



आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

माननीय श्री पवन सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI PAWAN SINGH, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.2924/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2009-10)

DCIT-9(3)(2) Room No.418, 4 th Floor Aaykar Bhavan M.K. Road, Mumbai-400 020	बनाम/ Vs.	M/s. Gladiolus Property & Inv. Pvt. Ltd. C-601, Vrindavan Behind Dindoshi Bus Depot Gokuldham, Malad (E) Mumbai-400 097.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AADCG-0676-N		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Revenue by	:	Shri B.B. Rajendra Prasad-Ld. CIT DR
Assessee by	:	Shri Jitendra Jain-Ld.AR

सुनवाई की तारीख/ Date of Hearing	:	07/03/2019
घोषणा की तारीख / Date of Pronouncement	:	16/05/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [AY] 2009-10 contest the order of Ld. Commissioner of Income-Tax (Appeals)-20, Mumbai, [CIT(A)], *Appeal No. CIT(A)-20/ACIT-12(2)(2)/IT-335/2015-16* dated 18/0/2017 on following effective grounds of appeal: -

1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.13,25,00,000/- made u/s.68 of the Act, by not appreciating the fact that the assessee has failed to discharge the burden to substantiate the creditworthiness of the shares investors and genuineness of the transactions?

The appellant prays that the order of the CIT(A) on the above grounds above be set aside and that of the A.O. be restored.



2.1 The assessment for impugned AY was framed by Ld. Assistant Commissioner of Income Tax-12(2)(2) [AO] u/s 143(3) *read with Section 147* on 30/03/2015 wherein the assessee was saddled with addition of Rs.13.25 Crores on account of *unexplained cash credit u/s 68*. The original return of income was filed by the assessee at Rs.2.38 Crores on 29/09/2009 which was processed u/s 143(1). The addition u/s 68 as made by Ld. AO is the sole subject matter of present appeal before us. The assessee being *resident corporate assessee* was stated to be engaged in *investment and trading in shares and securities*.

2.2 The reassessment proceedings got triggered pursuant to receipt of certain information from *Additional CIT-Range 9(1), Mumbai* vide letter dated 28/03/2014 that the assessee received Share Premium amounting to Rs.12.58 Crores during the impugned AY. On the basis of the same, Ld. AO formed an opinion that the income to that extent escaped assessment accordingly, notice u/s 148 was issued to the assessee on 30/03/2014 which was duly served on assessee. In response, the assessee offered original return of income as filed on 29/09/2009 and sought reasons for reopening which were duly supplied. The objections raised by the assessee challenging reopening were duly disposed-off by way of speaking order on 05/02/2015. Accordingly, the assessee was directed to demonstrate the fulfilment of primary ingredients of Section 68.

2.3 During reassessment proceedings, it transpired that the assessee issued 6,62,500 equity shares of face value of Rs.10/- each to 20 share applicants at premium of Rs.190/- per share. Accordingly, the amount, so received, on account of *Share Capital & Share premium* aggregated



to Rs.66.25 Lacs and Rs.1258.75 Lacs respectively. The complete details of share allotment including the details of Share Allottees have already been extracted at *para 5.1* of the quantum assessment order. The assessee was asked to explain and nature and source of the sums so received by it.

2.4 The assessee defended the aforesaid transactions by submitting various details like *Name, Address, Permanent Account Number [PAN]* of the investors along with their respective financials, Share Application forms, Bank statements, Copy of Board Resolution authorizing the issue of shares etc. A valuation report in justification of share premium was also submitted.

2.5 During the course of assessment proceedings, to confirm the stated transactions, notices u/s 133(6) were issued by Ld. AO on sample basis to following three share Allottees: -

- i) *Janki Textiles & Industries Ltd.*
- ii) *Sanatan Vinimay Pvt. Ltd.*
- iii) *Madhu Khetan*

However, all the three notices were returned back by postal authorities which led the Ld. do believe that the identity of all the share applicants could not be established. Further, after perusing the details submitted by the assessee, Ld.AO formed an opinion that the genuineness of the transactions could not be established by the assessee. Accordingly, the assessee was show-caused on 10/03/2015 asking him to explain as to why the amounts received from these parties should not be taxed as its unaccounted income. In response, the assessee defended the transactions on the strength of documentary evidences and various details submitted by him.



2.6 The Ld. AO, at *para 7* of the quantum assessment order, formed an opinion that the identity of the investors could not be established since notices u/s 133(6) remained unserved to the three parties. At the same time, an observation has been made by Ld. AO that the assessee had provided new addresses of the parties. The Ld. AO termed the assessee's replies as mere afterthought aimed at camouflaging non-genuine transactions, factually incorrect and devoid of any merits. It was also noted that the address provided by the assessee with respect to party listed at serial no. 1 above was different in the financial statements and no information of the aforesaid entity was available on the Ministry of Corporate Affairs [MCA] website which led the Ld. AO to form a belief that the party did not exist at the given address. Therefore, the assessee's claim in respect of identity of none of the parties, in the opinion of Ld. AO, could be relied upon.

2.7 Proceeding further, Ld. AO opined that creditworthiness of the parties could not be established since the assessee did not file the details of respective shareholders / directors. The examination of financial statements reveals that most of the entities were loss making entities and did not have any significant fixed assets or employees. The details of business activities were not available and the turnover was meagre. At the same time, an observation has been made in *para 8.1* that these entities had substantial money in *Securities Premium Account / Other Liabilities* which is the source of funds to make further investments in other entities including investment in assessee company. Therefore, these entities were terms as merely routing entities and there was no semblance of any genuine business activity and further the



facade of the company was created so as to impart a genuine character to the sham transactions.

2.8 The Ld. also doubted the high share premium in view of the fact that this was the first year of operation of assessee company and it had poor *Earning Per Share* [EPS] and had not declared any dividend.

2.9 Finally, making an observation that bank statements alone were not sufficient to prove the genuineness of the transactions, the aggregate amount of Share Capital and Share premium amounting to Rs.13.25 Crores was added to the income of the assessee as unexplained cash credit u/s 68.

3.1 Aggrieved, the assessee agitated the reassessment proceedings on legal grounds as well as quantum additions on merits with partial success before Ld. first appellate authority vide impugned order dated 18/01/2017 wherein Ld. first appellate authority, *inter-alia*, relying upon the judgement of Hon'ble Apex Court rendered in *ACIT Vs. Rakesh Jhaveri Stock Brokers Pvt Ltd. [291 ITR 500]* upheld the reassessment proceedings and proceeded to examine assessee's claim on merits.

3.2 Before Ld. CIT(A), the assessee asserted that the primary ingredients of Section 68 were fulfilled by the assessee on the strength of documentary evidences and therefore, additions were not justified. It was submitted that the assessee filed each detail as called for by Ld. AO during assessment proceedings, which *inter-alia* included the following documents: -

- i) *Details of investors with their name, Permanent Account No. (PAN), Number of Shares subscribed, face value and premium received, cheque number issued by the investor and account in which consideration has been credited.*
- ii) *Valuation Report*
- iii) *Relevant Extract of Bank Statement of the Appellant and Bank Book*
- iv) *Board Resolution passed by the appellant for issue of shares*
- v) *Form 2 (return of allotment of share) filed with Registrar of Companies*



- vi) *Acknowledgement of Return filed*
- vii) *Audited financial statements for the year ended 31.03.2009*
- viii) *Equity Share Application Form*
- ix) *Share Certificates issued*
- x) *Relevant extract of bank statement of the investor*

The attention was drawn to the fact that additions have been made merely because the three notices sent u/s 133(6) were returned back unserved whereas the assessee placed on record sufficient documentary evidences to establish the identity of the investors, creditworthiness of the investors and genuineness of the transactions and therefore, the additions were not justified. Reliance was placed on catena of judicial pronouncements including the decision of Hon'ble Apex Court rendered in **CIT Vs. Lovely Exports (P) Ltd. [319 ITR 5]** & Hon'ble Bombay High Court rendered in **CIT Vs. Gagandeep Infrastructure P. Ltd. [80 Taxmann.com 272]** in support of various submissions.

3.3 After considering the assessee's submissions and material on record, Ld. CIT(A) concurred with assessee's stand / submissions and deleted the additions by making following observations: -

6.8 On an analysis of the facts on records, it is seen that the share capital and premium of Rs.13,25,00,000/- has come from different shareholders. It is noted that these shareholders are existing shareholders and had confirmed that they had contributed to the share capital of the assessee company. The next aspect is their creditworthiness. The assessee has filed copy of PAN card, bank statement, balance sheet and P&L account, Share Application Form, etc. of shareholders. It emerges out from the record that the investing shareholders had recorded the investments in appellant company in their books of accounts during the relevant financial year. Thus, the shareholders had demonstrated these balances in their balance sheets in the shape of investment as well as loan and advances. The next issue is about the genuineness of the transaction. The assessee has produced the details of bank account. The share application money and share premium had been issued through banking channel. There is no cash transaction which could compel oneself to assume that the transactions were not genuine. The AO has made the addition on the issue that the shares were issued to shareholders at high premium and the subscribing shareholders had meager income during the year hence the entire transaction was to be treated as unexplained cash credit U/s 68 of Income Tax Act. The onus cast upon the assessee under Section 68 of the Act is to satisfy the department



about the true identity of an investor, its creditworthiness and genuineness of a transaction was explained by the Supreme Court in CIT Vs. Lovely Exports (P) Ltd., 216 CTR 295. Whilst, the A.O. acted legitimately in enquiring into the matter, the inferences drawn by him were not justified at all in the circumstances of the case. Whether the assessee company charged a higher premium or not, should not have been the subject matter of the enquiry in the first instance. Instead, the issue here was whether the amount invested by the share applicants was from legitimate sources. The objective of Section 68 is to avoid inclusion of amounts which are suspect. Therefore, the emphasis is on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is peculiar in the present case is when the assessment was being completed the A.O. has not made much investigation about these investor shareholders which would have established the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants. It has been submitted that these details called for by the A.O. were duly filled the assessee before the A.O. but the appellant failed to produce the share applicants before the A.O.

While observing so, the ratio of following judicial pronouncements was duly noted at *para 6.9 to 6.11* of the impugned order: -

No.	Title	Judicial Authority	Citation
1.	<i>Oasis Hospitality Pvt. Ltd. Vs. CIT</i>	<i>Hon'ble Delhi High Court</i>	<i>2011 333 ITR 119</i>
2.	<i>CIT Vs. Creative World Telefilms Ltd.</i>	<i>Hon'ble Bombay High Court</i>	<i>2011 333 ITR 100</i>
3.	<i>CIT Vs. P.Mohankala</i>	<i>Hon'ble Supreme Court</i>	<i>2007 291 ITR 278</i>
4.	<i>CIT Vs Stellar Investment Ltd.</i>	<i>Hon'ble Delhi High Court</i>	<i>1991 192 ITR 287</i>
5.	<i>CIT Vs Gangeshwari Metal Pvt. Ltd</i>	<i>Hon'ble Delhi High Court</i>	<i>2014 361 ITR 10</i>

Finally, the matter on merits, was concluded in assessee's favor by observing as under: -

6.12 In view of the legal position emanating from legal precedents and the observations of Hon'ble Delhi High Court, in the case of Gangeshwari Metal P. Ltd. as discussed above it is noted that when requisite documents such as PAN, Bank accounts, Balance Sheet etc. were available with the A.O., to establish that no cash transactions were involved in the bank accounts of the investing company then without further probe to prove contrary the addition u/s 68 in the hand of the assessee cannot be made. In view of the above discussion on the facts of the case and having regard to the decisions of courts and judicial precedents as noted above, the addition made by the A.O. of the share capital and premium of Rs. 13,25,00,000/- under section 68 of The Income Tax Act 1961 cannot be sustained in appeal and is directed to be deleted. Accordingly, this ground of appeal is allowed.

Aggrieved, the revenue is in further appeal before us.

4.1 The Ld. CIT-DR vehemently contested the stand of first appellate authority by submitting that the assessee failed to discharge the primary



onus to demonstrate fulfillment of primary ingredients of Section 68 and therefore, the stand of Ld. AO deserves to be restored. A chart has been placed before us with respect to share applicants to demonstrate that the turnover of these entities was low and most of the entities were either loss making entities or showing meagre income and therefore, did not have enough financial capacity to make the stated investments. Reliance has been placed on the recent decision of Hon'ble Apex Court rendered in **Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd. [412 ITR 161]** & various other judicial pronouncements to support the same, which could be tabulated in the following manner: -

No.	Case Law	Judicial Authority	Citation
1.	Konark Structural Engg P Ltd Vs DCIT	Hon'ble Bombay High Court	90 Taxmann.com 56 2018 [SLP dismissed 96 Taxmann.com 255]
2.	Major Metals Ltd. Vs UOI	Hon'ble Bombay High Court	19 Taxmann.com 176 2012
3.	CIT Vs. Nova Promoters & Finlease (P) Ltd.	Hon'ble Delhi High Court	18 Taxmann.com 217 2012
4.	CIT Vs. Frostair (P.) Ltd.	Hon'ble Delhi High Court	26 taxmann.com 11 2012
5.	CIT vs. Nipun Builders & Developers (P.) Ltd.	Hon'ble Delhi High Court	[2013] 350 ITR 407
6.	CIT vs. Precision Finance (P.) Ltd.	Hon'ble High Court of Calcutta	208 ITR 465 1995
7.	Pr.CIT Vs. NDR Promoters Pvt.Ltd.	Hon'ble Delhi High Court	ITA No.49 of 2018 dated 17/01/2019
8.	Advance PowerInfra Tech Ltd. vs. DCIT	ITAT, Kolkata	ITA No.605/Kol/2015 dated 23/08/2017
9.	Angel Pipes & Tubes (P.) Ltd. vs. ITO	ITAT, Mumbai	153 ITD 520 13/08/2014

4.2 Per Contra, Ld. Authorized Representative for Assessee, drawing our attention to the impugned order and documents placed in the *paper-book* including submissions made during assessment / appellate proceedings, submitted that the assessee furnished plethora of documents to establish the identity of share applicants, creditworthiness of the investors and genuineness of the transactions carried out by the



assessee and therefore, the impugned order would not warrant any interference. A chart has been placed before us with respect to share applicants to submit that the assessee filed Name, Addresses, PAN of the investors, Income Tax Return Acknowledgement, audited financial statements, copies of share application form, copies of share certificates, bank statements of the investors and confirmation of accounts. Our attention has further been drawn to the fact that the assessee had provided the new addresses of the 3 Share Allottees to the Ld. AO but no summons was issued to these parties at the new address and no further inquiry / investigation whatsoever has been made to bring the matter to logical conclusion. It has also been submitted that since all the share applicants were allotted Permanent Account Number by the Income Tax Department and the return of income as well as financial statements of all the Allottees was placed on record, there could be no doubt as to identity of the investors. Regarding creditworthiness of the investors, it has been submitted that it is the categorical finding of Ld. AO himself that the investments were sourced by the investors out of their unsecured loans / reserves / other liabilities. Similarly, other arguments have been advanced to support the fact that the transactions were genuine and nothing on record suggest that unaccounted money of the assessee flowed back, in any manner, in the shape of share capital / premium. It has further been submitted that the issue of share premium was a matter between the assessee and investee company and there was no illegality in commanding higher share premium on shares. Arguments have been made to submit that the provisions of Section 56(2)(viib) were applicable only from AY 2013-14 and the same were not retrospective in nature. In the above background, attention has been



drawn to the fact that case laws being relied upon by Ld. CIT-DR were distinguishable on facts.

4.3 Reliance has been placed on following judicial pronouncements to support the various submissions: -

No.	Case Law	Judicial Authority	Citation
1.	Pr.CIT Vs. M/s. Paradise Inland Shipping Pvt.Ltd.	Hon'ble High Court of Bombay at Goa	Tax appeal No.66 of 2016 dated 10/04/2017
2.	Orient Trading Co. Ltd. Vs. CIT	Hon'ble High Court of Bombay	(1963) 49 ITR 0723
3.	Pr. CIT & Ors. vs. Chain House International (P.) Ltd. & Ors.	Hon'ble High Court of Madhya Pradesh	(2018) 408 ITR 0561
4.	Sunshine Metals & Alloys Industries Pvt.Ltd. Vs. ITO	ITAT Mumbai	ITA No.3212/Mum/2014 (A.Y. 2008-09) dated 12/10/2018
5.	DCIT vs. Piramal Realty Pvt.Ltd.	ITAT Mumbai	ITA No.2317/Mum/2017 (A.Y.2012-13) dated 16/11/2018

5.1 We have carefully heard the rival contentions and perused relevant material on record including written submissions / documents placed in the *paper-book* & judicial pronouncements cited before us. The undisputed fact that emerges from the record are that the assessee was in receipt of certain share capital & share premium from as many as 20 investors during the impugned AY. The shares were stated to be issued at a premium of 190/- per share. During assessment proceedings, the assessee was directed to substantiate the said transactions at the threshold of Section 68. Various details and documentary evidences were called from the assessee to establish the identity of the investors, prove their creditworthiness and demonstrate genuineness of the transactions. The assessee, in support of the transactions, placed on record plethora of documents during assessment proceedings, which has already been enumerated by us at *para 3.2* above. These



documents, *inter-alia*, include details of the investors, their respective Permanent Account Numbers, copies of Income Tax Returns, Bank statements of the investors & assessee evidencing the aforesaid payment through banking channels and audited financial statements of the investors which would demonstrate that the assessee discharged the primary onus as casted upon him under the rigors of provisions of Section 68. Nothing on record would suggest that the assessee failed to supply any details called for by Ld. AO during assessment proceedings. However, Ld. AO chose to investigate the transactions by issuing notices u/s 133(6) on sample basis to 3 investors only. When these notices were returned back, the assessee provided new addresses of these 3 investors to Ld. AO. However, the same were completely disregarded and termed as mere after thought aimed at camouflaging non-genuine transactions, factually incorrect and devoid of any merit. No further inquiries / investigations etc. was carried out against these 3 entities whereas no inquiry, at all, was made in rest of the cases. It is important to observe that the moneys were received by the assessee in financial year 2008-09 whereas the notices were sent in the year 2014-15 i.e. after a period of 5 years and therefore, there was every possibility of change of office address by the investors. Therefore, the conclusions drawn by Ld. AO on half-baked investigation, in our opinion, were incomprehensible. Once primary onus was discharged by the assessee, it was obligatory on the part of the revenue to negate the assessee's submissions by bringing on record cogent material to establish that the assessee's unaccounted money was routed back into the accounts by way of share capital / share premium. Nothing on record suggest that any such material was brought on record by Ld. AO. It is trite law that no



additions could be made merely on the basis of suspicion, conjectures or surmises. Therefore, the conduct of the assessee, would not inspire us to confirm the additions as made by Ld.AO u/s 68.

5.2 This view of ours is in line with the decision of Hon'ble Bombay High Court rendered in **Orient Trading Co. Ltd. 49 ITR 723** wherein it has been observed that where an entry stands in the name of the third party, the assessee satisfies the Income-tax Officer as to the identity of the third party and also supplies such other evidence which will show, prima facie, that the entry is not fictitious the initial burden which lies on him can be said to have been discharged by him. It will not, thereafter, be for the assessee to explain further how or in what circumstances the third party obtained money and how or why he came to make a deposit of the same with the assessee. The burden will then shift on to the department to show why the assessee's case cannot be accepted and why it must be held that the entry, though purporting to be in the name of a third party, still represents the income of the assessee from a suppressed source. In order to arrive at such a conclusion, however, the department has to be in possession of sufficient and adequate material. We find absence of such material in the present case.

5.3 The aforesaid factual matrix would distinguish the recent judgment of Hon'ble Apex Court rendered in **PCIT Vs. NRA Iron & Steel Pvt. Ltd. [supra]** as relied upon by Ld. CIT-DR. Upon perusal of the cited judgment, we note certain distinguishing features vis-à-vis factual matrix of the present case. Upon perusal of *para 3.7 & 3.8* of the said judgement, it is noted that Ld. AO had issued summons to as many as 19 investor entities but nobody appeared on behalf of the investor companies. The submissions were received through DAK only which



created a doubt about the identity of the investor company. Further, Ld. AO independently got field inquiries conducted at the location of investor companies, the result of which has been tabulated under the said para. Notices were served on few entities but the same were not replied to. In few cases, the notices were returned back. Submissions were received in few cases through DAK wherein the company only provided the mode of investments without supplying any reason to pay huge premium. Another striking feature was that most of the investors had reflected meagre income during assessment year under dispute. The two companies in Mumbai as well as Guwahati were found to be non-existent. With respect to Kolkata Companies, the response came through DAK only and nobody appeared. Further, the bank statements were not produced in most of the cases to establish the source of funds for making huge investments. The totality of factual matrix would reveal that extensive inquiries were made by Ld. AO to bring the matter to a logical conclusion. However, the same are not the facts in the present case as noted by us in *para 5.1* above. Therefore, the stated case of Hon'ble Apex Court, in our respectful submission, do not apply to the facts of the case in hand and hence distinguishable.

5.4 Another case law of Hon'ble Bombay High Court, as relied upon by Ld. CIT-DR, rendered in **Konark Structural Engg. P Ltd Vs DCIT [supra]** was rendered in a situation wherein the creditworthiness of the investor as well as genuineness of the transactions could not be proved by the assessee. The summons was returned back and the transactions were between related parties. In the present case, nothing on record suggest that the share applicants were related parties.



5.5 Similar, the case-law of Hon'ble Bombay High Court in **Major Metals Ltd. Vs. UOI [supra]** deals with a situation wherein it was found that the investor company had no financial standing to advance huge sums to the assessee. In the present case, it is the finding of Ld. AO that the source of investment by investors was their respective unsecured loans / reserves / other liabilities.

5.6 In the case law of Hon'ble Delhi High Court **CIT Vs. Nova Promoters & Finlease (P) Ltd. [supra]**, the material before Ld. AO established link between the entry providers and the assessee company and the adverse statements were confronted to the assessee which could not be controverted satisfactorily. No such link is forthcoming in the present case.

5.7 The decision of Hon'ble Delhi High Court in **CIT Vs. Frostair P. Ltd. [supra]** deals with a situation where PAN of the investors supplied by the assessee were not correct and the investors were not filing their Income Tax Returns. The same is factually different in the present case.

5.8 The case law of Hon'ble Delhi High Court in **CIT Vs. Nipun Builders & Developers P. Ltd. [supra]**, *inter-alia*, deals with a situation wherein summons was issued u/s 131 and field inquiries revealed that none of the subscribers existed at the given address. No such inquiries have been conducted in the present case.

5.9 The case law of Hon'ble Delhi High Court in **CIT Vs. Precision Finance Pvt. Ltd. [supra]** deals with a situation wherein Income Tax file numbers provided by the assessee were found to be non-existent or Income Tax records did not tally with details furnished by the assessee.



5.10 Extensive inquiries were made by Ld. AO in the case law of **CIT Vs. NDR Promoters Pvt. Ltd. [supra]** to controvert the assessee's claim.

5.11 In the case of **Advance PowerInfra Tech Ltd. vs. DCIT [supra]**, only PAN was filed to explain creditworthiness and source of the investment, which is not the case here.

5.12 Lastly, the case law of **Angel Pipes & Tubes P.Ltd. Vs. ITO [supra]** deals with a situation wherein the matter of addition has been restored back to first appellate authority.

Therefore, the above case laws as relied upon by Ld. CIT-DR, in our opinion is distinguishable on facts and circumstances.

6.1 In the present case, so far as the identity of the investors, their creditworthiness & genuineness of the transactions is concerned, we find that all the investors were having Permanent Account number and were duly filing their Income Tax Returns. The audited financial statements were placed on record. The share applicants had confirmed the investments. In fact, it is the finding of Ld. AO that the investment in the shape of share capital as well as share premium was made by these entities out of their respective unsecured loan / reserves / other liabilities / share premium account which contradicts / negate the stand of Ld. AO that the entities were showing meagre profits and had no source to make the stated investments. Nothing on record suggest that any money got exchanged between the assessee and the investor entities which flew back in the shape of share capital / share premium. Another pertinent observation to be made is that as per Ld. AO's finding, the impugned AY was the initial year of business operation of the assessee company and therefore, it is difficult to accept that the assessee accumulated huge



unaccounted money which was ploughed back in the shape of share capital / share premium. Proceeding further, it is undisputed fact that the transactions have taken place through banking channels which is evident from the bank statements of the assessee as well as share applicants as placed on record. The entirety of facts would convince us to form an opinion that the assessee was successful in establishing the fulfilment of primary condition of Section 68. To form this opinion, we find support from the case laws being relied upon by Ld. AR as enumerated in succeeding paragraphs.

6.2 In the decision of *Pr.CIT Vs. M/s. Paradise Inland Shipping Pvt.Ltd. [supra]*, Hon'ble Bombay High Court, on similar factual matrix, observed as under: -

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

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

1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-

Date of Registration 09/05/1995

(a)	Memorandum of Association and Article of Association
(b)	Certificate of Incorporation
(c)	Certificate of Commencement of Business
(d)	Acknowledgment of the Return of Income AY 08-09
(e)	Affidavit of the Director confirming the investment
(f)	Application for allotment of shares
(g)	Photocopy of the share certificate



(h)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009.
(i)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010
(j)	The Bank Statement highlighting receipt of the amount by way of RTGS.
(k)	Banks certificate certifying the receipt of the amount through Banking channels."

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

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

8. The Apex Court in the case of *Orissa Corpn. (P.) Ltd. (supra)*, has observed at Para 13 thus :

"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 number was 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 anything 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."



9. This Court in the Judgments relied upon by the learned Counsel appearing for the Respondents, have come to the conclusion that once the Assessee has produced documentary evidence to establish the existence of such Companies, the burden would shift on the Revenue-Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subjected to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons, would not at all be justified. The Assessing Officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents.

10. We find no infirmity in the findings arrived at by the ITAT as well as CIT Appeals on the contentions raised by the Appellants-Revenue in the present case and, as such, the question of interference by this Court in the present proceedings under Section 260A of the Income Tax Act would not at all be justified. Apart from that, as rightly pointed out by the learned Counsel appearing for the Respondents, the CIT Appeals had also noted that proceedings under Section 147 of the Income Tax Act cannot lead to re-verification of the records. These findings of the CIT Appeals have not been assailed before the Income Tax Appellate Court.

11. In such circumstances, we find that there is no case made out by the Appellants-Revenue for any interference in the impugned Orders passed by the Courts below.

The aforesaid decision has already been confirmed by Hon'ble Supreme Court by way of dismissal of revenue's *Special Leave Petition* reported at 93 Taxmann.com 84. Similar are the decisions of the Tribunal rendered in *Sunshine Metals & Alloys Industries Pvt.Ltd. Vs. ITO [supra]* & *DCIT vs. Piramal Realty Pvt.Ltd. [supra]*. The decision of Hon'ble Bombay High Court in **CIT Vs. Gagandeep Infrastructure (P.) Ltd. [80 Taxmann.com 272]** held as under: -

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.

6.3 So far as the justification of share premium is concerned, we find that the assessee, in its investment note, adopted *Discounted Cash Flow* method to arrive at the valuation of shares. Be that as the case may be, we are of the considered opinion that quantum of premium was matter between assessee company issuing the shares and investor entities and the payment of high premium, in itself, could not be the basis of making addition in assessee's hand unless there was any illegality or restriction, under law, towards receipt of high share premium. Our view is in line with the decision of Hon'ble High Court of Madhya Pradesh rendered in **Pr.CIT Vs. Chain House International Pvt. Ltd. [supra]** as confirmed by Hon'ble Supreme Court by dismissal of revenue's Special Leave Petition reported at **103 Taxmann.com 435**, wherein it has, *inter-alia*, been held that It was the prerogative of the Board of Directors to decide the quantum of premium and it was the wisdom of the shareholders whether they wanted to subscribe to the shares at such a premium. The relevant observation of the Hon'ble Court were as under:-

52. Issuing the share at a premium was a commercial decision. It is the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe the shares at such a premium or not. This was a mutual decision between both the companies. In day to day market, unless and until, the rates is fixed by any Govt. Authority or unless there is any restriction on the amount of share premium under any law, the price of the shares is decided on the mutual understanding of the parties concerned.



53. Once the genuineness, creditworthiness and identity are established, the revenue should not justifiably claim to put itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of ascertaining how much is a reasonable premium having regard to the circumstances of the case.

54. There is no dispute about the receipt of funds through banking channel nor there is any dispute about the identity, creditworthiness and genuineness of the investors and, therefore, the same has been established beyond any doubt and there should not have been any question or dispute about premium paid by the investors therefore, unless there is a limitation put by the law on the amount of premium, the transaction should not be questioned merely because the assessing authority thinks that the investor could have managed by paying a lesser amount as Share Premium as a prudent businessman. The test of prudence by substituting its own view in place of the businessman's has not been approved by the Supreme Court in the decisions of *CIT v. Walchand & Co. (P.) Ltd.* [1967] 65 ITR 381 and *J.K. Woollen Mfg. v. CIT* [1969] 72 ITR 612 (SC).

55. The question of share premium has been considered by the Delhi High Court in the case of *CIT v. Anshika Consultants (P.) Ltd.* [2015] 62 taxmann.com 192 wherein it was held thus :—

"The onus cast upon the assessee under Section 68 of the Act to satisfy the department about the true identity of an investor, its creditworthiness and genuineness of a transaction was explained by the Supreme Court in *CIT v. Lovely Exports (P) Ltd.*, [2008] 216 CTR 195,. Whilst, the AO acted legitimately in enquiring into the matter, the inferences drawn by him were not justified at all in the circumstances of the case. Whether the assessee company charged a higher premium or not, should not have been the subject matter of the enquiry in the first instance. Instead, the issue was whether the amount invested by the share applicants were from legitimate sources. The objective of Section 68 is to avoid inclusion of amount which are suspect. Therefore, the emphasis on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is disquieting in the present case is when the assessment was completed on 31.12.2007, the investigation report which was specifically called from the concerned department in Kolkata was available but not discussed by the AO. Had he cared to do so, the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants would have been apparent. Even otherwise, the share applicants' particulars were available with the AO in the form of balance sheets income tax returns, PAN details etc. While arriving at the conclusion that he did, the AO did not consider it worthwhile to make any further enquiry but based his order on the high nature of the premium and certain features which appeared to be suspect, to determine that the amount had been routed from the assessee's account to the share applicants' account. As held concurrently by the CIT (Appeals) and the ITAT, these conclusions were clearly baseless and false. This Court is constrained to observe that the AO utterly failed to comply with his duty considers all the materials on record, ignoring specifically the most crucial documents."

56-57. It is well settled that if the creditworthiness of the investor company and genuineness of the transaction is proved no addition under Section 68 could be made and no substantial question of law arises. The M.P. High Court in the case of *CIT v. Metachem Industries* [2000] 245 ITR 160/[2001] 116 Taxman 572 (MP) has held thus :—



"Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee-firm is over. The assessee-firm cannot ask that person who makes investment whether the money invested is properly taxed or not. The assessee is only to explain that this investment has been made by the particular individual and it is the responsibility of that individual to account for the investment made by him. If that person owns that entry, then the burden of the assessee-firm is discharged. It is open to the Assessing Officer to undertake further investigation with regard to that individual who has deposited this amount. So far as the responsibility of the assessee is concerned, it is satisfactorily discharged. Whether that person is an income-tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income-tax. It is open to the Assessing Officer to take appropriate action under Section 69 of the Act, against the person who has not been able to explain the investment."

Another aspect of this is that the provisions of Section 56(2)(viib) were applicable only with effect from 01/04/2013 and the same were not applicable during impugned AY.

6.4 The consideration of the totality of above facts and circumstances lead us to inevitable conclusion that Ld. CIT(A) was justified in providing relief to the assessee in terms of catena of judicial pronouncements as discussed in the impugned order. Finding no infirmity in the same we dismiss the appeal.

7. Resultantly, the revenue's appeal stands dismissed.

Order pronounced in the open court on 16/05/2019.

Sd/-

(Pawan Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 16/05/2019
Sr.PS, Jaisy Varghese



आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**