01.2006 at the business premises of the assessee along with the residential as well as other business premises of Choudhary Group of Cases; and pursuant thereto, notices under Section 153A were issued. In the return filed on 06.12.2006 in response to the notice under Section 153A, the assessee company declared a loss of Rs.3,38,740/-

3. On the return so filed, the assessment was completed on 28.12.2007 at the total income of Rs. 76,61,210/- wherein, the Assessing Officer proceeded to make an addition of Rs. 79,80,000/- on account of share capital and share premium alleged to have been received from five Delhi based companies. Another amount of Rs. 19,950/- was also added as being the commission paid for arranging entries for share capital and share premium. In this regard, the AO relied upon the statements made by the persons related with the said Delhi based companies, including one Shri Pradeep Kumar Jindal. The AO observed that though they had confirmed about the companies having purchased the shares of the assessee company and such companies being assessed to tax but it was admitted in their statements that they were engaged in the business of sale and purchase of shares and providing accommodation entries in lieu of commission. The AO concluded that the assessee had routed its undisclosed funds through the banking channels of the accommodation entry providers and hence proceeded to make the addition.

4. Aggrieved against the assessment order dated 28.12.2007, the respondent assessee filed an appeal which was partly allowed by the CIT(A) in the order dated 09.02.2009. It is noticed that the CIT(A) considered the matter in thorough detail and even discussed the matter with the learned Assessing Officer threadbare. The CIT(A) found that the statement made by a third party at the back of assessee could not have been utilized against the assessee without providing an opportunity of cross-examination, which was not afforded by the AO. The CIT (A) also found that the AO could not bring any material to disapprove the genuineness of confirmations and affidavits; and following the decision of the Hon'ble Supreme Court in the case of CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195, found the additions unsustainable; and proceeded to delete the same. The CIT(A), *inter alia*, observed and held as under: —

"However, the assessee filed confirmations along with the affidavit of the directors of the 5 purchasing companies who had confirmed that they have purchased the regular share and premium shares total at Rs.79,80,000/- from the assessee-company and made the payment through account payee draft. It is also fact that the Id. A.O. made direct independent inquiry from the directors of the purchaser company by issuing a letter u/s 133(6) of the I.T. Act 1961. The Id. A.O. Sh. V.K. Chakarvarty was heard and the case was discussed with him. On perusal of letter u/s 133(6) I find that no confirmations or comment was asked from the directors of the purchaser company about their statement in the search and seizure operation in their case. The Id. A.O's only reason for rejecting the confirmations and affidavits filed by aforesaid directors of the purchaser companies was that the directors did not retracted their statement in such confirmations or

affidavits. The Id. A/R's contention is that the directors of the purchaser companies have fully replied against the Id. A.O's letter u/s 133(6). There is no question to retract against anything which is not mentioned in the letter u/s 133(6). Therefore, the rejection of confirmations and affidavits filed by the directors of the purchasing companies was not justified and the various case laws relied by him is still applicable in this case and binding on the department. Moreover the Id. A/R also submits that the statement made by third party on the back of the assessee can not be utilized against him without giving him opportunity of confrontation or cross-examination of such persons making such statement. This opportunity was not provided by the Id. A.O. Under such circumstances the addition on account of receipt of money for regular and premium sales of shares can not be sustained. Considering the facts and circumstances of the case, particularly that the Id. A.O could not bring any material to disprove the genuineness of the confirmations and affidavits and following the case laws mentioned supra, particularly the recent decision of Supreme Court in the case of CIT V/s Lovely Exports Pvt. Ltd (2008) 6 DJR SC 308 and other decisions of jurisdictional High Court and Jurisdictional ITAT, I hold that addition of Rs.79,80,000/- on account of receipt for sales of regular shares and premium shares of the company as unexplained share capital is not justified and the same is deleted. The A.O. is directed to take necessary action against the purchaser companies for such investment in purchase of shares.

Consequently the A.O's addition on account of commission payment for such transaction to the purchaser companies at a rate of 0.25% amounting to Rs 19,950/- also can not sustain and the same is deleted."

5. *Aggrieved by the order dated 09.02.2009 so passed by the CIT(A), the Revenue preferred an appeal before the ITAT. The ITAT dismissed the Revenue's appeal by the impugned order dated 19.01.2012 finding no justification for the additions towards the share capital, share premium and alleged commission in the hands of the assessee company. The ITAT has, inter alia, held and observed as under:—*

"We have gone through written submissions of Id. CIT D/R and also gone through various case laws relied upon and found that there is no evidence that assessee had paid any commission and has refunded the amount received under the garb of share application money. Various case laws relied upon by Id. D/R are in respect of cash credits added under section 68. After considering the submissions and various case laws, it is seen that the submission of Id. CIT D/R is not helpful to the case of revenue. The Hon'ble Supreme Court in case of Lovely Exports Pvt. Ltd. had clearly held that even if the shareholders are bogus in that case no addition can be made in the hands of the company but AO can reopen the cases of shareholders. The contention of Id. CIT D/R that in case of Lovely Exports Pvt. Ltd. only bogus share application was found but the investors were genuine. However, in the present case even there are no genuine investors as all the companies are fabricated just to provide accommodation entries only as admitted by one of the Directors i.e. Shri Pradeep Jindal. Whether those companies were fictitious or bogus, the moot question here is that whether the assessee company had received share application money or not. It is seen that share capital was received through account payee cheques along with premium amount totalling to Rs.79,80,000/- from five private limited companies i.e. M/s. Sanraj Associates Pvt Ltd., M/s. Fortress Impex Pvt. Ltd., M/s. Sumit Overseas Pvt. Ltd., M/s. Pushpanjali Caps Pvt. Ltd. and M/s. B.P. Builtech Pvt. Ltd. all these companies are situated at Delhi. All these companies are assessed to tax and they are registered under the Companies Act. Return of allotment of shares in prescribed form No.2 to the Registrar of Companies was also filed before Assessing Officer as well as before Id.

CIT (A). It is further seen that the addition is based on alleged statement of Shri Pradeep Jindal recorded under section 131 behind the back of the assessee on 15.4.2004. The assessee was not even afforded any opportunity of cross examination nor Shri Pradeep Jindal was examined in the course of assessment proceedings in case of assessee nor he was examined in presence of assessee company nor he was confronted with the documents of contemporary period showing investment in shares made by those five companies through regular banking channel. Therefore, in our view, the inference drawn by Assessing Officer was not correct. Even and otherwise, the issue is squarely covered by the decision of Hon'ble Supreme Court in case of M/s. Lovely Exports Pvt. Ltd., 6 DTR 308 wherein it has been held that—

"If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee-company."

Similar view has been expressed by Hon'ble Delhi High Court in case of CIT v. Divine Leasing and Finance Ltd., [2008] 299 ITR 268 (Delhi). The Hon'ble Rajasthan High Court has taken similar view in case of CIT v. Shree Barkha Synthetics Ltd. [2003] 182 CTR 175 and again reported in 197 CTR 432. Earlier, the Hon'ble Delhi High Court in case of CIT v. Steller Investment Ltd. [1991] 192 ITR 287 has taken similar view and this decision of Hon'ble Delhi High Court has been affirmed by Hon'ble Supreme Court in CIT v. Steller Investment Ltd. [2001] 251 ITR 263 wherein it is held that—

"It is evident that even if it be assumed that the subscribers to the increase share capital were not genuine, nevertheless, under no circumstances can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names the shares had been issued and money may have been provided by some other persons. If the assessment of the persons who were alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital could be assessed in the hands of the company itself."

The findings in these cases are squarely applicable on the facts of the present case and we noted that Id. CIT (A) has already taken a recourse for taking action against the respective shareholders as the Assessing Officer was directed to take necessary action against the purchaser company for such investment in purchase of shares.

10. We have also considered the contention of Id. D/R that the share application money which remained unproved can be added under section 68. We would like to observe here that there is a difference between cash creditor and shareholder. In case of cash creditor, the cash creditor has right to demand the money back from the assessee. However, in case of shareholder, there is no liability of the company to refund the amount as the shares can be sold in the market. Therefore, in case of cash creditor, heavy onus lies on the assessee to prove whether cash creditor was genuine or not. However, in case of shareholder, it is held by various High Courts and Hon'ble Supreme Court that if shareholders are not genuine, then in that case no addition can be made in the hands of the company but the case can be reopened of the shareholders for enquiring about their source of buying the shares in the company.

10.1 The contention of Id. CIT D/R that cash was deposited in the account of the respective five companies before issuing cheque to the assessee company for allotting the shares. Therefore, there is every likelihood that cash deposited in the account of those companies was belonging to assessee company for issuing cheque under the garb of issuing shares. In our view, this contention is without any evidence and if the cash deposited in the account of those companies then onus lies on those companies to prove that from which source the cash has been deposited in their account. Therefore, the AO should examine the case of those five companies instead of making addition in the hands of the assessee-company. The Id. CIT (A) has already directed, as stated above, to take action against the respective shareholders and, therefore, in our view, the Id. CIT(A) was justified in allowing the issue in favour of the assessee. Accordingly, without going into detail further, we are of the considered view that Id. CIT (A) was justified in allowing the claim of the assessee as the issue is squarely covered by the decision of Hon'ble Jurisdictional High Court as well as by the decisions of Hon'ble Supreme Court mentioned above. Accordingly, we confirm the findings of Id. CIT (A) on this issue.

12. In the result, appeal of the department is dismissed.'

6. Seeking to question the order so passed by the ITAT, it is submitted that the approach of the ITAT has been from an altogether wrong angle where it has failed to consider that the companies in whose names investments were shown, had no explainable source of the funds for investment in the assessee company; and the source of the funds was the cash deposits. It is submitted that all the referred companies were being managed by Shri Pradeep Jindal, who was engaged in the business of providing accommodation entries to various companies in lieu of commission; and who had admitted the facts in his statements recorded under Section 131 of the Act. It is also submitted that in the given status of record and the statement of the persons related with the assessee-company, the additions made by the AO had been justified and there was no reason for the CIT(A) in deleting the same.

7. Having given thoughtful consideration to the submissions made and having perused the material on the record, we are unable to find any reason to consider interference; and are clearly of the opinion that no substantial question of law is involved in this appeal.

8 The reference to the statements made by some of the persons related with the said investing companies is of no effect because such statements could not have been utilized against the assessee Company when the assessee-company had not been afforded an opportunity of confronting and cross-examining the persons concerned. There does not appear anything occurring in the statements of the persons relating with the assessee-company so as to provide a basis for the findings recorded by the AO.

9. In any case, the points as sought to be raised by the appellant in the present case are all the matters relating to appreciation of evidence. The relevant factors have been taken into account and considered by the appellate authorities before returning the findings in favour of the assessee. As regards the referred share capital contributors, it is noticed that they are existing assesseees having PA numbers; and are being regularly assessed to tax. The appellate authorities cannot be said to have erred in deleting the additions in their regard at the hands of assessee-company.

10. Ultimately, the question as to whether the source of investment or of credit has been satisfactorily explained or not remains within the realm of appreciation of evidence; and the Courts have consistently held that such a matter does not give rise to any substantial question of law. In the case of CIT v. Orissa Corpn. (P) Ltd. [1986] 159 ITR 78/25 Taxman 80F (SC), the Hon'ble Supreme Court held as

under:—

"13. 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 income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 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 thing further. In the premises, if the Tribunal came to the conclusion that the assessee has 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 is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

11. *In CIT v. Shree Barkha Synthetics Ltd. [2004] 270 ITR 477/[2003] 131 Taxman 114 (Raj.), in a similar nature of matter, this Court observed that the Tribunal having found that the companies from which the share application money had been received by the assessee-company were genuinely existing and the identity of the individual investors were also established and they had confirmed the fact of making investment, the finding that assessee had discharged initial burden and addition under Section 68 could not be sustained, was essentially a finding of fact. This Court said,—*

"19. A perusal of the aforesaid finding goes to show that deletion has been made on appreciation of evidence, which was on record Finding that there was existence of investors and their confirmation has been obtained, were found to be satisfactory. All these conclusions are conclusions of fact based on material on record and, therefore, cannot be said to be perverse so as to give rise to question of law, which may be required to be considered in this appeal under s.260A of the IT Act."

12. *The ratio of the decisions aforesaid directly applies to the present case too. Herein, as noticed, the appellate authorities have returned the findings of fact in favour of the assessee after due appreciation of the evidence on record, on relevant considerations, and on sound reasonings. These findings have neither been shown suffering from any perversity nor appear absurd nor are of such nature that cannot be reached at all.*

13. *Needless to reiterate the law laid down by the Courts consistently that the department is free to proceed in relation to the individual investor in accordance with law but the amount of increased share capital cannot be assessed at the hands of the assessee company itself.*

14. *In the result, the appeal fails and is, therefore, dismissed."*

25. In the case of CIT v. Orchid Industries Pvt. Ltd. (ITA No.1433 of 2014) (Bom.), Hon'ble jurisdictional High Court held as under:

"The Revenue has filed the appeal on following questions:

"6.3 Whether on the facts and in the circumstances of the case and in law, orders of the Tribunal was perverse in deleting the addition of Rs. 95,00,000/- made u/s. 68 of the Act, relying only on the documentary

evidence produced by the Respondent Company while ignoring the key factor that these entities were not traceable at their given addresses.

6.4 Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating the observations made by the Delhi High Court in *Nova Promoters and Finlease Pvt. Ltd.* 18 Taxman.com 217 wherein the Court has observed that cases of this type cannot be decided only on the basis of documentary evidences above and there is need to take into account the surrounding circumstances.

6.5 The Tribunal ought to have taken note of the fact that the assessee was not able to produce even a single party before the AO despite agreeing before the CIT(A) that it will produce all parties before the AO during remand proceedings."

2. Mr. Pinto, the learned counsel for the Assessee submits that the Assessing Officer upon considering all the facts had added Rs. 95 lakhs as income under Section 68 of the Income Tax Act. It needs to be considered that the Assessee had not discharged its onus to establish that the amount was received by the Assessee from the share holders as share application money. The Assessee could not prove the identity of the creditors, their credit worthiness and the genuineness of the transactions. The party from whom the Assessee had received the share amount never responded to the summons issued by the Assessing Officer. The Assessing Officer has considered the said aspect and thereafter has added the amount under Section 68 of the Income Tax Act. According to the learned counsel, the Tribunal only on the basis that documents are available has accepted the case of the Assessee. The Tribunal has failed to consider the circumstances and the facts which are relevant.

3. The learned counsel for the Assessee supports the order and submits that the Assessee had discharged its onus. The Assessee had produced the PAN of all the creditors along with the confirmation, Bank Statement showing payment of share application money and relevant record is produced with regard to the allotment of shares to those parties. The share application form, allotment letter, share certificate are also produced. Even the balance-sheet, profit and loss account, the books of account of these creditors were produced on record showing that they had sufficient funds for investing in the shares of the Assessee. The learned counsel relies on the judgment of the Division Bench of this Court in case of *CIT v. Gagandeep Infrastructure (P.) Ltd.* [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 (Bom.) and the order of the Apex Court in case of *CIT v. Lovely Exports (P.) Ltd.* [2008] 216 CTR 195.

4. We have considered the submissions.

5. The Assessing Officer added Rs. 95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6. The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the

Assessing Officer would not negate the case of the Assessee. The judgment in case of *Gagandeep Infrastructure (P.) Ltd.* (supra) would be applicable in the facts and circumstances of the present case.

7. Considering the above, no substantial question of law arises. The appeal stands dismissed. However, there is no order as to costs."

26. Hon'ble Bombay High Court in CIT vs Gangandeep Infrastructure

(P) Ltd. (394 ITR 680)(Bom) observed/held as under:-

"This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 23rd April, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. Mr. Suresh Kumar, the learned counsel appearing for the Revenue urges the following re-framed questions of law for our consideration:—

- "(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.7,53,50,000/- under Section 68 of the Act being share capital/share premium received during the year when the Assessing Officer held the same as unexplained cash credit?
- (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restricting the disallowance under Section 14A of the Act only to the amount of expenditure claimed by the assessee in the absence of any such restriction under Section 14A and/or Rule 8D?"

3. Regarding question no.(i):—

- (a) During the previous relevant to the subject Assessment Year the respondent-assessee had increased its share capital from Rs.2,50,000/- to Rs.83.75 lakhs. During the assessment proceedings, the Assessing Officer noticed that the respondent had collected share premium to the extent of Rs.6.69 crores. Consequently he called upon the respondent to justify the charging of share premium at Rs.190/- per share. The respondent furnished the list of its shareholders, copy of the share application form, copy of share certificate and Form no.2 filed with the Registrar of Companies. The justification for charging share premium was on the basis of the future prospects of the business of the respondent-assessee. The Assessing Officer did not accept the explanation/justification of the respondent and invoked Section 68 of the Act to treat the amount of Rs.7.53 crores i.e. the aggregate of the issue price and the premium on the shares issued as unexplained cash credit within the meaning of Section 68 of the Act.
- (b) Being aggrieved, the respondent carried the issue in appeal. By an order dated 24th May, 2011 the Commissioner of Income Tax (Appeals) (CIT(A)) deleted the addition of Rs.7.53 crores made by the Assessing Officer by holding that the Assessing Officer had given no reason to conclude that the investment made (inclusive of premium) was not genuine. This inspite of evidence being furnished by the respondent in support of the genuineness of the transactions. Further he held that the appropriate valuation of the shares is for the subscriber/investor to decide and not a subject of enquiry

by the Revenue. Finally he relied upon the decision of the Apex Court in *CIT v. Lovely Exports (P.) Ltd.* [2008] 216 CTR 195 to hold that if the amounts have been subscribed by bogus shareholders it is for the Revenue to proceed against such shareholders. Therefore it held the Assessing Officer was not justified in adding the amount of share capital subscription including the share premium as unexplained credit under Section 68 of the Act.

- (c) Being aggrieved, the Revenue carried the issue in the appeal to the Tribunal. The impugned order of the Tribunal holds that the respondent-assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names, addresses of the shareholders, PAN numbers, bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the Registrar of Companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon, would be on capital receipt and not in the revenue field. Further reliance was also placed upon the decision of Apex Court in *Lovely Exports (P.) Ltd.* (supra) to uphold the finding of the CIT(A) and dismissing the Revenue's appeal.
- (d) Mr. Suresh Kumar, the learned counsel appearing for the Revenue contends that proviso to Section 68 of the Act which was introduced with effect from 1st April, 2013 would apply in the facts of the present case even for A.Y. 2008-09. The basis of the above submission is that the de hors the proviso also the requirements as set out therein would have to be satisfied.
- (e) We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in *Lovely Exports (P.) Ltd.* (supra) in the context to the pre-

amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) *In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.*

4. (a) Admit the substantial question of law at (ii) above.

(b) The issue arising in question no. (ii) is essentially whether application of Rule 8D(2)(iii) of the Income Tax Act Rules would permit the Revenue to disallow expenditure not claimed i.e. much larger than the expenditure / debited in earning its total income. The Counsel inform us that there is no decision on this issue of any Court available and it would affect a large number of cases where similar issues arise. Therefore, this issue would require an early determination. In the above view, at the request of the Counsel, the appeal is kept for hearing on 17th April, 2017 at 3.00 p.m., subject to overnight part-heard.

5. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

6. Stand over to 17th April, 2017.”

27. In so far as the decision of the Hon'ble Delhi High Court in the case of PCIT v. NDR Promoters Pvt. Ltd., (supra), we are of the view that this decision is distinguishable on facts. We find that in the case of ITO v. M/s. Vulvan Traders in ITA.No. 4137/Mum/2015 and 4144/Mum/2015 dated 30.01.2019 the Coordinate Bench considered this decision of Hon'ble Delhi High Court and find that the facts are not identical observing as under: -

“4.4. In the case before Hon'ble Delhi High Court, NDR Promoter Pvt. Ltd.((supra)), cited by Ld. DR, it was found that the cash was deposited in the bank account of one such company and thereafter transferred/ circulated within the group companies before the cheque is issued to the beneficiaries. It is also noted (page-14, para-12) that the share holder companies (five in numbers) were all located at the common address i.e. 13/34 WEA, Fourth Floor, Arya Samaj Road, New Delhi. In that situation, Hon'ble Delhi High Court reached to a particular conclusion. It is clear that the facts in the case of NDR Promoter Pvt. Ltd., relied

upon by the Ld. DR, are different and distinguishable. It is also noted (para-4 of the order of the Hon'ble Delhi High Court) that the money was circulated by first depositing the cash in the bank account of one such company and thereafter transferred/circulated (group companies before cheque is issued to the beneficiaries), therefore, may not help the Revenue."

28. Since facts are different in the case of PCIT v. NDR Promoters Pvt. Ltd. (supra), we are of the view that this decision has no application to the present assessee's case.

29. In view of what is discussed above and in view of the evidences furnished by the assessee, we are of the view that the assessee has discharged its onus of proving the identity, genuineness and creditworthiness of the creditors/shareholders and fulfilled the requirement of ingredients of section 68 of the Act. Thus, the addition made u/s. 68 of the Act which is purely based on the investigation reports and statements recorded from PKJ and whose statements were not provided to the assessee for rebuttal and no cross examination was provided to assessee and therefore is in violation of principles of natural justice. Further we observe that no sort of enquiries were made by the Assessing Officer to disprove the evidences furnished by the assessee. Further, we find that the Assessing Officer accepted the subscription of share capital by the shareholders as genuine and no addition has been made in respect of the same. However, Assessing Officer treated only the share premium as unexplained cash credit. Having accepted the share capital as genuine the Assessing Officer cannot treat only the share

premium as non-genuine and bring to tax as unexplained cash credit u/s. 68 of the Act. In the circumstances, the addition cannot be sustained. Thus, we direct the Assessing Officer to delete the addition made u/s. 68 of the Act.

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

Order pronounced in the open court on the 05th April, 2019

Sd/-
(O.P. MEENA)
ACCOUNTANT MEMBER
Mumbai / Dated 05/04/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum