IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'A': NEW DELHI)

BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER &
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA No:- 1948/Del/2015
(Assessment Year: 2009-10)

VIJ Construction Ltd., 6/3, Kalkaji Extension Opp. Nehru Place, Kalakaji, New Delhi-110019. PAN-AAACV2060N	Vs	Addl.CIT, Range-17, New Delhi.
APPELLANT		**RESPONDENT**
Appellant by		None
Respondent by		Sh.D.S.Rawat, Sr.DR

ORDER

PER ANADEE NATH MISSHRA, AM

[A]. This appeal is filed by the assessee against the impugned order dated 30.03.2013 passed by Learned Commissioner of Income Tax(Appeals)-19, New Delhi [in short "Ld.CIT(A)"] pertaining to 2009-10 assessment year. The grounds of appeal are as under:-

l. "On the facts and circumstances of the case and in law, the Ld CIT (Appeals 19) New Delhi has erred upholding the additions made by the learned Assessing officer assessing the income of the assessee at Rs 6,59,53,300/- instead returned income of Rs. 2,28,35,229

2. The order of the assessing officer is not based on law and facts of the case and the Learned CIT (Appeals) 19 New Delhi has

erred in upholding the additions made by the Learned Assessing Officer.

3. On facts and circumstances of the case the learned CIT has erred in upholding an addition of Rs 288,000/- made by the Learned Assessing Officer on account of interest free deposits.

4. On facts and circumstances of the case the learned CIT has erred in upholding an addition of Rs 3,99,00,000/- made by the Learned Assessing Officer on account of Share Application Money.

5. On facts and circumstances of the case the learned CIT has erred in upholding an addition of Rs 29,30,000/- made by the Learned Assessing Officer on account of unsecured Loans u/s 68 of the Income Tax Act. 1961."

[B]. At the time of hearing before us, Revenue was represented by Sh.D.S.Rawat and the assessee was represented by none. In the absence of representation from the assessee's side, we heard the Learned Departmental Representative [in short "Ld.DR"]. Ld.DR opposed the appeal filed by the assessee on grounds of limitation and also on merits. It was his view that the appeal of the assessee should be dismissed as time barred as the appeal was filed beyond the prescribed time limit u/s 253(3) of the Act.

[C]. This appeal has been filed beyond the prescribed time limit u/s 253(3) of the Income Tax Act, 1961. We find from the record that defect notice was issued to the assessee by Registry intimating that the appeal was time barred. We also find from the record that the

assessee has filed an affidavit praying for condonation of delay in filing of appeal. In the aforesaid affidavit, Mr. Vinod Vij, Director of the assessee company has referred to problems faced by the assessee due to ill health of the Directors, ongoing various legal proceedings on the company due to financial defaults, changes in staff due to nonpayment of wages etc. We also find from the record that medical papers of Mr.Vinod Vij, Mrs. Preeti Vij [Wife of Mr. Vinod Vij] and death certificate of aforesaid Mrs. Preeti Vij have also been filed from the assessee's side. Having regard to the facts and circumstances of the case, we decline to dismiss the appeal on grounds of limitation and condone the delay in filing of this appeal. Accordingly, we admit the appeal having regard to section 253(5) of the Income tax Act, 1961.

[D]. On merits, Ld.DR relied on the order of Ld.CIT(A). Relevant portion from the order of Ld.CIT(A) is reproduced as under:-

> *2.1 "In the course of appellate proceedings, the appellant filed an application for admission of additional evidence under rule 46A. A copy of the application u/r 46A was sent to the A.O. vide letter dated 31.8.12 for his comments. The A.O. has submitted a remand report dated 10.10.12 through the Addl. C.I.T. Range-17 vide her letter dated 10.10.12.*
>
> *2.2 In the remand report, the A.O. and the Addl. CIT have observed as follows regarding the admissibility of additional evidence:*
>
> > *Reasons are not there as to what prevented the assessee from filing the present evidence now instead of at time of*

assessment. Sufficient opportunities given at time of assessment a detailed questionnaire issued on 24-08-2011 followed by notice u/s 142(1) dated 16-11-2011, letter dated 09-12-2011 and 14-12-2011, show cause notice dated 2012-2011 and 23-12-2011 which goes to prove that there is no sufficient ground which prevented him for filing the details during the course of assessment and for which he has requested for admittance of additional grounds/evidences. Hence, the same may be rejected.

Comments of the Addl. CIT:- In addition to what A.O. has stated above numerous case laws supports the above position namely Moser Baer, FairDeal Filaments Ltd.(2008) 302 ITR 0173 Gujrat wherein it has been stated that no person is entitled to seek admission of additional evidence as a matter of right. Sufficient opportunity were granted to the assessee in the present case.

2.3 In his rejoinder, the appellant has stated as follows regarding admission of additional evidence:

In the above matter the appellant had furnished its reply earlier along with certain evidence which could not be furnished before the learned Assessing Officer. '-The Appellant also made a request for admission of this fresh evidence under Rule 46A of the Income Tax Rules, 1962. Your Honour had called for a remand report from the learned Assessing officer who furnished the same vide his letter dated 10.10.2012.

The learned assessing officer has firstly objected to admission of the fresh evidence under rule 46(A). The learned Assessing officer has however wrongly

observed that the assessee did not give any reason which prevented it from furnishing the evidence before the Assessing officer. The learned Assessing Officer has perhaps lost sight of last para of the appellant's submissions which reads as under-

"In view of above fact it requested to kindly grant necessary permission to provide additional evidence as due to change of Accountant the necessary details could not be furnished in time."

The Rules provide the appellant a right to produce additional evidence in the circumstances specified in Rule 46(A). It provides….

Your Honour may kindly appreciate that the appellant was handicapped because of change of Accountant during the period from August 2011 to Dec. 2012 and therefore the required evidence could not be completely furnished before the learned Assessing Officer. This is a very reasonable & sufficient cause which satisfies the condition specified in clause (b) of the Sub-Rule (1) of Rule 46A & therefore the appellant should be allowed to produce the evidence. There is no doubt that no person is entitled to seek admission of additional evidence as a matter of right but still the fact remains that in case of a reasonable & sufficient cause, the Appellate Authorities should allow submission of fresh evidence. There are innumerable judicial decisions as well as Board's instructions which lay down that the Departmental authorities should in all cases try to tax an assessee for his correct income and that will certainly not be possible in the present case if permission to adduce fresh evidence is denied.

In view of above submissions, your honour may kindly admit the fresh evidence now furnished by the appellant u/Rule 46A of IT Rules, 1962.

2.4 The submissions of the appellant and the facts have been carefully considered. In the asstt. order, the A.O. has given details of the opportunities given during asstt. proceedings.

(i) On page 1 & 2 of the asstt. order, the A.O. has stated that a notice u/s 143(2) was issue on 23.8.10 and notices u/s 142(1) and 143(2) were again issued on 3.8.11.

(ii) On pages 12 & 13 of the asstt. order, the A.O. has observed as follows:

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142 (1) dated 16-11-2011, Letter dated 09-12-2011, List of Details dated 14-12-2011 and show cause dated 20-12-2011 and 23-12-2011.

The Assessee Company was repeatedly asked to file the confirmations and details of the Share Applications. On 19-12-2012, details of the Share Applicants with PAN Nos and Addresses was hand delivered through an employee. Notices u/s 133(6) were issued. Notices to ultimate Solutions Pvt. Ltd. and Advent Trading Pvt. Ltd, came back unserved as on 30-12-2011. Since the other Notices have not been returned as on 30-12-2011, it is presumed that they have been served but are not complied with.

The point to be noted here is that the Assessee Company has not given any detail with regard to the Share Applicants, barring their Names, Addresses and PAN Nos. Based on the Addresses submitted by the Assessee Company, Notices u/s 133(6) were issued to all the 7 Parties. The fact the addresses were given with details of Share Applicants during the year as late as 19-12-2011 is the reason that the Notice u/s 133(6) could not be issued earlier.

After repeated follow up, the details of Vinod Vij, Director was filed. After follow up, another reply from Intercon Infotech Pvt. Ltd., was filed on 29-12-2011, but it is just a narration of amounts, without ITR copy and there is no bank statement.

During this entire process, repeatedly, the Assessee Company was being asked to file the required confirmations, but the Assessee Company has not failed to do so.

The following decisions since the principle of law which was to be applied in all these cases was common, by way of this singular judgment all these appeals were decided,

Commissioner of Income-tax v. Oasis Hospitalities P. Ltd.
Commissioner of Income-tax v. UP Bone Mills India Ltd.
Commissioner of Income-tax v. Vijay Power Generators Ltd.
Commissioner of Income-tax v. Director of Income-tax……...

(iii) On page 22 of the asstt. order, the A.O. has observed as follows:

In this case, in the absence of basic details, there was no occasion for the Assessing Officer to examine the creditworthiness of the Parties. When the details like addresses were submitted as late as 19-12-2011, there was no response to the Notices issued u/s 133(6). The email in case of Intercon Infotech Pvt. Ltd, was insufficient to prove the genuineness of the transaction.

The final show Cause dated 23-12-2011, issued to the Assessee Company is reproduced below to emphasize the efforts put in the undersigned to get the details on record….

(iv) On page 23 of the asstt. order, the A.O. has reproduced the show cause notice dated 23.12.12 issue to the appellant stating as follows:

Kindly refer to the Questionnaire issued by this office dated 24-08-2011, the Final Notice u/s 142(1) dated 16-11-2011, letter dated 09-12-2011, list dated 14-12-2011 and show cause dated 20-12-2011.

You are directed to file the following details:-

Despite repeated opportunities, you have not filed the details as called for by the above referred letters. Part and insufficient details have been sent to this office. No confirmations have filed with regard to Share application money and unsecured loans.

The pin code of Parijat Tie Up Pvt. Ltd., Kolkatta is of Delhi. This office contacted your representative for the correct pin code on 23-12-2011 and there has been no response.

In the list of Loans and Advances given during the year, there are no addresses mentioned apart from H M Informatics. No confirmations are filed.

It is seen that you have deliberately delayed the submission of names and addresses and amount to avoid cross verification. As this is a time barring assessment it is proposed that in absence of details and confirmation which were repeatedly asked by the undersigned, there is no choice but to add the respective amounts to the total income filed by you.

You can make your submission on or before 28-12-2011 at 11 am. This is the final show cause issued to you to file all the details called by this office. In absence of details, ex parte assessment will be done in your case.

Your failure to make any submission on this date will be taken as if you have nothing further to say on this issue. Your failure to respond to this letter will be taken to be your inability to substantiate the claims made by you in your Audited Accounts.

(v) On page 24 of the asstt. order, the A.O. has observed as follows:

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142 (1) dated 16-11-2011, Letter dated 09-12-2011, List of Details dated 14-12-2011 and show cause dated 20-12-2011 and 23-12-2011.No confirmations were filed.

On page 25 of the asstt. order, the A.O. has again observed as follows:

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142(1) dated 16-11-2011, Latter dated 09-12-2011, List of Details dated 14-12-

2011 and Show cause dated 20-12-2011 and 23-12-2011. No confirmations were filed.

2.5 It is apparent from the discussion in the asstt. order that sufficient opportunity was given during asstt. proceedings. A notice u/s 143(2) was issued on 23.8.10 and notices u/s 142(1) and 143(2) were again issued on 3.8.11. The A.O. has pointed out that a questionnaire was issued on 24-08-2011. Apart from this a notice u/s 142(1) dated 16-11-2011, letter dated 09-12-2011, List of Details required dated 14-12-2011 and Show cause dated 20-12-2011 and 23-12-2011, were also issued. The appellant has argued that "*appellant was handicapped because of change of Accountant during the period from August 2011 to Dec. 2012 and therefore the required evidence could not be completely furnished before the learned Assessing Officer*". This argument is unacceptable because no evidence in respect of this claim has been filed. Even if there was a change in accountant, the records were still available to the appellant and if the appellant could manage other aspects of his business, there is no reason why he could not comply to statutory notices in income tax proceedings. The appellant has claimed to be handicapped due a change in accountant for a very long period of 17 months. Surely, he would have made some alternative arrangements for such a long period. In this case, a notice u/s 143(2) was issued on 23.8.10 and notices u/s 142(1) and 143(2) were again issued on 3.8.11. A questionnaire was issued on 24.8.11 and after several opportunities, asstt. has been completed on 30.12.11. It is apparent from the discussion in the asstt. order that sufficient opportunity was given during asstt. proceedings. The appellant has failed to show that any of the conditions required in Rule 46A have been fulfilled. A failure to avail the opportunities granted does not mean a denial of opportunity. The facts and reasons mentioned by the A.O. have remained uncontroverted. In view of these facts, the additional evidence filed by the appellant is not admitted as none of the conditions laid down in Rule 46A are satisfied.

2.6 This view is supported by the following judicial decisions:

(i) JYOTSNA SURI v DCIT [1997] 61 ITD 139 (DELHI)

As regards admission of additional evidence by Commissioner (Appeals), it has been held by the Supreme Court in State of U.P. v. Manbodhan Lal Srivastava 1968 SCR 533, that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage to file in gaps. The mere fact that the evidence sought to be produced is vital does not constitute sufficient cause to allow its admission at the appellate stage. It is for the party seeking to adduce additional evidence to come within the four corners of rule 46A. It is trite law that evidence capable of being adduced should be credible from the relevancy and materiality

point of view. The jurisdiction to admit additional evidence is not the same as jurisdiction to admit additional ground or allow setting up of a new plea based on facts already on record. Onus is on the person seeking to adduce additional evidence to prove the circumstances enabling him to do so.

(ii) C UNNIKRISHNAN v CIT [1998] 233 ITR 485 (KER.)

Rule 46A shows that production of additional evidence is conditioned by certain situations. The assessee has to show that the Assessing Officer has refused to admit the evidence. The assessee also has to show alternatively that he was prevented by sufficient cause from producing the evidence before the Assessing Officer. Alternatively further the assessee also has to show its relevance to the grounds of appeal sought to be urged. Lastly, the assessee also has to establish that the Assessing Officer did not afford him sufficient opportunity in regard thereto. The material on record was abundantly clear that no attempt was made by the assessee before the Assessing Officer. In addition thereto, the contention raised before the Tribunal showed no regard to follow the requirements of the above rule. The Tribunal was, therefore, justified in holding that the appellate authority was justified in not considering the additional evidence.

2.7 Considering the facts, the additional evidence filed is not admitted.

3. Ground no.1 is general in nature and does not require separate adjudication as the issues challenged in appeal have been adjudicated while deciding other Grounds.

4.1 Ground no.2 challenges the disallowance of interest u/s 36(1)(iii). In the assessment order, the A.O. has stated as follows:

> *It is seen that the Company has granted interest free unsecured loans to Alka Vinayak of Rs. 24 Lacs, which is outstanding as on date. It has been recorded vide order sheet entry dated 29-12-2011 where the Director, Shri Vinod Vij, has explained that this is a business advance. This lady is a sister in law on the Director and also a Shareholder (less than 10%). There is no evidence substantiating that the purpose of the Advance is related to any business of the company or commercial expediency.*
>
> *The first analysis which is done is the amount of Borrowings of the Assessee Company.*
>
> *The Assessee Company has the following Borrowings:*

	A.Y. 2009-2010	A.Y. 2008-2009
Secured Loans	10,30,44,056	4,74,37,616

Unsecured Loans	*58,16,984*	*37,59,171*
Total Loans	*10,88,61,040*	*5,11,96,787*

The Finance expenses details are as follows:

	A.Y. 2009-2010	*A.Y. 2008-2009*
Finance Expenses	*1,99,20,211*	*1,03,72,652*

So it emerges that the Assessee Company has Total Borrowings of Rs. 16.00 crores and has paid Interest of Rs. 1.99 crores during the year.

As per details filed on 19-12-2011 the assessee-company, during the year made advance of Rs. 24 Lacs to one of the Shareholders, who also happens to be a relative of the Director.

The balance to Alka Vinayak is existing as on date. It is evident that this is also a loan to a Shareholder. The Assessee Company has not been able to prove any business exigency/purpose why these Interest free loan are extended to the shareholder.

In this regard, it may be noted that the assessee from time to time is raising loan and during the year has paid interest to various parties amounting to Rs. 1.99 crores. On the interest-free loan advance to a Shareholder, the Department has consistently taken the stand that in fact the interest bearing loans in a way has been utilized to make the interest-free advance to a Shareholder which is not for the purpose of business. The interest expenditure referable to the amount advanced to a Shareholder has been held to be not allowable while giving deduction for the interest expenditure.

The assessee is engaged in the civil Construction business. Where it borrows a huge sum of money, cash balance in its own account may show a huge amount and the same may not be determinative of the question as to whether the said amount was earned by way of profit or not. Normally, a company which is engaged in the civil Construction business would not grant any interest-free loan.

The assessee Company has submitted that the Loans are made from its own funds. In other words, the Assessee Company is arguing that no nexus had been established between borrowed funds and the Interest Free Loans of Rs. 24 Lacs. In the common pool of funds, it is difficult to ascertain whether Interest Free Loans/Advances had been made out of internal accruals or from borrowed funds. If the assessee had not extended these interest free loans, it would not have been required to borrow funds to that extent and consequently, the interest burden could have been reduced.....

In the case of the Assessee company, there are no conclusive evidences filed which can prove that the Interest Free Loans given to the Shareholder have been extended for any business purposes. This Shareholder also happens to be a relative of the Director of the Company.

On this basis, it is concluded that a part of the interest payment pertained to funds utilized for the purpose of giving Interest Free Loans of Rs.24 Lacs. An average rate of 12% is taken for calculation of interest pertaining to the amount of Rs.24,00,000/-.

The interest pertaining to Interest Free Loans works out as follows:-

Name of the Party	*Amount of Loan*	*Amount of Interest (12% for respective period)*	*Remark*
Alka Vinayak	*24,00,000/-*	*2,88,000/-*	*As discussed above*

I am convinced that the assessee company has furnished inaccurate particulars of such income, thereby concealing particulars of income and rendering itself liable for initiation of penalty proceedings u/s 271(1)(c). Penalty proceedings u/s 271(1)(c) read with section 274 are initiated separately.

ADDITION: Rs.2,88,000/-

2 In the remand report, the A.O. and the Addl. CIT have stated as follows:

1. *Addition of Rs.2,88,000/- made on account of interest on advance of Rs.24,00,000/- made to one of the share holders:*

   In this case, with regard to the above, the assessment order has discussed the issue in detail. The crux of the issue is that the borrowing should be for the purpose of business and commercial expediency behind advancing loans is the criteria to be produced by the assessee. In this case, further reliance is placed upon the following cases:

   - *SA Builders Vs. CIT (SC) 288 ITR 1*
   - *Punjab Stainless Steel CIT(Del) 324 ITR 396*
   - *CIT Vs. Accellerated Freeze Co. Ltd(Ker.) 324 ITR 316*

Even now, the assessee has not proved that the advance is for business purpose and also the evidence to show that the funds advanced by him are out of interest free funds. Hence, the submissions made by the assessee may kindly be rejected and the additions made by the Assessing Officer confirmed.

In the case of the Assessee company, there are no conclusive evidences filed which can prove that the Interest Free Loans given to the Shareholder have been extended for any business purposes. This Shareholder also happens to be a relative of the Director of the Company.

On this basis, it is concluded that a part of the interest payment pertained to funds utilized for the purpose of giving Interest Free Loans of Rs.24 Lacs. An average rate of 12% is taken for calculation of interest pertaining to the amount of Rs.24,00,000/-.

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ADDITION: Rs.2,88,000/-

4.2 In the remand report, the A.O. and the Addl. CIT have stated as follows:

1. *Addition of Rs.2,88,000/- made on account of interest on advance of Rs.24,00,000/- made to one of the share holders:*

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   - *CIT Vs. Accellerated Freeze Co. Ltd(Ker.) 324 ITR 316*

Even now, the assessee has not proved that the advance is for business purpose and also the evidence to show that the funds advanced by him are out of interest free funds. Hence, the submissions made by the assessee may kindly be rejected and the additions made by the Assessing Officer confirmed.

Comments of Addl.' CIT;- It is also added that the interest free unsecured loans have been given without any commercial expediency and to the sister in law of the director who is also a share holder. Further, the assessee;s company argument that no nexus has been established between borrowed funds and industry funds dies not carry much weight. Firstly, it is not possible to ascertain of interest free loans have been made from borrowed funds. Further, it is very evident that rationale behind the addition is availability of these funds for the company which would reduce borrowing funds to that extent. The case laws cited in the assessment order are also relied upon strongly.

4.3 In his rejoinder, the appellant has stated as follows:

The brief facts of this advance are that during the Financial year 2007-08 i.e. A.Y. 2008-09, the assessee made advance to this party aggregating to Rs. 29,00,000/- out of which Rs.5,00,000/- were received back. Copy of her account has already been furnished. It may kindly be seen that out of this Rs.25,00,000/- was given from appellants' current account with Canara Bank whereas only Rs. 4,00,000/- was paid from the overdraft account. The amount received back from her was also deposited back in the overdraft account. It would thus be clear that the balance remaining with her during the previous year was not out of overdraft carrying interest burden. The Learned Assessing Officer's observations that "It is difficult to ascertain whether interest free loans/advances had been made out of internal accruals or from borrowed funds" is thus not correct.

As already submitted, the appellant had free reserves of Rs.2,5125,670/- and interest free unsecured loans of Rs.58,16,984/- as on 1.4.2008. It has already been shown that the advance was not made out of the bank overdraft account. Further, the interest has been paid by the appellant to the bank only for the bank limits provided for specific purposes. There is therefore no justification to disallow in part the interest paid to banks where the Bank Overdraft has not been utilized by the appellant for making interest free advance.

4.4 The submissions of the appellant and the facts have been carefully considered. In the asstt. order, the A.O. has given detailed and valid reasons for making the addition. She has referred to several judicial decisions in support of the view taken. The appellant has not been able to explain the business purpose of the interest free loans given to a share holder and sister-in-law of the Director. While the appellant has given interest free loans to related persons, it has also paid interest on borrowings from the bank. In his reply, the appellant has failed to file any evidence in support of his claim that interest fee advances were given out of

interest free funds. Since details of receipts and payments are available with the appellant and not the Revenue, it is for the appellant to show the linkage as claimed, between interest free funds and interest free advances. It is settled law that burden of proving the allowability of a deduction, such as interest debited to the P&L account, is on the assessee and not on the Revenue. Therefore, it was for the appellant to demonstrate the linkage between interest free funds and interest free loans given by him. The burden of proving the claim that interest fee advances were given out of interest free funds, lay on the appellant. The appellant has failed to discharge his burden of proof in this regard. The AO's decision to disallow the interest debited to the P & L account is therefore, justified.

4.5 This view is supported by the following judicial decisions:

(i) **Motor General Finance v. CIT (2002) 254 ITR 449 (Del)**

There could not be any doubt whatsoever that the nexus between the amount paid by way of advance to a sister concern and the fund available at the relevant time in the assessee's hands must be found out from the advances taken by the assessee. The onus to prove that it was entitled to deduction in that regard was on the assessee. It was to be proved that a bona fide loan had been granted in favour of a sister concern. It was, therefore, its duty to place requisite materials on record. Keeping in view the fact that the assessee had not produced material, despite opportunities having been granted to it, by the Assessing Officer, the purported finding of fact arrived at by the Tribunal was perverse. Moreover, as the assessee was a finance company, it could show a huge amount at its hands at any point of time, but the bank accounts of the assessee during the relevant period having not been produced, it was for the Assessing Officer to ascertain as to whether the advance had been paid out of the loan taken by it or not. It was not expected that a financing company would advance an interest-free loan to another, when it itself took loan and paid interest upon the principal sum.

As the assessee could not produce any document in that regard, an adverse inference in terms of section 114 of the Indian Evidence Act was drawn to the effect that had those documents been produced, the same would have gone against the interest of the assessee. Thus, the Tribunal was not right in deleting the addition of Rs. 10 lakhs made on account of interest-free loan/advance given by the assessee to a sister concern.

(ii) **ACIT v Samrat Rice Mills P Ltd [2012] 23 taxmann.com 350 (Delhi - Trib.)**

Section 36(1)(iii) of the Income-tax Act, 1961 - Interest on borrowed capital - Assessment year 2008-09 - Whether once an assessee claims deduction under section 36(1)(iii), onus is on it to satisfy Assessing Officer that loans raised were used for business purposes and if it transpires that assessee had diverted certain fund to its sister concern without any interest,

assessee has to justify its action before Assessing Officer to his satisfaction - Held, yes - Whether where assessee failed to establish nexus of use of funds borrowed from bank for purpose of business to claim deduction under section 36(1)(iii), interest paid by assessee to bank to extent amounts were diverted to sister concerns or other persons on interest-free basis was to be disallowed - Held, yes [In favour of revenue]

4.6 The facts and reasons mentioned by the A.O. have remained uncontroverted. The appellant has failed to substantiate his claim that the asstt. order is erroneous on this issue. In view of the above, the addition made is justified and is upheld. The Ground is dismissed.

5.1 Ground no.3 challenges the addition u/s 68 of share application money. In the assessment order, the A.O. has stated as follows:

I. Introduction of Funds through Share Application and Premium;-
Details of Share Application introduced in the F.Y.2008-09. Total Share 213500 shares were issued at face value of Rs. 10, amounting to Rs. 213.25/- Lacs and at a premium of Rs. 20 amounting to Rs. 431.75/- Lacs

Party Name & Address	*Amount Introduced-Shares+Premium (In Lacs)*	*Remarks*
Vinod Vij 6/3, Kalkaji Extension, New Delhi-110019	*2,46,00,000*	*Confirmation Filed.*
Intercom Infotech Pvt. Ltd., L 252, Sant Nagar, 2nd Floor, New Delhi-110065	*1,04,00,000*	*Narration of amounts filed, no ITR and no bank Accounts.*
Advent Trading Pvt. Ltd., F-75, Mangal Bazaar, Gali No-9, New Delhi-110092	*30,00,000*	*Confirmation not Filed.*
Nipun Tradex Pvt. Ltd., 408, Ist Floor, West Guru Angad Kumar, Laxmi Nagar, New Delhi-110092	*35,00,000*	*Confirmation not Filed.*
Sidharth Chandra, S-52, Ground Floor, GK 1, New Delhi-110048	*1,45,00,000*	*Confirmation not Filed.*
Ultimate Solution Pvt. Ltd., B-979, Shastri Nagar, New Delhi-110052	*35,00,000*	*Confirmation not Filed.*

Parijat Tie up Pvt. Ltd., 255, Canal Street, VIP Road, Kolkatta-110048	*50,00,000*	*Confirmation not Filed.*
Total	*6,45,00,000*	

Out of total Share Application and Premium of Rs.6,45,00,000/-, Confirmations of Rs.2,46,00,000 is filed with copy of ITR.

The Narration of amounts of Rs.1,04,00,000/- are filed by the respective Company but with no ITR and no bank Accounts.

And for Rs.2,95,00,000/- there are no confirmations, no ITR and no bank Accounts.

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142 (1) dated 16-11-2011, Letter dated 09-12-2011, List of Details dated 14-12-2011 and show cause dated 20-12-2011 and 23-12-2011.

The Assessee Company was repeatedly asked to file the confirmations and details of the Share Applications. On 19-12-2012, details of the Share Applicants with PAN Nos and Addresses was hand delivered through an employee. Notices u/s 133(6) were issued. Notices to ultimate Solutions Pvt. Ltd. and Advent Trading Pvt. Ltd, came back unserved as on 30-12-2011. Since the other Notices have not been returned as on 30-12-2011, it is presumed that they have been served but are not complied with.

The point to be noted here is that the Assessee Company has not given any detail with regard to the Share Applicants, barring their Names, Addresses and PAN Nos. Based on the Addresses submitted by the Assessee Company, Notices u/s 133(6) were issued to all the 7 Parties. The fact the addresses were given with details of Share Applicants during the year as late as 19-12-2011 is the reason that the Notice u/s 133(6) could not be issued earlier.

After repeated follow up, the details of Vinod Vij, Director was filed. After follow up, another reply from Intercon Infotech Pvt. Ltd., was filed on 29-12-2011, but it is just a narration of amounts, without ITR copy and there is no bank statement.

During this entire process, repeatedly, the Assessee Company was being asked to file the required confirmations, but the Assessee Company has not failed to do so.

The following decisions since the principle of law which was to be applied in these cases was common, by way of this singular judgment all these appeals were decided,

- *Commissioner of Income-tax v. Oasis Hospitalities P. Ltd.*
- *Commissioner of Income-tax v. UP Bone Mills India Ltd.*

Commissioner of Income-tax v. Vijay Power Generators Ltd.
Commissioner of Income-tax v. Director of Income-tax.....

In this case, in the absence of basic details, there was no occasion for the Assessing Officer to examine the creditworthiness of the Parties. When the details like addresses were submitted as late as 19-12-2011, there was no response to the Notices issued u/s 133(6). The email in case of Intercon Infotech Pvt. Ltd, was insufficient to prove the genuineness of the transaction.

The final show Cause dated 23-12-2011, issued to the Assessee Company is reproduced below to emphasize the efforts put in the undersigned to get the details on record.

To,

The Principal Officer
Vij Construction Ltd.,
6/3, Kalkaji Extension,
Opp. Nehru Place, Kalkaji,
New Delhi-110019

SUBJECT: Details with regard to pending Assessment Proceedings- A.Y. 2009-2010- LAST FINAL OPPORTUNITY

Kindly refer to the Questionnaire issued by this office dated 24-08-2011, the Final Notice u/s 142(1) dated 16-11-2011, letter dated 09-12-2011, list dated 14-12-2011 and show cause dated 20-12-2011.
You are directed to file the following details:-
Despite repeated opportunities, you have not filed the details as called for by the above referred letters. Part and insufficient details have been sent to this office. No confirmations have filed with regard to Share application money and unsecured loans.
The pin code of Parijat Tie Up Pvt. Ltd., Kolkatta is of Delhi. This office contacted your representative for the correct pin code on 23-12-2011 and there has been no response.
In the list of Loans and Advances given during the year, there are no addresses mentioned apart from H M Informatics. No confirmations are filed.
It is seen that you have deliberately delayed the submission of names and addresses and amount to avoid cross verification. As this is a time barring assessment it is

proposed that in absence of details and confirmation which were repeatedly asked by the undersigned, there is no choice but to add the respective amounts to the total income filed by you.

You can make your submission on or before 28-12-2011 at 11 am. This is the final show cause issued to you to file all the details called by this office. In absence of details, ex parte assessment will be done in your case.

Your failure to make any submission on this date will be taken as if you have nothing further to say on this issue. Your failure to respond to this letter will be taken to be your inability to substantiate the claims made by you in your Audited Accounts.

The Final show cause issued to the assessee Company is reproduced below to emphasize the efforts to make the Assessee Company comply with the details called for by the undersigned.

Notice u/s 142(1) dated 23-12-2011 issued for compliance….

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142 (1) dated 16-11-2011, Letter dated 09-12-2011, List of Details dated 14-12-2011 and show cause dated 20-12-2011 and 23-12-2011.No confirmations were filed.

In view of the above detailed discussion the following additions are being done:

(1) In the case of Intercon Infotech Pvt. Ltd (Rs.1,04,00,000), the detail filed via mail is just a narration of amounts, it does not include the ITR copy, bank Statements. Since the Bank account details are not furnished and the credit worthiness of he party is not proceed, hence, addition of Rs.1,04,00,000/- is being done on in the hands of the Assessee Company u/s 68, as no details are filed. Notice u/s 133(6) was issued and there has been no response.

(2) In the case of Mr. Sidharth Chandra, S-52, Ground floor, GK 1, New Delhi-110048 (Rs.1,45,00,000), who is the Son in law of the Director, Mr Vinod Vij, no details are filed. The Addition of Rs.1,45,00,000/- is being done on in the hands of the assessee Company u/s 68, as no details are filed. Notice u/s 133(6) was issued and there has been no response.

(3) In the following cases, the Assessee Company has not filed any details barring the address and PAN. Based on these addresses, Notices u/s 133(6) were issued. Notices to Ultimate Solutions Pvt. Ltd and Advent Trading Pvt. Ltd, came back unserved as on 30-12-2011. Since the other Notice to Nipun Tradex Pvt Ltd. have not been returned as on 30-12-2011, it is presumed that it has been served but not complied with.

In case of Parijat Tie up Pvt. Ltd, the Assessee Company had given wrong PIN Code, hence, notice u/s 133(6) could not be sent.

As has discussed above, despite repeated opportunities, no compliance was done by the Assessee Company. Hence in the following cases additions are being done u/s 68:

Share Applicant (alleged)	*Amount*
Advent Trading Pvt. Ltd., F-75, Mangal Bazaar, Gali No-9, New Delhi-110092	*30,00,000*
Nipun Tradex Pvt. Ltd., 408, Ist Floor, West Guru Angad Kumar, Laxmi Nagar, New Delhi-110092	*35,00,000*
Ultimate Solution Pvt. Ltd., B-979, Shastri Nagar, New Delhi-110052	*35,00,000*
Parijat Tie up Pvt. Ltd., 255, Canal Street, VIP Road, Kolkatta-110048	*50,00,000*
Total	*1,50,00,000*

Hence, the amount of Share Application of Rs.3,99,00,000/- is added u/s 68 of the Income Tax Act, 1961.

5.2 In the remand report, the A.O. and the Addl. CIT have stated as follows:

The assessee was asked to file the confirmations along with ITR and bank statements to prove the creditworthiness of the assessee's who have infused share capital. The same has been discussed in the assessment order in detail. The assessee has even now not given the reasons for the non-service of the notices u/s 133(6) issued during the course of assessment proceedings.

Even the details furnished in respect of M/s Parijat Tie Up Pvt.Ltd. filed now along with the balance sheet of the company shows that this assessee has got no funds of its own and the same have been borrowed by this company. Even the profit and loss account shows and income if Rs. 68,070/-. Hence, the creditworthiness of the assessee is in serious doubt.

In respect of the other companies namely M/s Advent Trading Pvt. Ltd., M/s Ultimate I.T. Solutions Pvt. Ltd. and M/s Nipun Tradex Pvt. Ltd., it is seen that the confirmations are all similar and dated 01-04-2009 given raise to suspension regarding the transactions. Furthermore, it is seen that the auditor in respect of the share holders is the same and the income of these companies is quite low to justify the huge amount of share capital infused. Even the bank accounts of all these companies are at Kotak Mahindra Bank,Chandni Chauk, New Delhi-110006.

In respect of the share capital of Rs.1.04 Crores infused by M/s intercom InfoTech Pvt. Ltd., the assessee has still not filed the copy of the ITR and bank statements which was called during the course of assessment proceedings and the creditworthiness is not prove.

In respect of Shri Sidharth Chandra who has infuse a share capital of Rs.1.45 crores to whom notice u/s 133(6) was issued by no reply was filed during the course of assessment proceedings. Still, no evidence has been filed in respect of the same.

Hence, the submissions made by the assessee may kindly be rejected and the additions made by the Assessing Officer confirmed.

Comments of Addl. CIT:- Beside the above mentioned facts it may be noted that all the confirmations from Advent, Ultimate and Nipun Traders are in an identical format, signed by the same director. Further, the date of debit of 30,00,000/- is 31-10-2008 for Advent, 35,00,000/- for Ultimate and 35,00,000/- for Nipun Traders all to on 31-10-2008.

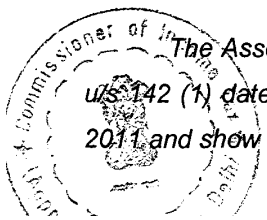
Keeping in mind the probability of surrounding circumstances and 82 ITR 540 Durga Prasad More is applicable here.

Further, the most important fact is that assessee has not provided details of M/s Intercom Infotech Pvt. Ltd. for 1.04 Cr. And 1.45 Cr. In respect of Shri. Sidhartha Chandra.

Absence of adequate explanation by assessee entitles the A.O. to make an addition. R. Dalmia 113 ITR 522, 72 ITR 194 Supreme Court. If assessee fails to discharge the onus the addition is warranted, 228 ITR Supreme Court, Hero Cycles.

5.3 In his rejoinder, the appellant has stated that "*During the course of assessment proceedings, the PAN and address of all above shareholders were submitted. The learned Assessing Officer issued notice u/s 133(6) out of which some were presumed served whereas ones issued to M/s Ultimate Solution Pvt. Ltd. And Advent Trading Pvt. Ltd. Were received back unserved*". The appellant has relied on the additional evidence filed and argued that the addition should be deleted.

5.4 The submissions of the appellant and the facts have been carefully considered. In the asstt. order, the A.O. has pointed out the following:



The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142 (1) dated 16-11-2011, Letter dated 09-12-2011, List of Details dated 14-12-2011 and show cause dated 20-12-2011 and 23-12-2011.

The Assessee Company was repeatedly asked to file the confirmations and details of the Share Applications. On 19-12-2012, details of the Share Applicants with PAN Nos and Addresses was hand delivered through an employee. Notices u/s 133(6) were issued. Notices to ultimate Solutions Pvt. Ltd. and Advent Trading Pvt. Ltd, came back unserved as on 30-12-2011. Since the other Notices have not been returned as on 30-12-2011, it is presumed that they have been served but are not complied with.

The point to be noted here is that the Assessee Company has not given any detail with regard to the Share Applicants, barring their Names, Addresses and PAN Nos. Based on the Addresses submitted by the Assessee Company, Notices u/s 133(6) were issued to all the 7 Parties. The fact the addresses were given with details of Share Applicants during the year as late as 19-12-2011 is the reason that the Notice u/s 133(6) could not be issued earlier.

After repeated follow up, the details of Vinod Vij, Director was filed. After follow up, another reply from Intercon Infotech Pvt. Ltd., was filed on 29-12-2011, but it is just a narration of amounts, without ITR copy and there is no bank statement.

During this entire process, repeatedly, the Assessee Company was being asked to file the required confirmations, but the Assessee Company has not failed to do so……..

In this case, in the absence of basic details, there was no occasion for the Assessing Officer to examine the creditworthiness of the Parties. When the details like addresses were submitted as late as 19-12-2011, there was no response to the Notices issued u/s 133(6). The email in case of Intercon Infotech Pvt. Ltd, was insufficient to prove the genuineness of the transaction.

The final show Cause dated 23-12-2011, issued to the Assessee Company is reproduced below to emphasize the efforts put in the undersigned to get the details on record……

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142 (1) dated 16-11-2011, Letter dated 09-12-2011, List of Details dated 14-12-2011 and show cause dated 20-12-2011 and 23-12-2011.No confirmations were filed…

In view of the above detailed discussion the following additions are being done:

(1) In the case of Intercon Infotech Pvt. Ltd (Rs.1,04,00,000), the detail filed via is just a narration of amounts, it does not include the ITR copy, bank Statements. Since the Bank account details are not furnished and the credit

worthiness of he party is not proceed, hence, addition of Rs.1,04,00,000/- is being done on in the hands of the Assessee Company u/s 68, as no details are filed. Notice u/s 133(6) was issued and there has been no response.

(2) In the case of Mr. Sidharth Chandra, S-52, Ground floor, GK 1, New Delhi-110048 (Rs.1,45,00,000), who is the Son in law of the Director, Mr Vinod Vij, no details are filed. The Addition of Rs.1,45,00,000/- is being done on in the hands of the assessee Company u/s 68, as no details are filed. Notice u/s 133(6) was issued and there has been no response.

(3) In the following cases, the Assessee Company has not filed any details barring the address and PAN. Based on these addresses, Notices u/s 133(6) were issued. Notices to Ultimate Solutions Pvt. Ltd and Advent Trading Pvt. Ltd, came back unserved as on 30-12-2011. Since the other Notice to Nipun Tradex Pvt Ltd. have not been returned as on 30-12-2011, it is presumed that it has been served but not complied with.

In case of Parijat Tie up Pvt. Ltd, the Assessee Company had given wrong PIN Code, hence, notice u/s 133(6) could not be sent.

As has discussed above, despite repeated opportunities, no compliance was done by the Assessee Company. Hence in the following cases additions are being done u/s 68.....

Hence, the amount of Share Application of Rs.3,99,00,000/- is added u/s 68 of the Income Tax Act, 1961.

5.5 It is apparent from the discussion in the asstt. order that sufficient opportunity was given during asstt. proceedings but the appellant failed to furnish the required details. A failure to avail the opportunities granted does not mean a denial of opportunity. An adverse inference is naturally drawn and the appellant's claim remains unestablished. The facts and reasons mentioned by the A.O. have remained uncontroverted. Considering the facts, the additional evidence filed by the appellant has not been admitted as none of the conditions laid down in Rule 46A are satisfied.

5.6 In the remand report, the A.O. has pointed out that the appellant has even now not explained why the notices issued u/s 133(6) to these persons were returned unserved by the postal authorities. The A.O. has further pointed out that "*Even the details furnished in respect of M/s Parijat Tie Up Pvt.Ltd. filed now along with the balance sheet of the company shows that this assessee has got no funds of its own and the same have been borrowed by this company. Even the profit and loss account shows and income if Rs. 68,070/-. Hence, the creditworthiness of the assessee is in serious doubt.In respect of the other companies*

namely M/s Advent Trading Pvt. Ltd., M/s Ultimate I.T. Solutions Pvt. Ltd. and M/s Nipun Tradex Pvt. Ltd., it is seen that the confirmations are all similar and dated 01-04-2009 given raise to suspension regarding the transactions. Furthermore, it is seen that the auditor in respect of the share holders is the same and the income of these companies is quite low to justify the huge amount of share capital infused. Even the bank accounts of all these companies are at Kotak Mahindra Bank,Chandni Chauk, New Delhi-110006.In respect of the share capital of Rs.1.04 Crores infused by M/s intercom InfoTech Pvt. Ltd., the assessee has still not filed the copy of the ITR and bank statements which was called during the course of assessment proceedings and the creditworthiness is not prove. In respect of Shri Sidharth Chandra who has infuse a share capital of Rs.1.45 crores to whom notice u/s 133(6) was issued by no reply was filed during the course of assessment proceedings. Still, no evidence has been filed in respect of the same.

5.7 It is apparent from the above that even if the additional evidence filed by the appellant is admitted and considered, the appellant has still failed to prove the identity and capacity of these persons and the genuineness of the transactions. The appellant has not been able to explain why the notices issued u/s 133(6) to these persons were returned unserved by the postal authorities. The evidence sought to be filed by the appellant showing the existence of some companies is not sufficient. In any case, mere existence on record is not enough to prove their creditworthiness, and genuineness of the transactions, particularly in view of the appellant's failure to produce these persons for cross examination. It is incorrect to say that the burden was on the A.O. to prove that these credits were unexplained. In such matters, the A.O. cannot be asked to prove the impossible and the addition is to be tested on the anvil of 'preponderance of probabilities', and not of 'beyond reasonable doubt'. The surrounding circumstances and the appellant's failure to discharge their burden of proof, shows that the credits were bogus accommodation entries. Considering the facts, the appellant has clearly failed to discharge his onus of proof.

5.8 The appellant's claim that mere filing of return is sufficient and payment by cheque is sufficient proof of capacity is not acceptable. This view is supported by the following decisions:

(1) ITO v. Diza Holdings (P) Ltd. (2002) 255 ITR 573 (Ker)

On the terms of section 68, the burden is on the assessee to offer a satisfactory explanation about the nature and source of the amount found credited in the books of the assessee. It is also clear that the mere furnishing of particulars is not enough. The mere fact that payment is by way of account payee cheque is also not conclusive. Therefore, the Assessing Officer

was entitled to consider whether notwithstanding the fact that the payments were not made by cheques, whether the assessee had satisfactorily explained the nature and source of the amounts found credited in the books of the assessee.

(2) CIT v. United Commercial & Indl. Co.(P) Ltd. (1991) 187 ITR 596 (Cal)

Mere production of confirmation letters before the ITO would not by itself prove that the loans have been obtained from those loan creditors or they have credit worthiness.
The Tribunal misdirected itself in holding that the transactions were genuine simply because some of the transactions were made by cheques.

(3) Sumati Dayal v CIT (1995) 214 ITR 801 (SC)

Taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities

5.9 The appellant has referred to certain judicial decisions but they are on different facts. In a case where funds are claimed to have been received from dubious private limited companies, the standard of proof required has to be greater. In this regard, the following observations of the Hon'ble Delhi High Court in **Nova Promoters** (supra) are significant:

> *The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec. 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of*

material showing that the share subscriptions were collected as part of a pre-meditated plan - a smokescreen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec. 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.

5.10 In **Nova Promoters** (supra), the Hon'ble High Court also referred to the observations of the Hon'ble Supreme Court in the case of Durga Prasad More. The Hon'ble High Court have observed as follows:

*In the course of the assessment proceedings, the assessee had adduced documentary evidence in an attempt to prove all the three ingredients of Section 68 viz. (i) identity of the creditor, (ii) creditworthiness of the creditor and (iii) the genuineness of the transaction. But the question before us cannot be resolved merely on the basis of the documentary evidence. The evidence adduced by the assessee has to be examined not superficially but in depth and having regard to the test of human probabilities and normal course of human conduct. Before we proceed to note the findings of the Tribunal and decide whether they have been properly arrived at, it is relevant to note a few judgments of the Supreme Court. In CIT v . **Durga Prasad More** [1971] 82 ITR 540 Hegde J. speaking for the Supreme Court observed as under: -*

"Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will b e very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent

was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

5.11 The addition made by the A.O. is supported by the following judicial decisions:

(1) CIT v Nova Promoters & Finlease (P) Ltd. [2012] 342 ITR 169 (Delhi)

Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2000-01 - For relevant assessment year, assessee filed its return declaring loss - Said return was processed under section 143(1) - Subsequently, Assessing Officer received information from Investigation Wing that assessee had obtained accommodation entries in garb of share application monies - In order to examine genuineness and creditworthiness of companies which gave entries to assessee, Assessing Officer issued summons to two persons namely, 'M' and 'R' who did not appear before him - Subsequently, assessee filed a letter with Assessing Officer along with affidavits of 'R' and 'M' in which both of them had stated that transactions with assessee were genuine and earlier statements recorded from them by investigation wing were given under pressure - Assessing Officer did not accept those affidavits and made certain addition to assessee's income under section 68 - Tribunal, however, taking a view that there was no dispute about identity of shareholders namely 'M' and 'R', deleted addition made by Assessing Officer - On revenue's appeal, it was noted that both 'M' and 'R' had admitted before Additional Commissioner (Investigation) that they were acting as accommodation entry providers - They had also given a list of 22 companies in which they were operating accounts - It was also apparent that out of 22 companies whose names figured in information given by them to investigation wing, 15 companies had provided so-called 'share subscription monies' to assessee - Whether on facts, there was specific involvement of assessee-company in modus operandi followed by 'M' and 'R' - Held, yes - Whether, therefore, impugned order passed by Tribunal deleting addition was to be set aside - Held, yes [In favour of revenue]

(2) Dhingra Global Credence (P) Ltd. v. ITO [2010] 1 ITR(TRIB.) 529 (DELHI)

The identity of a person is not proved on paper. The record available with the Registrar of Companies is as filed by some persons but the office of the Registrar of Companies never took any action to verify the existence of the companies at the so-

called addresses. Since the existence of the respective share applicants itself is not found to be proved, the Assessing Officer could not further enquire as to the source of their investment. Therefore, none of the case law relied on by learned counsel for the assessee will apply to the facts of the present case.

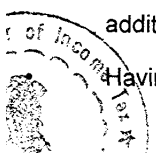
7. As rightly contended by the learned Departmental representative, the assessee being a private limited company, the basic structure of a private limited company is such that a private limited company cannot make an invitation for issue of shares to the public. The private limited company is/ are prohibited from making any invitation to the public to subscribe for any shares in the company. This provision is contained in section 3 of the Companies Act, 1956, whereby sub-clause (iii) of sub-section (1) of section 3 defines a "private company". The primary document to hold that the amount was received by way of share application itself is missing, i.e., the application for allotment of shares itself. As per the balance-sheet of the assessee-company, as per its profit and loss account for the year ended March 31, 2004, there were neither any business nor any income. It only incurred administrative expenses of Rs. 24,356 and the unabsorbed losses stood at Rs. 51,512. Neither was there any business plan nor any instance which affects the profitability of the company to an extent that it can command a premium nine times its face value. As a common perception prevailing even in case of listed companies, the price is generally related to the earning per share and such profit earning ratio is generally 10. Therefore, if the profit earning ratio is one, the market price will be to the extent of its face value. In the present case it is seen that the company has negative reserve and incurred losses all along. Therefore, it will be putting blinker on the eye to believe that the company commands premium as high as nine times its face value. Therefore, there is something more than that meets the eye. Mere filing of undated confirmation letters/affidavits will not prove the identity of the share applicants or the genuineness of the transaction. The observation of the hon'ble Supreme Court while deciding the special leave petition in the case of Lovely Exports (P.) Ltd. [2009] 319 ITR (St.) 5 ; 216 CTR 195, cannot be considered to be a law declared which has a binding precedent under article 141 of the Constitution of India. Such observations are purely on the facts of the respective case and cannot be applied across the board even when the facts in other cases are altogether different. The court while deciding the appeal will not put blinker in its sight and merely believe what is written on paper but also consider concerning circumstances and ground reality as observed by the hon'ble Supreme Court in the cases of CIT v. Durga Prasad More [1971] 82 ITR 540 and Sumati Dayal [1995] 214 ITR 801 . In the present case in spite of all the efforts where the Assessing Officer could not even locate the respective so-called

applicants, the assessee could file undated confirmations and affidavits. Therefore, it is a case where all the papers are manufactured at the instance of the assessee and not the real transaction. We, therefore, merely on the basis of such papers cannot hold that the amount received by way of share capital is explained within the meaning of section 68 of the Act. The Full Bench of the Delhi High Court in the case of Sophia Finance Ltd. [1994] 205 ITR 98 have held that the provision of section 68 shall equally apply even in the case of amount stated to be received towards share capital. Since the assessee failed to prove even the basic identity as also the creditworthiness and the genuineness of the transaction in the form of share premium, the addition was rightly made by the Assessing Officer.

(3) CIT v N. R. Portfolio P Ltd. [2013] 29 taxmann.com 291 (Delhi)

Duties of assessee in case of receipt of cash from investors

- The instant Bench is conscious of a view taken in some of the previous decisions that the assessee cannot be faulted if the share applicants do not respond to summons and that the revenue authorities have the wherewithal to compel anyone to attend legal proceedings. However, that is merely one aspect.
- An assessee's duty to establish that the amounts which the Assessing Officer propose to add back under section 68 are properly sourced does not cease by merely furnishing the names, addresses, PAN particulars and entries in Registrar of Companies website. One must remember that in all such cases the company is a private one and share applicants are known to it, since they are issued on private placement or even on request basis. If the assessee has access to the share applicant's PAN particulars or bank account statement, surely its relationship is closure than arm's length. Its request to such concerns to participate in income-tax proceedings, would, viewed from a pragmatic perspective, be quite strong, because the next possible step for the tax administrators could well be reopening of such investor's proceedings.
- That apart, the concept of 'shifting onus' does not mean that once certain facts are provided, the assessee's duties are over. If on verification or during proceedings the Assessing Officer cannot contact the share applicants or the information becomes unverifiable or there are further doubts in the pursuit of such details, the onus shifts back to the assessee. At that stage if it falters, the consequence may well be an addition under section 68. [Para 8]



Having regard to the totality of facts and circumstances particularly the remand

report the appellate authorities were wrong in deleting the impugned addition made by the Assessing Officer. [Para 9]

(4) CIT v Nipun Builders & Developers P Ltd. [2013] 30 taxmann.com 292 (Delhi)

Onus is upon the assessee to prove the identity and creditworthiness of subscribers and the genuineness of transactions under section 68

- Under section 68 the onus is on the assessee to prove the three ingredients, i.e., identity and creditworthiness of the person from whom the monies were taken and the genuineness of the transaction. As to how the onus can be discharged would depend on the facts and circumstances of each case. It is expected of both the sides - The assessee and the assessing authority - to adopt a reasonable approach.
- The assessee was a private limited company, which cannot issue shares in the same manner in which a public limited company does. It has to generally depend on persons known to its directors or shareholders directly or indirectly to buy its shares. Once the monies are received and shares are issued, it is not as if the share-subscribers and the assessee-company lose touch with each other and become incommunicado. It is a continuing relationship.
- The share-subscribers in the present case have each invested substantial amounts in the assessee's shares. Most of them, barring two or three, are themselves private limited companies. The assessee-company received the share monies; it even says that the communications sent by it at the addresses did not return unserved, yet when the Assessing Officer requested it that too only after trying to serve the summons unsuccessfully to produce the principal officer of the subscribing companies, the assessee developed cold feet and said it cannot help if those companies did not appear and that it was for the Assessing Officer to enforce their attendance.
- It was not open to the assessee, given the facts of this case, to direct the Assessing Officer to go to the website of the company law department/ROC and search for the addresses of the share-subscribers and then communicate with them for proof of the genuineness of the share-subscription. That is the onus of the assessee, not of the Assessing Officer. [Para 7]
- So far as creditworthiness of the share subscribers is concerned, difficulty may be faced by the assessee to unimpeachably establish the creditworthiness of the share-subscribers, but at the same time mere furnishing of the copies of the bank accounts of the subscribers is not sufficient to prove their creditworthiness. There must be

some positive evidence to show the nature and source of the resources of the share-subscriber himself.

• If the assessee was serious enough to establish its case, it ought to have produced the principal officers of the subscribing companies before the Assessing Officer so that they could explain the sources from which the share-subscription was made. That would also have taken care of the difficulty of the assessee in proving the creditworthiness of the subscriber companies.

• Instead , the assessee took an adamant, attitude and failed to comply with the direction of the Assessing Officer. It also challenged the Assessing Officer's finding that the summons sent to the companies came back unserved with the remark 'no such company', which was also supported by the report of the inspector who made a visit to the addresses.

• The assessee thus took a very extreme stand which was not justified; certainly it did nothing worthwhile to discharge the onus to prove the creditworthiness of the subscribing companies. [Para 8]

Tribunal did not seriously appraise the facts and circumstances of the case.

• A perusal of the order of the Tribunal shows that it has gone on the basis of the documents submitted by the assessee before the Assessing Officer and has held that in the light of those documents, it can be said that the assessee has established the identity of the parties. It has further been observed that the report of the investigation wing cannot conclusively prove that the assessee' s own monies were brought back in the form of share application money.

• It is not the burden of the Assessing Officer to prove that connection. There has been no examination by the Tribunal of the assessment proceedings in any detail in order to demonstrate that the assessee has discharged its onus to prove not only the identity of the share applicants, but also their creditworthiness and the genuineness of the transactions.

• No attempt was made by the Tribunal to scratch the surface and probe the documentary evidence in some depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee has discharged its onus under section 68.

• With respect, it appears that there has only been a mechanical reference to the case-law on the subject without any serious appraisal of the facts and circumstances of the case. [Para 12]

• In view of above, it has to be held that the Tribunal was not right in law in upholding the order of the Commissioner (Appeals) deleting the addition made under section 68 on the ground that the assessee had proved the nature and source of the

share subscription money and had established the identity and creditworthiness of the share-subscribers and the genuineness of the transactions. [Para 13]

5.12 In view of the facts discussed above, the addition made by the A.O. is justified and is upheld. The Ground is dismissed.

6.1 Ground no.4 challenges the addition u/s 68 of unsecured loans. In the assessment order, the A.O. has stated as follows:

The Assessee Company has taken the following unsecured Loans during the year:

Name of the Party	*Amount (in Lacs)*	*Remarks*
Vijay Rai, IInd Floor, Verma Complex, Above PNB Sukhrali, Gurgaon-122001	*5.00*	*No confirmation filed. Amount received in Cash*
Intercon Recyclopolis Pvt. Ltd., L252, Sant Nagar, 2nd Floor, New Delhi-110065	*24.30*	*Narration of amounts Filed and no bank Accounts and no PAN mentioned.*

The applicability of Section 68 and the basic details to be filed for establishing the genuineness of Loan/Deposit or Share Application has been discussed at length in the foregoing paras above. In the case of the Loan from Vijay Rai, the amount is taken in cash and despite repeated letter and questionnaires, the assessee Company has failed to produce any confirmation or bank statement or ITR copy of the person. In the details filed on 19-12-2011, the PAN No. is also not mentioned. Notice issued u/s 133(6) has come back unserved.

In the case of the Loan from Intercon Recyclopolis Pvt. Ltd., the assessee Company has failed to produce any confirmation or bank statement or ITR copy of the Company. In the details filed on 19-12-2011, the PAN No. is also not mentioned. After repeated follow up, an email was received from Intercon Recyclopolis Pvt. Ltd, on 29-12-2011 at 09:09P.M. Narrating the amounts, however in absence of copy of ITR and bank Statements which has ot been submitted, the amount of Rs.24.30 Lacs is added u/s 68. Notice issued u/s 133(6) has not come back unserved as on 30-12-2011 and therefore, presumed that it is not complied with. The PAN o this party is not filed.

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142(1) dated 16-11-2011, Latter dated 09-12-2011, List of Details dated 14-12-

2011 and Show cause dated 20-12-2011 and 23-12-2011. No confirmations were filed.

In the light of these fact, the amount of Rs.29,30,000/- is added back to the income of the Assessee Company u/s 68 of the Income Tax Act 1961.

6.2 In his rejoinder, the appellant has stated as follows:

It is submitted that necessary documents in respect of the two depositors namely Sh. Vijay Rai (Rs. 5lacs) & M/s Intercon Recyclopolis Pvt. Ltd. were inadvertently left to be attached with the previous submissions. The same are being submitted now. From these documents, your honour would appreciate that the identity of the depositors is proved. They are regularly assessed to tax as is evident from their details. As such the deposits should be treated as genuine, the appellant having discharged its onus.

6.3 The submissions of the appellant and the facts have been carefully considered. In the asstt. order, the A.O. has poir.ted out the following:

In the case of the Loan from Vijay Rai, the amount is taken in cash and despite repeated letter and questionnaires, the assessee Company has failed to produce any confirmation or bank statement or ITR copy of the person. In the details filed on 19-12-2011, the PAN No. is also not mentioned. Notice issued u/s 133(6) has come back unserved.

In the case of the Loan from Intercon Recyclopolis Pvt. Ltd., the assessee Company has failed to produce any confirmation or bank statement or ITR copy of the Company. In the details filed on 19-12-2011, the PAN No. is also not mentioned. After repeated follow up, an email was received from Intercon Recyclopolis Pvt. Ltd, on 29-12-2011 at 09:09P.M. Narrating the amounts, however in absence of copy of ITR and bank Statements which has ot been submitted, the amount of Rs.24.30 Lacs is added u/s 68. Notice issued u/s 133(6) has not come back unserved as on 30-12-2011 and therefore, presumed that it is not complied with. The PAN o this party is not filed.

The Assessee Company was issued Questionnaire dated 24-08-2011, Notice u/s 142(1) dated 16-11-2011, Latter dated 09-12-2011, List of Details dated 14-12-2011 and Show cause dated 20-12-2011 and 23-12-2011. No confirmations were filed.

6.4 In the remand report, the A.O. has pointed out that the "*The copy of the assessee's submission does not have any documents or supporting evidence in respect of the loans taken*". In his rejoinder to the remand report, the appellant has stated that "*It is submitted that necessary documents in respect of the two depositors namely Sh. Vijay Rai (Rs. 5lacs) & M/s Intercon Recyclopolis Pvt. Ltd. were inadvertently left to be attached with the previous submissions. The same are being submitted now*".

6.5 It is apparent from the discussion in the asstt. order that sufficient opportunity was given during asstt. proceedings but the appellant failed to furnish the required details. The facts and reasons mentioned by the A.O. have remained uncontroverted. The appellant has failed to show that any of the conditions required in Rule 46A have been fulfilled. A failure to avail the opportunities granted does not mean a denial of opportunity. Additional evidence cannot be admitted particularly at the stage of rejoinder to the remand report and it is apparent that the appellant has been negligent rather than prevented by reasonable cause in filing the additional evidence. In view of these facts, and in view of the detailed discussion in para 2 above, the additional evidence filed by the appellant is not admitted as none of the conditions laid down in Rule 46A are satisfied.

6.6 It is apparent from the above that the appellant has failed to prove the identity and capacity of these persons and the genuineness of the transactions. The evidence sought to be filed by the appellant showing the existence of these persons is not sufficient. In any case, mere existence on record is not enough to prove their creditworthiness, and genuineness of the transactions, particularly in view of the appellant's failure to produce these persons for cross examination. It is incorrect to say that the burden was on the A.O. to prove that these credits were unexplained. In such matters, the A.O. cannot be asked to prove the impossible and the addition is to be tested on the anvil of 'preponderance of probabilities', and not of 'beyond reasonable doubt'. The surrounding circumstances and the appellant's failure to discharge their burden of proof, shows that the credits were bogus accommodation entries. Considering the facts, the appellant has clearly failed to discharge his onus of proof. The position with respect to the burden of proof in terms of section 68 is the same as discussed above in para 5 in Ground no. 3. The discussion in respect of Ground no.3 in para 5 above is adopted mutatis mutandis as a part of this Ground.

6.7 In view of the facts discussed above, the addition made by the A.O. is justified and is upheld. The Ground is dismissed.

[D.1]. On merits, we find that Ld. CIT(A) has passed speaking order. Relevant portion of the impugned order of the Ld. CIT(A) has already been reproduced in foregoing paragraph [D] of this order. During appellate proceedings in Income Tax Appellate Tribunal ("ITAT", for short) no material has been brought for our consideration to persuade us to take a view different from the view taken by the Ld. CIT(A) in the impugned order. After hearing the Ld. DR and after perusal of materials on record, and further, in view of the foregoing discussion, we decline to interfere with the impugned order of Ld. CIT(A).

[D.2]. Before we part; we explicitly clarify that the assessee will be at liberty to approach ITAT for restoration of the appeals in accordance with Proviso to Rule 24 of Income Tax (Appellate Tribunal), Rules, 1963. If the assessee does approach ITAT for restoration of the appeals in ITAT, the matter will be considered in accordance with law having regard to the facts and circumstances.

[E]. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 22nd day of August, 2019.

Sd/-	**Sd/-**
(H.S.SIDHU)	**(ANADEE NATH MISSHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 22.08.2019
** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI