

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

**BEFORE SHRI K.N. CHARY, JUDICIAL MEMBER  
AND  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 6352/Del/2016  
(Assessment Year: 2008-09)**

M/s Carol Securities Pvt. Ltd., 6 <sup>th</sup> Floor, GYS Global, A-3, 4, 5 Plot No. 11, Sector 125 Noida- 201301.	Vs.	Deputy Commissioner of Income –Tax, Circle 3(1) (Now DCIT Circle 5(1), CR Building New Delhi-110002).
<b>PAN No:</b> AACCC7690K		
<b>APPELLANT</b>		<b>RESPONDENT</b>

**Assessee by** : None  
**Revenue by** : Shri Dheeraj Garg, Sr. DR

**ORDER**

**PER ANADEE NATH MISSHRA, AM**

**[A]** This appeal has been filed by the Assessee against the impugned appellate order dated 08.08.2016 passed by Learned Commissioner of Income Tax (Appeals)-2, New Delhi, [in short, "Ld.CIT(A)"] pertaining to Assessment Year 2008-09. The Assessee has raised following grounds of appeal:-

*"1. That the Commissioner of Income Tax (Appeals) ("CIT(A)") erred on facts and in law in confirming the addition of Rs. 2,59,90,054 under section 68 of the Income Tax Act, 1961, ("the Act") earlier made by the assessing officer ("the AO") under section 41(1) of Rs. 15,50,000 and section 68 of the Act of Rs. 2,44,40,054.*

2. *That the CIT(A) erred on facts and in law by making the addition of Rs. 15,50,000 under section 68 of the Act after hearing and on being satisfied with the submissions of appellant that addition of said amount can-not be made under section 41(1) qua the facts of the case and thereby erred in flip-flopping the addition from section 41(1) to section 68 of the Act.*

2.1 *That the CIT(A) erred on facts and in law by not appreciating the fact that the amount of Rs. 15,50,000 shown as unclaimed receipt during AY 2008-09 has been duly reconciled with the names of respective security depositor and the said amount was shifted from unclaimed receipts to outstanding liabilities in AY 2009-10.*

3. *That the CIT(A) has erred on facts and in law in upholding the order passed by Assessing Officer in treating the receipt of refundable security deposit as unexplained credited and charging it to tax under section 68 of the Act on the ground that the appellant had failed to prove the credit worthiness of depositors ignoring the fact that the appellant had abundantly proved (a) identity of agents and (b) genuineness of transaction and as far as "credit worthiness" of depositors is concerned, law does not require the appellant to prove the same considering the nature of business and facts of the case.*

3.1 *That the CIT(A) erred on facts and in law by not appreciating that the appellant has discharged the primary onus casted upon him by section 68 of the Act by proving the identity of depositors and genuineness of transaction and now the burden of proof has been shifted upon Revenue.*

3.2 *That CIT(A) erred on facts and in law by overlooking the fact that the "refundable" security deposits received from Agents were actually refunded to them in subsequent years at the time of their disassociation with the appellant.*

3.3 *That the CIT(A) erred on facts and in law by not appreciating that the position of law with respect to addition made under section 68 of the Act qua the "refundable security deposits" from business agents is different from the position and requirement of law with respect to ordinary loan transaction from a third party.*

3.4 *That the CIT(A) erred on facts and in law by not appreciating that nothing has been brought on record by the Revenue to show that the impugned amount has been originated form the appellants own coffers and not received from the Business Partners/Agents of appellant.*

3.5 *That the CIT(A) erred in upholding the addition made by assessing officer without appreciation the fact that none of the PAN/Conformation put on record by the appellant found to be false, collusive and fictitious by the Revenue authorities. Therefore the explanation given by the appellant cannot be rejected on the basis of surmises and conjectures.*

3.6 That the CIT(A) erred in facts in not appreciating that merely because the 76 depositors are not responding the notices issued under section 133(6) of the Act, it can-not be inferred that PAN, address and confirmations filed by the appellant are incorrect inasmuch as the non-receipt back of un-served letters to 76 depositors by Revenue authorities itself means that the letters have been served upon them and the address provided by the appellant is correct.

**Without Prejudice**

4. CIT(A) erred on facts and in law in not following the binding precedent of Hon'ble Delhi High Court in the case of CIT v. Kinetic Capital Finance Ltd.: 354 ITR 296 wherein it was held that Revenue has to advert to each and every entry and not to pick up a couple of entries and label entire set of deposits made as undisclosed income. Accordingly, security deposits received from 93 parties from whom confirmation were also provided by assessee, should not be considered for making addition under Section 68 of the Act.

*The appellant craves leave to add, alter, amend or vary the above grounds of appeal at or before the time of hearing."*

[B] Vide Assessment Order passed under Section 143(3) of the Income Tax Act, 1961 (in short "the I.T. Act"). The relevant portion of the Assessment Order is reproduced as under:-

"

2. The company is engaged in the business of Mutual Fund Distribution and Marketing & Promotional Services.

**DISALLOWANCE OF UNCLAIMED RECEIPTS:-**

During the course of asstt. proceedings while examining the details as furnished by the assessee it was noticed that the assessee co. had claimed 'security deposits' under Schedule-G: Current Liabilities. Therefore, vide note sheet entry dated 26.10.2010 the assessee was asked to produce the details of security deposits. On perusal of the details of the security deposits as produced by the assessee, it was noticed that the assessee co. had claimed 'unclaimed receipts' amounting to Rs 15,50,000/- by debiting it in 'detail of security deposits shown as 'others' in the annexure-II'. Therefore, vide note sheet entry dated 29.11.2010 the assessee was show caused as under:-

"Please furnish details of unclaimed receipts of Rs 15,50,000/- shown in security deposits and to show cause as to why the same be not added to your income u/s 41 of the I.T. Act, 1961."

In response to the query put to, the assessee vide its written submission dated 10.12.2010 has furnished as under:-

*"With regard to unclaimed receipts of Rs 1,550,000 as appearing in the balance of the co. for year ended March 31, 2008 we wish to submit as follows:*

*a. The co. is a sub broker and for generating more sales it had appointed further agents across India. During the year under consideration the co. had appointed more than 270 agents. The agents gave a security deposits which was to be adjusted against a default by the client who traded in securities through the co.*

*b. The team which appointed the agent was responsible for executing the documentation and collection of cheques towards security deposit did not work in coordination with accounting which was responsible for banking such cheques and accounting for them. This lead to a situation where the cheques received for security deposit were banked but the part from whom it was received was not known to the accounting team. As respective parties were assigned specific codes/account number, parties having same name added to the confusion due to which the amount received was accounted for as unclaimed receipt.*

*c. We are enclosing herewith a copy of the account of unclaimed receipts as annexure-V which will show that throughout the year 2007-08 there were security deposit receipts which were not identifiable with the respective parties. Therefore as part of overall accounting process an accounting team reconciled the unclaimed security deposit receipts in coordination with the operations team.*

*d. We wish to submit that the closing balance of unclaimed security deposit receipt outstanding as on March 31, 2008 has been totally reconciled before March 31, 2008. Copy of the account of unclaimed receipt of the financial year 2008-09 is enclosed herewith as Annexure-VI.*

*e. So far applicability of section 41 to the unclaimed receipts is concern we wish to submit that the section covers the cases where recovery is made of the payments or expenses which were allowed as deduction while computing the taxable income of the earlier year(s). In the case of the co. the unclaimed receipt does not represent any allowance or a deduction that the co. claimed while computing its taxable income for the subject year."*

The reply of the assessee co. has been considered carefully and carries no force. Despite of the above reply, the assessee had just filed a list of these receipts which shows that these unclaimed receipts were received during the period of Sep'07 to Mar'08 in assessee's account code GL010000. The assessee in its reply had stated that the cheques received for security deposit were banked but the party from whom it was received was not known to the accounting team and due to which the amount received was accounted for as unclaimed receipt.

In view of the above facts, it can be safely held that the assessee had failed to discharge its onus by not substantiating the claim of these receipts with supporting

documentary evidences even though specifically sought at the time of asstt. proceedings. Since the assessee could not prove the genuineness of the depositors of the unclaimed receipts, the same is being disallowed u/s 41 of the I.T. Act, 1961 and added back to the total income of the assessee.

**(Addition:- Rs 15,50,000/-**

For the above mentioned reasons, I am satisfied that assessee company concealed the income/filed in accurate particulars, hence penalty proceedings u/s 271(1)(c) of the I.T. Act have been initiated separately.

**UNEXPLAINED CREDITS / DEPOSITS:-**

During the course of asstt. proceedings the assessee vide note sheet entry dated 26.10.2010 was required to produce the details of security deposits received, in response to which, the assessee vide submission dated 10.11.2010 had furnished the detail of security deposits received from various parties/individual amounting to Rs 3,00,91,531/- in the financial year 2007-08.

Further, the assessee vide note sheet entry dated 22.11.2010 was required to produce complete address of the parties from whom securities received with their copy of a/c, and confirmation. The assessee did not produce any address, copy of a/c and confirmation of the parties.

Therefore, again vide note sheet entry dated 29.11.2010 the assessee was required to produce the complete address of the parties from whom securities received with their copy of a/c and confirmation (above one lac).

It is seen that assessee had received a total security deposit of Rs 3,00,91,531/- out of which assessee has received security deposits above Rs 1 lac from 178 parties and a total of Rs 5651477/- from parties at amount less than Rs 1 lacs. The assessee had filed the alleged confirmation from the 71 parties only. The confirmation letter filed by the assessee from the depositor has no credence in the eye of law since even the PAN had not been mentioned in all such cases. The genuineness of the depositors and the creditworthiness of the depositor had not been proved by the assessee. In remaining 107 cases, even no confirmations were filed. In the absence of the basic documents required to establish the genuineness of the transaction, the deposits cannot be accepted. The assessee is showing receipts of security deposits of Rs 30091531/- without even furnishing basic details regarding depositors. The assessee must have obtained the PANs of the depositors when it was receiving deposits which are in the denomination of more than 50,000/- as mandatory requirement. The assessee had failed to prove the deposits in the absence of any documentary evidence to prove the same.

To sum up the facts and events of the case as described above the assessee co. has failed to discharge the onus u/s 68 of the I.T. Act, 1961. It is evident from the sequence of events narrated above that the assessee co. has been provided sufficient time and opportunity to produce other details/ documents/ evidences to substantiate its claim. The assessee co. intentionally avoided to furnish complete records and evidences to the department on false ground. As merely submitting the list of depositors/creditors is not

sufficient to discharge the onus and burden of proof cast on the assessee. Vide questionnaire entry dated 30.11.2010 the assessee was show caused as to why the amounts received from the above parties be not treated as unexplained credit and added to your income u/s 68 of the I.T. Act. 1961.

The provisions of section 68 of the I.T. Act, 1961, are as under:-

*“Cash Credits –Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the income tax officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year.”*

It has been judicially established that the primary onus is on the assessee to prove the identity, creditworthiness and genuineness of transactions in respect of cash credits in the books of account. Identity of the party does not simply mean its existence. The identity should be seen in perspective that it has got a standing in the particular line of activity. Identity is defined in the new shorter oxford dictionary as “*The condition or fact of a person or thing being that specified unique person or thing*”. The person has to have some sign of identification other than merely on paper. These signs could be the place of work, staff members, actual transactions, reorganization in the eye of public, signboard, and premises anything, which can prove that some actual activity is going on.

The creditworthiness essentially means capacity in financial dealings or capacity to pay. The creditworthiness of a person is something that is assessed by somebody while giving loan to the said person or arm's length basis. The bank assesses the creditworthiness of the person while lending loan. The creditworthiness is reflected in the balance sheet of the person and also in the profit making capacity. Can it be said that the bank will give loan of the same amount to the entry operators who are receiving money in its account. The entry operators are certainly not receiving the money in its accounts as sale consideration or as part of actual business activity. The nature of deposits in its accounts can never be explained except by the truth that these amounts represent the money of the beneficiary routed through it. The argument that the money has come through banking channel hence the same is genuine is farce in itself. The beneficiary has to have the money in its account through normal banking channel. This is the entire reason for getting the entry. Can the beneficiary deposit its unaccounted cash in its bank account? The whole purpose of money laundering is getting money through the banking channel and ironically, the same is being used as a tool to satisfy the genuineness of the transaction. The persons who are giving cheques/drafts through banking channel have no standing of their own. They do not have their own profits making apparatus other than by earning commission on such illegal activity. They do not manufacture or produce anything. They do not render any services other than its services for laundering of money. Their bank account reflects their creditworthiness. The moneys that come to its account by way of cash or by way of other similar accounts seldom rest for a day. It immediately finds its destination. The source of money is not explainable by the entry operators. However, the beneficiary, who enjoys the benefit of such money ever after, does not ever give back any dividend or any share in profit or interest to the entry operators. The

volume of transactions undertaken is not visible in their balance sheet/ P/L Account. They are only available in the bank statements in a definite pattern.

The profit motive in the entire transaction of the entry operators is conspicuously absent. They give the money to the beneficiary and never bother to ask for the benefit of providing so much money to the beneficiary. In case of share capital, in most of the cases, subsequently the shares are purchased back at nominal amount, otherwise the shares keep on lying in the name of the entry operators. But in fact no profit is received from having invested so much ever in all cases including the present case. This in itself reflects that the transactions are not genuine. Any person who would invest his own money or forward a loan would certainly seek return in any form. The inherent capacity of money to earn is forgone without any consideration. These facts clearly show that the transaction is not genuine. It is most important to note that the assessee is enjoying the benefit of the said money without any associated financial burden in the same manner as if it is its own tax paid money after utilizing the services of the said entry operator.

The contention that the co. was incorporated and hence its identity is established cannot be accepted. In appropriate cases, law permits looking beyond the corporate veil. The corporate veil can be lifted or pierced where the only actual activity the alleged corporate entity is found to be engaged in is evading the obligations imposed by law, more particularly in tax matters to see whether the entire façade has been put up to evade payment of taxes. Reliance in this context is placed on the decision of *Hon'ble Supreme Court in the case of Juggilal Kamlatpat vs. CIT (1969) 73 ITR 702.*

The assessee co. is Ltd. Company. In the case of such companies, there is close and proximate relationship between the promoter/directors and the shareholders. The closely held companies are permitted to accept the subscriptions of share capital or deposits only from the friends or relatives of the promoters/directors and such companies are not allowed to accept subscriptions or deposits from the public. As such, there should have been no difficulty on the part of the assessee to produce somebody from the said entity, had the whole apparatus not been merely a conduit to plough back the unaccounted money of the assessee co. in the garb of share application money. The assessee company's contention that it has no relationship/connection with the said party does not stand to reason. Even if it is presumed to be correct, for the sake of argument, it is necessary to examine as to how the 'investor' came to know of the requirements of funds by the assessee co. in the absence of a public issue or any advertisement by the assessee co.

There are any number of decisions of the Apex Court and various other courts including the celebrated judgment of the Apex Court in the case of *McDowell & Co. Ltd. 154 ITR 148* on the issue of using dubious means by the assessee for tax evasion. Various other decisions on superiority of substance over form have been in the public domain. These decisions undisputedly conclude that adopting of dubious means for resorting tax evasion is clearly not permissible. Present case is classic example of utilization of dubious means for the purpose of tax evasion, which should not be allowed to be perpetuated.

In the above backdrop, the assessee was required to produce the person to verify its claim of genuineness.

Reliance has been placed in the following cases:-

1. *CIT vs. Sophia Finance Ltd., 205 ITR 98*
2. *CIT vs. Steller Investment Ltd.*

In the case of *CIT vs. Ruby Traders And Exporters Ltd. 263 ITR 300*, the Hon'ble Calcutta High Court while reversing the order of the ITAT has considered the decision in *CIT vs. Korlay Trading Co. Ltd. 1998, 232 ITR 820 (Cal)* and observed as follows:-

*'..... In the said decision, it was held that mere furnishing of income tax file numbers is not sufficient. In fact, once these materials have been produced, it is incumbent on the AO to enquire into the same ..... except disclosing the list of subscribers noting has been produced before the authority either for establishing the identity of the subscribers or for proving their creditworthiness and the genuineness of the transaction. Even if such payments are made through bank and by cheques still then in view of the settled proposition of law, the AO can enquire into the same and it is the assessee who has to satisfy the AO about the genuineness of the same in the manner as discussed above and in Hindusthan Tea Trading Co. Ltd's case 2003 263 ITR 289 (Cal). On failure to do so, section 68 would visit the assessee with all its consequences.'*

In the instant case, since the identity of the shareholders has not been established by way of the exercise carried out and as the assessee failed to offer any reply in the rejoinder filed by it with reference to this issue, it is held that the assessee was not able to establish the identity of the persons which is one of the primary conditions on the part of the assessee.

The reply of the assessee co. shows that the assessee has nothing to prove the creditworthiness/genuineness of the shareholders and substantiate the claim that money credited to the bank account of the assessee co. by way of cheques/draft are exclusively relating to the share application money received from those persons.

In the case of *Diza Holdings (P) Ltd. 255 ITR 573*, the Hon'ble Kerala High Court has held that "the burden was on the assessee to offer a satisfactory explanation about the nature and source of the amount found credited in the books of the assessee. Mere furnishing of particulars was not enough and the mere fact that the payment was by way of account payee cheque was also not conclusive. Therefore, the assessee had not explained the cash credits satisfactorily..... the AO was fully justified in finding that the explanation of the assessee was unsatisfactory regarding the amount found credited in the books of the assessee."

In the case of *M.A. Unneeri Kutty vs. CIT 198 ITR 147*, the Hon'ble Kerala High Court has "dealt that the issue as to what is the criteria to be proved by the assessee to establish a cash credit in his books of accounts and held that the assessee is not only

required to prove the identity of the creditor, but also his creditworthiness and the genuineness of the transactions.”

The Hon'ble Rajasthan High Court in the case of *Rajshree Synthetics Pvt. Ltd. vs. CIT 256 ITR 331* has held “that section 68 of the Act, gives a statutory recognition to the principle that cash credits which are not satisfactorily explained, may be assessed as income. . . . If he is satisfied that these entries are not genuine, he has every right to add its amounts as income from other sources. The satisfaction of the AO is the basis for invocation of power under section 68 and the satisfaction must be derived from the relevant factors on the basis of proper enquiry. It is well settled that the assessee is required to prove prima facie the transactions, which result in cash credits in his books of account. Such proof includes the proof of identity of his creditor, the capacity of such creditor to advance the money and lastly, the genuineness of the transaction, . . . . Mere filing of confirmatory letters does not discharge the onus that lies on the assessee. Similarly, mere furnishing of particulars is not enough.”

In the case of *Oceanic Products Exporting Co. vs. CIT, 241 ITR 497*, the Hon'ble High Court has observed that “it is trite law that when there is non-consideration of a relevant material and/or non-consideration of a plea not given up, or consideration of irrelevant material, a question of law may arise. But, in the case at hand, we find that the tribunal elaborately dealt with the respective stands and gave its positive findings as to how the explanation offered by the assessee was untenable. After the enactment of section 68 of the Act, the burden is placed on the assessee to prove a credit appearing in its books of account. That burden has to be discharged with positive material. When it is contended that a person had advanced money or had given a loan, it has to be established that the person was not a man of straw and had the capacity to give the money. A conclusion regarding creditworthiness or otherwise of a person is essentially one of facts. It does not give rise to a question of law unless it is established that the conclusion was contrary to the materials on records. Section 68 gives statutory recognition to the principle that cash credits, which are not satisfactorily explained, may be assessed as income. Where an assessee has failed to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the AO is entitled to draw the inference that the receipts are of an income nature.”

In view of the above detailed discussion, based on the language used under section 68 of the Act. and the various decisions of different High Court and the Apex Court discussed above, the only conclusion which could be arrived at is:

- (i) that the onus or burden to prove the identity, capacity and genuineness has to be on the assessee.
- (ii) if the cash credit is not satisfactorily explained, the Income Tax Officer is justified to treat it as income from 'undisclosed sources'.
- (iii) if the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by section 68 can be invoked.

Asses. Year: 2008-09

In this circumstances, it is held that, simply because the amount is credited in the books of the assessee, it cannot be said that it is not the undisclosed income of the assessee co. and in all cases it has to be assessed as an undisclosed income of the assessee co. alone.

The assessee failed to discharge its onus of proving the genuineness and creditworthiness of the person who have deposited money with the assessee. The assessee has completely failed in discharging its onus of proving the genuineness and creditworthiness of the entities from where the credits have been appearing in the books of the assessee.

As per the show cause the assessee co. was required to prove the creditworthiness and genuineness of the transactions in order to discharge the onus u/s 68 of the Act which it has failed to do. It opted not to furnish any details or clarification to this office though it was given sufficient opportunities to do so. Accordingly, the amount of Rs 2,44,40,054/- is being added to the income of the assessee co. as 'unexplained credits/deposits u/s 68 of the I.T. Act, 1961.

( Addition:- Rs 2,44,40,054/- )

For the above mentioned reasons, I am satisfied that assessee company concealed the income/filed in accurate particulars, hence penalty proceedings u/s 271(1)(c) of the I.T. Act 1961 have been initiated separately.

**COMPUTATION OF TOTAL INCOME:-**

Loss as declared by the assessee:-	Rs. 893051/-
<b><u>Less:-</u></b>	
Disallowance of Unclaimed Receipts:-	Rs 1550000/-
Unexplained credit/deposits u/s 68:-	<u>Rs 24440054/-</u>
<b>Total Assessed Income</b>	<b>Rs. 25097003/-</b>
<b>Rounded Off</b>	<b>Rs. 25097000/-</b>

Assessed at **taxable income of Rs. 2,50,97,000/-**. Credit of pre-paid taxes is given. Demand notice and challan issued. Interest charged as per the provisions of the I.T. Act 1961. Penalty proceedings u/s 271(1)(c) of the I.T. Act 1961 have been initiated separately.

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[C] The Assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 08.08.2016, the Ld. CIT(A) dismissed the assessee's appeal. The relevant portion of the order dated 08.08.2016 of the Ld. CIT(A) is reproduced as under:

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3.0 The written submission of the appellant is as under:-

*“With regard to captioned subject matter we wish to submit as under:*

**1. Background**

*For the Assessment year (“AY”) under consideration the Appellant filed its return of income on September 29, 2008 declaring a total loss of Rs. 893,051. The said return was selected for scrutiny assessment. The Assessing Officer (“AO”) passed an assessment order, dated December 13, 2010, under section 143(3) of the Income Tax Act, 1961 (“Act”). As per the said order, the AO has assessed the total loss of the Appellant at Rs 25,097,000 after making the following additions / disallowances:*

<b>Sr. No.</b>	<b>Nature of Disallowance</b>	<b>Amount (Rs.)</b>
1.	<i>Disallowance under section 41 of the Act on account unclaimed receipts</i>	1,550,000
2.	<i>Treatment of security deposits received by the Appellant as unexplained credit / deposits under section 68 of the Act</i>	24,440,054

*Aggrieved by the above additions the Appellant has preferred this appeal before your honour.*

**2. Our Submissions:**

**Ground of appeal no. 4 - Treatment of security deposits received by the Appellant as unexplained credit / deposits under section 68 of the Act:**

- 4.1 *That on facts and circumstances of the case and in law, the AO has erred in invoking the provisions of section 68 of the Act and considering security deposits of Rs 24,440,054 received from its agents as unexplained cash credits.*
- 4.2 *That on facts and circumstances of the case and in law, the AO has erred in not appreciating the business model of the appellant and in making an addition of Rs 24,440,054 completely disregarding the documentary evidence submitted by the Appellant with regard to the security deposits received by it.*
- 4.3 *That on facts and circumstances of the case and in law, the AO has erred in alleging that the Appellant has intentionally avoided furnishing records and evidences to the tax department and in not appreciating that adequate time was not available to the appellant to provide confirmations from all the depositors.*
- 4.4 *That on facts and circumstances of the case and in law, the AO has erred in making the addition under section 68 of the Act purely on the basis of conjectures and surmises and in holding that the appellant had not been able to prove the identity and genuineness of the depositors.*

## **2.1 Facts of the case:**

- a. *The Appellant, incorporated on 25<sup>th</sup> October, 2005, is inter alia engaged in the business of distribution of mutual fund products and providing business auxiliary services viz. marketing & business promotional services. The Appellant is registered with Association of Mutual Funds in India ("AMFI"). Apart from this, the Appellant is also a registered sub-broker of Religare Securities Limited ("RSL") for Bombay Stock Exchange & National Stock Exchange.*
- b. *RSL is a company engaged in the business of providing stock broking and depository services. It appoints different sub brokers who collect the trade orders for purchase and sale of securities from their individual clients and these order are executed using RSL's trading platform. RSL earns the commission income from such clients, which is shared with CSPL.*
- c. *The Appellant being a sub broker of RSL utilizes the trading platform provided by RSL for execution of trade orders placed by its clients. In return, the Appellant earns commission in the form of percentage share in brokerage income earned by RSL from trading done by the said clients.*
- d. *In order to expand and diversify its business, the Appellant appointed business partners/agents on pan India basis. These business partners / agents referred new clients who can trade in securities through the Appellant on the platform provided by RSL. In return, the Appellant shared its commission received from RSL with such business partners / agents which was paid as a commission/referral fees as per the mutually agreed terms. Such commission / referral fee was a percentage share in brokerage income earned from the clients referred by the business partners / agents. The copy of sample agreements entered between the Appellant and aforesaid business partners are enclosed as Annexure 1.*

- e. *As per the terms of the agreement, the Appellant took refundable security deposit from its business partners at the time of their association with the Appellant. The said deposit is taken as a security against any possible default committed by the client introduced by the said business partners who traded in securities through the RSL platform provided by Appellant Company. It may be appreciated that acceptance of security deposits from the business partners is mandatory in the Appellant's line of business as it provides a safety net and thus minimizes the risk of any possible default in payment by the customers. At the time of termination of contract with business partner, the said security deposits are either refunded or adjusted against the dues of the clients referred by him.*
- f. *During the assessment year under consideration the Appellant has appointed more than 270 business partners on pan India basis. Further, the Appellant has received securities deposits, aggregating to Rs. 30,091,531, from the said business partners.*
- g. *The Appellant during the course of Assessment proceedings has submitted following details/documentary evidences to the AO in relation to security deposits received during the year:*
- *The Appellant has apprised the business model of the Company to the AO vide its submissions dated December 10, 2010 wherein it was categorically mentioned that in the Appellant's line of business, which is dealing in stocks and securities, acceptance of security deposits is imperative since it provides a safety net and thus minimizes the risk of any possible default in payment by the customers. The copy of the submissions is attached as **Annexure 2**.*
  - *The list of parties from whom security deposits have been received during the year along with their addresses. The copy of the list is enclosed as **Annexure 3**.*
  - *Copy of confirmations received from 71 parties out of 178 parties from whom security deposits of more than Rs 100,000 has been received. The same is enclosed as **Annexure 4**. We are attaching with 22 additional confirmations. The same is enclosed as **Annexure 5**.*
  - *The copy of bank statement of the Appellant for AY under consideration evidencing receipt of security deposits through normal banking channels. The same is enclosed as **Annexure 6**.*
  - *The Appellant also produced complete books of accounts before AO for verification which had the ledger accounts of all the parties from whom security deposit was received along with the cheque details and which also had details of regular business transactions with them. The copy of ledger accounts of the parties is enclosed as **Annexure 7**.*
  - *Copy of certificates of tax deducted at source on payments made to various business partners, who had given security deposit, on account of commission paid*

*to them. The copy of certificates issued to 123 parties is enclosed herewith as Annexure 8. It may be pertinent to mention here that the TDS certificates issued contains the PAN numbers of the respective parties.*

- In addition to the above details filed with the AO it is further submitted that the security deposits received during the year were refunded to the parties in subsequent years at the time of their disassociation with the Appellant through account payee cheques only. The cheque details under which the security deposits were refunded are attached on sample basis as Annexure 9. We are also enclosing herewith the copy of bank statement evidencing refund of said security deposits as Annexure 10.*

## **2.2 Discussions during Assessment proceedings:**

*During the course of assessment proceeding, the AO sought details of the parties from whom security deposits of more than Rs 100,000 was received by the Appellant during the AY under consideration along with the copy of their accounts and confirmations from the respective parties that they have actually given security deposit.*

*In response, the Appellant vide submissions dated December 10, 2010 submitted the details of the parties from whom security deposit of more than Rs 100,000 was received along with their names and complete addresses. Further, out of 178 parties, spread across India, which had given security deposit of more than Rs 100,000, the Appellant filed duly signed confirmation letters received from 71 parties from whom security deposit was received and sought time to file the rest.*

*As mentioned under para 2.1(g) above, it also produced complete books of accounts before AO for verification which had the ledger accounts of all the parties from whom security deposit was received and which also had details of regular business transactions with them. In addition to this the Appellant filed its bank statement containing details of all its transactions including the receipt of security deposits.*

*It also submitted certificates of tax deducted at source on payments made to various business partners, who had given security deposit, on account of commission paid to them. It may be pertinent to mention here that the TDS certificates issued contains the PAN numbers of the respective parties.*

*The AO has however rejected all such details put forth by the Appellant. He has treated security deposit Rs 24,440,054 received by the Appellant as unexplained cash credit chargeable to tax under section 68 of the Act based on the following allegations:*

- (a) The Appellant has not been able to prove the genuineness and creditworthiness of the parties from whom the security deposits have been received by the Appellant (exceeding Rs 1 lakhs).*
- (b) The Appellant has failed to furnish even the basic details of depositors from whom security deposits have been received during the year.*

- (c) The Appellant has failed to furnish documentary evidence for proving the receipt of security deposits.*
- (d) The Appellant must have received PAN numbers of the depositors at the time of receipt of security deposits, the same being a mandatory requirement.*
- (e) The Appellant has intentionally avoided furnishing records and evidences to the tax department.*

### **2.3 Legal Submissions:**

*At the outset the Appellant wishes to submit that the allegations made by the AO in his assessment order are totally baseless and without any merit.*

*As mentioned above, the Appellant is engaged in the business of acting as sub-broker for sale and purchase of securities, mutual fund distribution, and providing marketing & business promotion services. During the AY under consideration, in order to expand its business it appointed various business partners spread across the country for referring new clients to trade on platform of RSL of which the Appellant is registered sub-broker.*

*As per the terms of arrangement, the Appellant received security deposits of Rs 30,091,531 from the business partners appointed during the subject year. It is submitted that in the Appellant's line of business it is imperative to take such security deposit to avoid potential loss on account of default committed by the clients who trade in securities. This is apparent from the fact that a stock broker who buys and sells securities on behalf of its clients retains margin money of the clients as a security against potential default by the client in payment of principal amount in relation to the securities purchased by him.*

*During the course of Assessment proceedings, the AO sought details of parties from whom security deposits of more than Rs 100,000 was received during the year. The Appellant as mentioned in Para 2.1(g) above, submitted the complete details of parties from whom security deposits have been received during the year. In addition, in order to establish the bonafides and genuineness of the transaction receipt of security deposit, the Appellant has apprised its business model to the AO vide submissions dated December 10, 2010. The copy of the said submissions is enclosed as **Annexure 2**. The Appellant has submitted that the Appellant is a sub broker and for generating more sales, it had appointed more than 270 agents across India during the AY under consideration. It was further submitted that the said agents give a security deposit which was to be adjusted against possible default by the client who traded in securities through the Appellant. In addition, the Appellant has submitted the copy of ledger accounts of parties from whom security deposits have been received, bank statements evidencing the receipt of security deposits, TDS certificates issued to them, copy of confirmations and all other documents / details listed under 1(g) above.*

*However, the AO without appreciating the business model of the Appellant and without considering the documentary evidences submitted by the Appellant erroneously treated the security deposits of Rs 24,440,054 received by the Appellant from business partners*

*appointed during the year as unexplained credit/deposits thereby invoking the provisions of Section 68 of the Act and added such security deposits to the income of the Appellant.*

*In this regard, it is respectfully submitted that the addition made by the AO is bad in law and liable to be quashed. The same is on account of following reasons:*

**2.3.1 Complete details of the parties from whom security deposits have been received were furnished with the AO:**

*The AO while invoking the provisions of Section 68 of the Act has alleged that the Appellant has failed to furnish the basic details of the depositors from whom security deposits have been received during the year. The said contention of the AO is highly misplaced on account of following reasons:*

*As mentioned in Para 2.1(g) above, during the course of Assessment proceedings, the Appellant has furnished following details with the AO:*

- *The list of parties from whom security deposits have been received during the year along with their addresses.*
- *Copy of confirmations received from 71 parties out of 178 parties from whom security deposits of more than Rs 100,000 has been received. Copies of confirmations received from 22 more parties are attached as Annexure 5.*
- *The copy of bank statement of the Appellant for AY under consideration evidencing receipt of security deposits through normal banking channels.*
- *The Appellant also produced complete books of accounts before AO for verification which had the ledger accounts of all the parties from whom security deposit was received along with the cheque details and which also had details of regular business transactions with them.*
- *The Appellant has also furnished certificates of tax deducted at source on payments made to various business partners, who had given security deposit, on account of commission paid to them wherein the PAN numbers of the parties were duly disclosed.*

*Thus, the identity of the parties from whom security deposits were received during the year was duly disclosed to the satisfaction of the AO. Hence, the allegation made by the AO that the Appellant has not furnished even the basic details regarding depositors is highly misplaced since the complete details of the parties were submitted to the AO during the course of Assessment proceedings.*

*In addition to the above, the AO has also alleged that the Appellant must have received the PAN numbers of the depositors at the time of receiving security deposits since quoting of PAN number is a mandatory requirement in case the transaction value exceeds Rs 50,000. In this regard, it is submitted that such an inference is also misplaced since the transaction under consideration i.e. receipt of security deposits is*

*not included in the list of transactions prescribed by the Board in Rule 114B of the Income Tax Rules, 1962, wherein quoting of PAN is a mandatory requirement. Hence, there is no mandatory requirement of quoting of PAN at the time of receipt of security deposit from the depositors.*

*The same is without prejudice to the fact the Appellant has duly submitted the certificates of tax deducted at source on payments made to various business partners, who had given security deposit, on account of commission paid to them wherein the PAN numbers of the depositors were duly disclosed.*

### **2.3.2 Genuineness of the transaction was proved:**

*The AO while invoking the provisions of Section 68 has also alleged that the genuineness of the transaction under consideration has not been proved by the Appellant. This contention is also incorrect since:*

- *The Appellant has furnished ledger accounts of said parties in the books of accounts of the Appellant which also had details of regular business transactions with them.*
- *It was further submitted to the AO that the security deposits have been received through normal banking channels. To substantiate the same, the Appellant has submitted copy of bank statements evidencing receipt of security deposits from the aforesaid parties.*
- *Apart from the above, the Appellant has also submitted copy of confirmations from 71 out of 178 parties stating that the security deposits have been given by them to the Appellant and has sought time to file the rest.*

*Thus, the Appellant has duly discharged its onus of proving the bonafideness and genuineness of the transaction under consideration. Merely because the Appellant could not furnish balance confirmations of parties spread across the country on account of paucity of time could not be a ground to reject the genuineness of the transaction. Hence, the allegation made by the AO that the genuineness of the transaction has not been proved is incorrect.*

*In this regard reliance is placed on the following decisions which are discussed further in detail in this submission:*

- *CIT, Orissa v Orissa Corporation P. Ltd. 159 ITR 78 (SC)*
- *CIT vs. Dwarkashish Investment (P) Limited 239 CTR 478 2010*

### **2.3.3 Sufficient time and opportunity was not given to the appellant:**

*The AO in the Assessment order has contended that the Appellant has intentionally avoided furnishing records and evidences to the tax department. The said contention is highly misplaced since:*

- *As mentioned in Para 2.1(g) above, the Appellant has furnished the complete details of the depositors viz. name, addresses, amount received, PAN numbers, copies of accounts etc.*
- *The Appellant has filed confirmations of 71 parties out of 178 depositors from whom security deposits have been received during the year. The Appellant vide its submissions dated December 10, 2010 (copy attached as Annexure 2) has further pleaded before the AO that in case more time is provided to the Appellant, it will be able to produce the balance confirmations also.*
- *The AO has not appreciated the fact that the Appellant appointed business partners on pan India basis and getting the confirmations from various places across the country is a time consuming process. Thus, adequate time was not available to the Appellant to provide confirmations from all the depositors spread across various parts of the country. In addition to this various business partners had disassociated themselves with the Appellant therefore getting confirmations from them was not possible.*

*In view of the above, it is respectfully submitted that the Appellant has not been provided reasonable time and opportunity to furnish the confirmations from all the depositors.*

#### **2.4 Provisions of Section 68 of the Act:**

*Section 68 of the Act provides as under:*

*“Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.”*

*Thus, Section 68 has following essential ingredients:*

- *Any sum is found credited in the books of the Assessee.*
- *The Assessee offers no explanation about the nature and source of such credit*
- *In case the Assessee offers explanation which is not satisfactory in the opinion of Assessing officer*
- *Then, such sum credited in the books of Assessee may be treated as its income in the previous year*

*Thus, Section 68 places the burden of proof on the taxpayer to explain the nature and source of any credit found in the books. The expression “nature and source” has to be understood as a requirement of identification of the source and its genuineness. Further, the onus on the assessee has to be understood with reference to the facts of each case and proper inference drawn from the facts.*

#### 2.4.1 Discharge of Onus by the Assessee:

*Where the statute places the burden of proof in income tax cases on the taxpayer, it is to be understood that it is only the initial burden. The initial burden is a prima facie one in that, where the explanation is prima facie credible, the burden will shift to the other party. Where the prima facie inference on the facts is that the assessee's explanation is probable, the onus will shift to the revenue.*

*It is in this context, that where an assessee explains the credit by giving evidence of identity of the investors along with proving the genuineness of the transaction, the assessee can be said to have discharged his initial burden, so that where an addition is made with no further attempt on the part of AO to examine the source of credit, the addition with reference to Section 68 will not be justified.*

- *Reliance in this regard is placed on the decision of Supreme Court in the case of CIT, Orissa v Orissa Corporation P. Ltd. 159 ITR 78 (SC)(copy attached as Annexure 11)*

*In the instant case, the assessee, a private limited company maintained accounts according to the calendar year. For the accounting year ending on December 31, 1961, corresponding to the assessment year 1962-63, the Income-tax Officer did not accept the assessee's accounts showing cash credits of Rs. 1,50,000. Three amounts were shown to have been received by way of loans from three individual creditors of Calcutta under hundis. The assessee produced before the Income-tax Officer, the letters of confirmation, the discharged hundis and particulars of the different creditors whose general index numbers were with the Income-tax Department. Attempts had been made to bring those creditors before the Income-tax Officer by issue of notices under section 131 of the Act, but the said notices were returned with the endorsement "left". The Income-tax Officer, therefore, treated the entire amount of Rs. 1,50,000 as unproved cash credit and added the same to the income of the assessee.*

*The Hon'ble Supreme Court held as under:*

*"In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy 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."*

- **Reliance is also placed on the decision of jurisdictional Delhi High Court *CIT vs. Dwarkashish Investment (P) Limited 239 CTR 478 2010*(copy attached as Annexure 12):**

*In the instant case Assessee was engaged in the business of financing and trading of shares. The Assessee filed a return declaring NIL income. The case was selected for scrutiny and notice under Section 143(2) of Act, 1961 was issued to the respondent-assessee. On scrutiny of accounts, the Assessing Officer found an addition of Rs.71,75,000/- in the share capital of the assessee. The AO sought an explanation of the assessee about this addition in the share capital. The assessee offered a detailed explanation. However, according to the AO, the assessee failed to explain the addition of share application money from five of its subscribers. Accordingly, AO made an addition of Rs.35,50,000/- with the aid of Section 68 of Act, 1961 on account of unexplained cash credits appearing in the books of the assessee. However, in appeal, the Commissioner of Income Tax (Appeals) [in short "CIT(A)"] deleted the addition on the ground that the assessee had proved the existence of the shareholders and the genuineness of the transaction. The ITAT confirmed the order of the CIT(A) as it was also of the opinion that the assessee had been able to prove the identity of the share applicants and the share application money had been received by way of account payee cheques. On an appeal by the revenue the Hon'ble High Court held as under:*

"...Though in Section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicant by either furnishing their PAN number or income tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then onus of proof would shift to the revenue. Just because the creditors/share applicant could not find the address given, it would not give the revenue the right to invoke Section 68. One must not lose sight of the fact that it is the Revenue which has all power and wherewithal to trace any person. Moreover it is settled law that the assessee need not to prove the 'source of source'...."

- **Further reliance is placed on the decision of *Orient Trading Co. Ltd. vs. CUT (1963) 49 ITR 723 (Bom)*(copy attached as Annexure 13), wherein the Division Bench of Bombay High Court enunciated the position as under:**

"When, however, in a case where the entry stands in the name of the third party, the assessee satisfies the ITO 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."

- The above legal position was followed and reiterated by the Gujarat High Court in the case of DCIT v Rohini Builders 256 ITR 360 (Guj)(copy attached as Annexure 14)which has been upheld by Hon'ble Supreme Court in 254 ITR 276.In the said case it has been held that where the assessee has proved the identity of the creditors and the amounts were received by account payee cheques, the initial burden on the Assessee is discharged.
- Similar reliance is placed on the following judicial precedents:
  - CIT v Nilchem Capital Limited 18 Taxman 350 (Guj) (copy attached as Annexure 15)
  - Sarogi Credit Corporation vs. CIT (1976) 103 ITR 344 (Pat);
  - Ashok Pal Daga vs. CIT(1996) 220 ITR 452(MP);
  - CIT vs. Pragati Co.op. Bank Ltd., (278 ITR-170)(Guj)
  - Nirma Industries Ltd. vs. DCIT (2006) 283 ITR 402 (Guj.)
- Reliance is placed on the decision of Patna High Court in the decision of CIT v Bahri Bros. (P.) Ltd. 154 ITR 244 (Pat.)(copy attached as Annexure 16)

*In the instant case, for the assessment year 1964-65, the ITO, having found certain deposits in the assessee's books in the names of certain parties, required the assessee to explain the nature and source of these amounts. The assessee submitted that these amounts represented genuine loans borrowed from the parties concerned by cheque and added that the loans had also been repaid by cheque. The assessee had also paid the amount of interest as also the brokerage in each case, through cheques. However, the assessee could not produce a confirmatory document from the parties concerned as the letter addressed by it to the parties concerned came back with the postal remark, 'addressee left'. The ITO, however, added back the amounts as the assessee's income from undisclosed sources and disallowed the interest on the same without attempting verification of the 7 parties concerned on his own. The AAC rejected the assessee's appeal. On further appeal, the Tribunal was of the view that the assessee had discharged the primary onus that lay upon him to prove the nature and source of loans and came to the conclusion that the creditors were not fictitious persons. It, accordingly, held that the impugned loans could not be treated as the assessee's income from undisclosed sources.*

*On reference:*

**Held**

" ....In the instant case, the transactions were completed through account payee cheques. The creditors gave the amount to the assessee by account payee cheques which were encashed by the assessee through his own bank. Not only this, the assessee had also submitted the copy of a certificate of the bank to the effect that the cheques given by the creditors were honoured in favour of the assessee. Even the brokerage amount was paid through cheques. Thus, the assessee had not only disclosed the identity of the creditors but also the sources of income. The assessee, thus, having discharged the primary onus and the onus having shifted to the department, the latter

could not add the amount as income from undisclosed sources without resorting to verification. The Tribunal was, therefore, right in deleting the addition and allowing the interest on the same.....”

- **Reliance is placed on the decision of Jabalpur Tribunal in the case of Rewa Group vs ITO 109 TTJ 657 (Jab)(copy attached as Annexure 17):**

*In the instant case, the Tribunal has held as under:*

“.....We have carefully considered the rival submissions of the parties and perused the material available on record. We find that the assessee has taken deposit of Rs. 18,000 to Rs. 19,000 from 202 salesmen as a security deposit as it is imperative for the assessee to obtain the same in this line of liquor business. The AO without pointing out any substantial discrepancy in the statements recorded by him added the same in the income of the assessee. We further find that the learned CIT(A) after considering the assessee's submission, however, deleted the addition made by the AO with the following finding appearing at p. 15 of his order :

“.....As a matter of fact, their statements proved the claim of the appellant and, therefore, such addition was not called for. Accordingly, addition of Rs. 37.46 lakhs is hereby deleted.”

*In the absence of any contrary material brought on record by the Revenue against the finding of the learned CIT(A) and keeping in view that the assessee has discharged his burden and also considering the general trade of the assessee's business, we are of the view that there is no error in the order of the learned CIT(A) in deleting the addition of Rs. 37.46 lakhs and accordingly, the ground taken by the Revenue is rejected.”*

- **In ITO v Suresh Kalmadi<sup>32</sup> TTJ (Pune) TM 300 it was held that where identity of creditor is established and entry shown to be not fictitious, the burden shifts on to the department to show as to why the entry still represented the suppressed income of the assessee. The assessee cannot be called upon to prove the worth of his creditor's creditor. The fact that in the books of the creditors exactly the same amounts had been credited in the name of other parties and that immediately after repayment, the creditors withdrew the money could not lead to any adverse inference when this was their modus operandi and assessee's case was not the solitary transaction.**
- **Umesh Electricals v ACIT (Agra ITAT Three Bench) [2011] 12 taxmann.com 5 (Agra)(TM)(copy attached as Annexure 18)**

*In the instant case, the assessee had taken a loan of Rs. 1.5 lakhs from one 'OP' vide a bank draft dated 6-8-1999 on a certain bank 'C'. When the Assessing Officer asked to prove the genuineness of the cash credit, the assessee submitted the confirmation of 'OP' along with their PAN number, copy of the bank statement of 'OP' in the bank 'C' as well as copy of cash book. The Assessing Officer noted that 'OP' had deposited cash of Rs. 1.5 lakhs in the bank 'C' on 6-8-1999 itself, out of which demand draft in favour of the assessee was made. The Assessing Officer added the sum of Rs. 1.5 lakhs under*

section 68 holding that the assessee had introduced his own money which was unaccounted, in the name of the creditor, i.e., 'OP'.

The Commissioner (Appeals), under the appeal from the assessee had confirmed the order of the Assessing Officer holding that the assessee had not been able to establish the creditworthiness of the creditor.

On further appeal, to the Tribunal, the Judicial Member allowed the appeal of the assessee and deleted the addition of Rs. 1.5 lakhs holding that the amount of Rs. 1.50 lakhs could not be regarded to be an unexplained cash credit.

The Accountant Member, however, did not agree with the Judicial Member and had dismissed the appeal of the assessee.

### **HELD (AS PER THIRD MEMBER)**

*“From the reading of the section 68, it is apparently clear that the section lays down rule of evidence that when any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source of such credit found in the books of the assessee, or the explanation offered by the assessee, in the opinion of the Assessing Officer is not satisfactory, the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. [Para 7]*

*Before charging the credit as the income of the assessee, the Assessing Officer has to form an opinion. This opinion is subjective, but it has to be judicious and based on material on record. An opinion is an inference of facts from observed facts. It is not an impression. It is a conviction based on appraisal of evidence on record.*

**Thus, before the Assessing Officer forms an opinion, he must consider the material submitted by the assessee while giving an explanation, then he must collect his own material as an enquiry officer, weigh the two materials and as a quasi-judicial authority form an opinion as to whether explanation furnished by the assessee is satisfactory or not. If the Assessing Officer does not apply his mind in examining the documents furnished by the assessee and does not find any substantive error in them nor he collects any material by exercising powers under Income-tax Act, then the claim of the assessee cannot be straightway rejected. If he does, it would be a violation of principles of natural justice and provisions of section 68. [Para 8]**

**The expression 'the assessee offers no explanation' means where the assessee offers no proper, reasonable and acceptable explanation as regards the sum found credited in the books of account maintained by the assessee. The opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory must be based on proper appreciation of the material and other surrounding circumstances available on record. The opinion of the Assessing Officer is to be based on appreciation of the material on record. [Para 9]**

*.....In the instant case, the Assessing Officer without looking into the facts and bringing any evidence to the contrary rejected the explanation of the assessee. Section 68 nowhere empowers the Assessing Officer to reject each and every explanation of the assessee. The Assessing Officer is a quasi-judicial authority and he should form his opinion judiciously, not in an arbitrary manner. It appeared that in the instant case the revenue had just made the addition for the sake of making the addition under section 68. [Para 21]*

*In view of aforesaid discussion, the view taken by the Judicial Member was agreed with, that under the given facts and circumstances of the case, the impugned cash credit of 1.50 lakhs was genuine. [Para 22]*

The legal position enunciated in the above case laws is summarized hereunder:

- *Section 68 places the initial burden of proof on the taxpayer to explain the nature and source of any credit found in its books.*
- *The initial burden is said to be discharged once the Assessee proves the identity, bonafides and genuineness of the transaction.*
- *Once the initial burden is discharged, the onus shifts upon the AO to show as to why the explanation given by the Assessee cannot be accepted.*
- *The AO cannot reject the explanation given by Assessee in an arbitrary manner without proper appreciation of the material and other surrounding circumstances available on record.*

In the instant case, the Appellant has duly discharged its onus of proving the nature and source of deposits received by furnishing following details / documentary evidences with the AO as mentioned in Para 2.1(g) above:

- *Complete details of parties from whom security deposits have been received viz. name, addresses, amount received*
- *Copy of confirmations received from 71 parties out of 178 parties from whom security deposits of more than Rs 100,000 has been received.*
- *The copy of bank statement of the Appellant for AY under consideration evidencing receipt of security deposits through normal banking channels.*
- *The Appellant also produced complete books of accounts before AO for verification which had the ledger accounts of all the parties from whom security deposit was received along with the cheque details and which also had details of regular business transactions with them.*
- *Copy of certificates of tax deducted at source on payments made to various business partners, who had given security deposit, on account of commission paid to them. It*

*may be pertinent to mention here that the TDS certificates issued contains the PAN numbers of the respective parties.*

- In addition, the business model of the Appellant was also apprised to the AO wherein it was categorically mentioned that in the Appellant's line of business, acceptance of security deposits is imperative since it provides a safety net and thus minimizes the risk of any possible default in payment by the customers*

*Thus, the appellant has proved the identity, bonafides and genuineness of the transaction to the satisfaction of the AO by submitting the above details / documentary evidences. Accordingly, the initial onus assigned on the Appellant of proving the nature and source of transaction has been duly discharged by it.*

*Once the initial onus was discharged by the Appellant, the burden was then shifted to the AO to show as to why the Appellant's explanation 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 the instant case, the AO has not placed on record any evidence to contradict the facts and documents furnished by the Appellant and thus has not discharged its onus and merely acted arbitrarily while adding the security deposits received during the year to the income of the Appellant.*

*Thus, the addition made by the AO by invoking provisions of Section 68 of the Act is bad in law and liable to be quashed.*

#### **2.4.2 Explanation given by Assessee to be considered objectively:**

*It is a settled law that an explanation given by the assessee in relation to the nature and source of receipt should be considered objectively by the officer before he takes a decision to accept it or reject it. In this context, it is necessary to enunciate the following propositions:*

- (i) If the explanation given by the assessee shows that the receipt is not on income nature, the department cannot "convert good proof into no proof" or otherwise act unreasonably and reject it.*

*Reliance in this regard is placed on the decision of Supreme Court in the case of Sreelekha Banerjee vs Commissioner of Income-tax ( 1963 ) 49 ITR 112(copy attached as Annexure 19).*

*In the instant case, the apex court held that if there was an entry in the account books of the assessee which showed the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money was and to prove that it was not income. The Department was not at that stage required to prove anything. It could ask.*

*the assessee to produce any books of account or other documents or evidence pertinent to the explanation if one was furnished and examine the evidence and the explanation. If the explanation showed that the receipt was not of an income nature, the Department could not act unreasonably and reject that explanation to hold that it was income. If, however, the evidence was unconvincing, then such rejection could be made. The Department cannot by merely rejecting a good explanation unreasonably, convert good proof into no proof.*

*In the Appellant's case, the Appellant during the course of Assessment proceedings has explained to the AO that the acceptance of security deposits from the business partners is mandatory in the Appellant's line of business as it provides a safety net and thus minimizes the risk of any possible default in payment by the customers; hence the same is not of income nature. Further, the said security deposits were refunded / adjusted at the time of disassociation with the business partners. Hence, the same is not and cannot be of income character.*

- (ii) *The explanation given by the assessee cannot be rejected arbitrarily or capriciously, without sufficient grounds, on suspicion or imaginary or irrelevant grounds.*

*The true view is that while the Assessing officer is not bound to accept as true any possible explanation which the Assessee may put forth, he cannot also arbitrarily reject the Assessee's explanation. The matter is not one of dogmatic assertion by the assessee or the officer, it is one of an objective determination on an appraisal of all the relevant facts in each particular case. Where the explanation furnished by an assessee about a credit is prima facie reasonable it cannot be rejected on arbitrary and capricious grounds.*

*Reliance in this regard is placed on the decision of Naidu v CIT 29 ITR 194(Nag) wherein the Hon'ble High Court observed as under:*

*"There is no doubt that the Department is not bound to prove by direct evidence the source of income before an assessee's explanation is rejected. Nevertheless if the explanation is prima facie reasonable, it cannot be rejected on capricious or arbitrary grounds."*

*In the Appellant's case, the AO has rejected the explanation given by the Appellant arbitrarily merely on presumptions and surmises and on a pre-conceived notion without appraising the business model of the Appellant and supporting documents submitted by the Appellant towards receipt of security deposit.*

- iii) *The explanation cannot be rejected merely on the ground that the department is unable to verify its correctness. Where the Assessee furnishes full details regarding the creditors, it is up to the department to pursue the matter further to trace these and examine their creditworthiness. Reliance in this regard is placed on the decision of CIT v Orissa Corporation Pvt. Ltd 159 ITR 78(SC) mentioned supra.*

*Reliance is also placed on the decision of Supreme Court in the case of **Lovely Exports (2008) 216 CTR 195 2008(SC)**(copy attached as **Annexure 20**):*

*In the said case, the Hon'ble Supreme Court while answering the question that whether the amount of share money received during the year can be regarded as undisclosed income under section 68 of the IT Act, 1961 has held that:*

*"We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose name are given to the AO, then the department is free to proceed to reopen their individual assessments in accordance with law. Hence we find no infirmity with the impugned judgment.*

*Subject to the above, Special leave petition is dismissed."*

*In the case under consideration, the Appellant has furnished the complete details of depositors from whom security deposits have been received during the year. Once the initial onus of the Appellant was discharged, it was upto the department to pursue the matter and trace the parties and examine their creditworthiness and the security deposits received cannot be added to the income of the Appellant.*

#### **2.4.3 No contrary evidence has been produced by the AO:**

*The AO while invoking the provisions of Section 68 has merely acted on presumptions and surmises and rejected the explanation put forth by Appellant without producing any cogent evidence on record. The same is evident from following facts:*

- No evidence in contra-distinction has been placed on record by the AO while disregarding the explanation/documentary evidences furnished by the Appellant in relation to security deposits received during the year.*
- No independent enquiry or verification was made by the AO from the depositors for verifying the correctness of Appellant's explanation despite the fact that the name and addresses of the depositors were duly furnished by the Appellant.*
- The AO has not made any effort to verify the assessment records of parties despite the fact that the PAN numbers of the parties were available with the AO, the same being disclosed in the TDS certificates issued to the said parties which were filed with the AO. Further, no steps were taken to get the assessment records of the parties from the respective AOs having jurisdiction over them.*

*Thus, it is evident from the above that the AO acted purely on conjectures and surmises while invoking provisions of Section 68 of the Act without appreciating the facts of the case and completely disregarding the documents submitted by the AO and hence the additions made by the AO are bad in law and liable to be quashed.*

*Reliance in this regard is placed on the decision of Delhi Tribunal in the case of ITO v Jyoti Estate Pvt Ltd ITA No 4603/2009(copy attached as Annexure 21) wherein the Hon'ble ITAT has observed as under:*

*"We have heard the parties and have perused the material on record. A perusal of the assessment order shows that the assessee had filed before the AO, complete details of the share applicants, giving their names and addresses, details of Income Tax assessment, acknowledgement of Income Tax Returns, particulars of PAN and details of their bank accounts, mentioning the respective bank account numbers, names of the banks and their branches and the details of the cheques through which the share application money had been paid by the share applicants. The initial burden cast on the assessee u/s 68 of the Act was thus duly discharged. The identity of the shareholders stood established. The factum of the shareholders having invested money in the purchase of shares also stood proved. Per contra, the AO could not point out any discrepancy in the copious evidence filed by the assessee. No evidence in contradistinction had been brought on record by the AO. The documents filed by the assessee have not been stated, in the assessment order, as having been even attempted to be verified. No independent enquiry or verification in this regard was carried out. Moreover, as rightly observed by the Id. CIT(A), it is not evincible from the assessment order as to what was the desired documentary evidence required to be filed by the assessee in support of its claim. The assessment records of the share applicants were not verified, even though the names of the share applicants did exist on the file of the Income Tax Department and their Income Tax details had been furnished by the assessee to the AO. No steps were taken to get the assessment records of the share applicants examined by the respective AOs having jurisdiction over them."*

*Thus, it is abundantly clear that where the Assessee has submitted the complete details of credits received during the year and has proved the genuineness of the transaction, the onus shifts on the AO to place evidences to contradict the explanation/evidences filed by the Assessee. In case he failed to do so, provisions of Section 68 of the Act cannot be invoked.*

*In the Appellant's case, as mentioned in Para 2.1(g) above, the Appellant has submitted the details of the depositors including their names, addresses and PAN numbers and proved the genuineness of the transaction. Thus, the onus shifted on the AO to contradict the evidences/explanation given by the AO which he failed to do so. Hence, provisions of Section 68 cannot be invoked in the instant case.*

**2.4.4 Assessee must be given fair opportunity to explain the credit within a reasonable time:**

*The inferences should be drawn after giving the assessee a fair opportunity to explain the credits. After the lapse of a decade an assessee should not be placed upon the rack and called upon to explain not merely the origin and source of a receipt, but the origin or origin and source of source as well and add the amount because the department is unable to verify the correctness of assessee's explanation. The difficulty on the part of any assessee to explain the transaction which took place long time back is to be borne in mind*

by the department and should under no circumstances be under estimated or taken advantage thereof by them.

*In the Appellant's case, the AO has contended that the Appellant has intentionally avoided furnishing records and evidences to the tax department and has not appreciating that adequate time was not available to the Appellant to provide confirmations from all the depositors. The AO has failed to appreciate the Appellant appointed business partners on PAN India basis and getting the confirmations from various places across the country is a time consuming process. Despite of the same, the Appellant has been able to provide confirmations of 71 parties out of 178 depositors from whom security deposits have been received during the year. The Appellant has further pleaded before the AO that in case more time is provided to the Appellant, it will be able to produce the balance confirmations also.*

*In view of the above, it is respectfully submitted that the Appellant has not been provided reasonable time to furnish the balance confirmations and thus the AO has erred in invoking provisions of Section 68 in the instant case.*

#### **2.4.5 Unexplained cash credit "may" be charged to income-tax:**

*Without prejudice to the fact that the Appellant has duly discharged its onus by explaining the nature and source of transaction, even for argument sake, though not submitting, it is assumed that the Appellant has failed to provide the satisfactory explanation to the AO then also it does not automatically result in deeming the amount credited in the books as income of the Appellant.*

*The provisions of section 68 requires that the assessing officer must be satisfied that the explanation offered by the assessee is genuine; but it also provides that in the absence of a satisfactory explanation, the unexplained cash credit "may" be charged to income tax- therefore, the unsatisfactory explanation does not automatically result in deeming the amount credited in the books as income of the assessee.*

*The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. The legislative mandate is not in terms of the words "shall be charged to income-tax as the income of the assessee of that previous year". In CIT v. Smt. P. K. Noorjahan (1999) 155 CTR (SC) 509, the Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus, the unsatisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee.*

### **3. Conclusion:**

*In view of the above facts and judicial precedence's, it is respectfully submitted that the addition made by the AO by invoking provisions of Section 68 of the Act is bad in law and liable to be quashed on account of following reasons:*

- (i) *The AO acted purely on conjectures and surmises and on a preconceived notion while invoking provisions of Section 68 of the Act without appreciating the business model of the Appellant and the documentary evidences furnished by AO.*
- (ii) *The Assessee has furnished the complete details of parties from whom security deposits have been received during the year including name, addresses, amount etc. Further, the details of PAN number were also disclosed in the TDS certificates issued to the said parties which were duly submitted with the AO. Thus, the identity and source of security deposits received during the year were disclosed to the AO during the course of assessment proceedings.*
- (iii) *The genuineness of the transaction was also proved since the copy of parties from whom security deposits have been received was submitted with the AO along with the copy of bank statements evidencing receipt of security deposits. Further, the deposits were received through normal banking channels. Also, the said deposits were refunded / adjusted in subsequent years through account payee cheques only. Apart from the above, the Appellant has also submitted the confirmations from 71 parties out of 178 parties and requested time to file the rest. Hence, the bonafide-ness and genuineness of the transaction was proved to the satisfaction of AO.*
- (iv) *The AO has not produced any documentary evidences while contradicting the explanation given by Appellant. Thus, the AO did not acted objectively while disregarding the explanation put forth by the Appellant.*

*Thus, the Appellant has duly discharged its onus of proving the nature and source of transaction as required under provisions of Section 68 of the Act and accordingly the onus had shifted to the AO to contradict the explanation furnished by the Appellant in case he wishes to add the amount as undisclosed income of the Appellant which has not been discharged by the AO. Thus, the addition made by AO is bad in law and liable to be quashed.*

*We request you to take the above submissions on record. We would be pleased to furnish any additional details/documents which you may require. Further, we reserve our right to file further submissions in support of our contentions.*

*Should you have any questions or require any further clarifications on the above, please do not hesitate to contact us."*

3.1 The A/R of the appellant by his submission dated. 12.11.2013 requested for admission of additional evidences. While seeking admission for additional evidences u/r 46A the appellant made the following submission:-

*"a. The Petitioner is inter alia engaged in the business of distribution of mutual fund products and providing business auxiliary services viz. marketing & business promotional services. The Petitioner is registered with Association of Mutual Funds in India ("AMFI"). Apart from this, the Petitioner is also a registered sub- broker of*

*Religare Securities Limited ("RSL") for Bombay Stock Exchange & National Stock Exchange.*

- b. RSL is a company engaged in the business of providing stock broking and depository services. It appoints different sub brokers who collect the trade orders for purchase and sale of securities from their individual clients and these order are executed using RSL's trading platform. RSL earns the commission. income from such clients, which is shared with CSPL.*
- c. The Petitioner being a sub broker of RSL utilizes the trading platform provided by RSL for execution of trade orders placed by its clients. In return, the Petitioner earns commission in the form of percentage share in brokerage income earned by RSL from trading done by the said clients.*
- d. In order to expand and diversify its business, the Petitioner appointed business partners/agents on pan India basis. These business partners / agents referred new clients who can trade in securities through the Petitioner on the platform provided by RSL. In return, the Petitioner shared its commission received from RSL with such business partners / agents which was paid as a commission/referral fees as per the mutually agreed terms. Such commission / referral fee was a percentage share in brokerage income earned from the clients referred by the business partners / agents .*
- e. As per the terms of the agreement entered between the Petitioner and business partners, the Petitioner took refundable security deposit from its business partners at the time of their association with the Petitioner. The said deposit is taken as a security against any possible default committed by the client introduced by the said business partners who traded in securities through the RSL platform provided by Petitioner Company.*
- f. During the assessment year under consideration the Petitioner has appointed more than 270 business partners on pan India basis. Further, the Petitioner has received securities deposits, aggregating to Rs. 30,091,531, from the said business partners.*
- g. During the course of assessment proceeding, the AO sought details of the parties from whom security deposits of more than Rs 100,000 was received by the Petitioner with copy of their accounts and confirmations from the respective parties that they have actually given security deposit.*
- h. To prove the genuineness and bona fides of the receipt of security deposit, the Petitioner submitted the details of the parties from whom security deposit of more than Rs 100,000 was received. Out of 178 parties, spread across India, which had given security deposit of more than Rs 100,000, the Petitioner filed duly signed confirmation letters received from 71 parties from whom security deposit was received.*
- i. The Petitioner vide its submissions dated December 10, 2010 has further pleaded before the AO that in case more time is provided to the Petitioner, it will be able to produce the balance confirmations also.*
- j. However, the AO has disregarded the submissions filed by the Petitioner and alleged that the Petitioner has not been able to prove the genuineness and creditworthiness of the parties from whom the security deposits have been received by the petitioner (exceeding Rs 11 lakhs). The AO has further stated that the confirmations of 71 parties filed by the Petitioner have no credence in eyes of law since even the PAN numbers have not been mentioned in such confirmations.*
- k. Thus the AO has treated security deposits of Rs 24,440,054 received by the Petitioner as unexplained credit / deposits under section 68 of the Act and has added the same to the returned income of the Petitioner. The AO has not appreciated the fact*

that the Petitioner appointed business partners on pan India basis and getting the confirmations from various places across the country is a time consuming process. Thus, adequate time was not available to the Petitioner to provide confirmations from all the depositors spread across various parts of the country. In addition to this various business partners had disassociated themselves with the Petitioner therefore getting confirmations from them was not possible.

In view of the above, it is respectfully submitted that the Petitioner has not been provided reasonable time and opportunity to furnish the confirmations from all the depositors. In light of the aforementioned facts, the Petitioner requests your Honor to admit the following

S.No.	Particulars	Annexure No.
1	Copy of 22 additional confirmations received from business partners from whom security deposits of more than Rs 100,000 has been received by the petitioner	1
2	Copy of 71 confirmations (submitted before AO) mentioning PAN details of business partners.	2

Rule 46A which deals with production of additional evidence before the Commissioner (Appeals) reads as follows -

46A. (1) The Petitioner shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing officer] except in the following circumstances, namely ;-

(a) where the Assessing Officer has refused to admit evidence which ought to have been admitted; or

(b) where the Petitioner was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or

(c) where the Petitioner was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; or

(d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the Petitioner to adduce evidence relevant to any ground of appeal.

The Petitioner wishes to submit that it is evident from the facts explained above that the Petitioner was given reasonable time and opportunity by the AO to furnish additional confirmations from the business partners, which gave security deposit of more than Rs 100,000, other than the 71 confirmations filed by the Petitioner during the assessment proceedings. Therefore, in terms of clause (d) of Rule 46A(1) of the Income tax Rules, the petitioner requests Your Honor to kindly admit the additional evidence viz. copy of 22 additional confirmations received from business partners from whom security deposits of more than Rs 100,000 has been "received by the petitioner (enclosed as Annexure 1) and kindly consider the same for judicious disposal of the appeal.

*In addition, it is submitted that the AO, in the assessment order passed for the subject AY, has stated that the confirmations of 71 parties filed by the Petitioner during the course of assessment proceedings have no credence in eyes of law since even the PAN numbers have not been mentioned in such confirmations. In this regard, it is submitted that the PAN numbers of the business partners were not available at that time and hence the Petitioner was prevented by sufficient cause from providing the same to the Assessing Officer. The Petitioner now therefore, in terms of clause (c) of Rule 46A(1) of the Income tax Rules, requests Your Honor to kindly admit the additional evidence viz. copy of 71 confirmations mentioning PAN details of business partners (enclosed as Annexure 2) and kindly consider the same for [judicial disposal of the appeal.]”*

3.2 The additional evidences along with submission of the appellant were sent to the AO under Rule 46A for his comments, if any. The AO in the remand report dated 09.07.2014 opposed the admission of additional evidences under Rule 46A and submitted as under:-

*“Brief facts of the case are that the assessment in this case was completed u/s 143 (3) on 14.12.2010, after making the additions/disallowance on account of disallowance of unclaimed receipts (Rs.1550000) and unexplained credit/deposits u/s 68 (Rs.24440054).*

*During the course of assessment proceedings, the assessee was vide order sheet entry dated 26.10.2010 was required to produce the details of security deposits received. Vide reply dated 10.11.2010 the assessee furnished the details of security deposits received from various parties/individual amounting to Rs.300,91,531/- out of the above sum of Rs.300,91,531/- an amount of Rs.56,51,477/- were parties at amount less than Rs.1 lacs. Further vide order sheet entry dated 22.11.2010, assessee was required to produce complete address of the parties from whom securities received with their copy of account and confirmation. Since the assessee did not furnish any documents in this regard, vide order sheet entry dated 29.11.2010, the assessee was again required to furnish the documentary evidences in this regard. In response to this the assessee filed confirmation from 71 parties only. The assessee did not file the PAN details of these 71 parties. Since the assessee did not furnish the PAN details, which is mandatory for providing the identity and genuineness of the party. In the absence of PAN details the A.O. did not considered the confirmations from 71 parties as genuine as the A.O. could not verify the transactions. Hence, the A.O. treated Rs.24440054/- as unexplained credits/deposits and added the same to the income of the assessee.*

*Now, the assessee company has requested for furnished of additional evidence under Rule 46A of the I.T. Rules 1962 by way of PAN of 71 parties along with additional confirmations from 22 more parties.*

*The relevant provisions of the Rule 46A are reproduced hereunder:-*

*“(i) The appellant shall not be entitled to produce before the DCIT (A) or, as the case may be, the CIT (A), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the A.O. except in the following circumstances, namely:-*

- (ii) *Where the A.O. has refused to admit evidence which ought to have been admitted; or*
- (iii) *Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the A.O.; or*
- (iv) *Where the appellant was prevented by sufficient cause from producing before the A.O. any evidence which is relevant to any ground of appeal; or*
- (v) *Where the A.O. has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal."*

*Thus from the above, it is clear that the assessee is entitled to produce additional evidence before the appellate authorities only in those cases where the assessee was denied opportunity by the A.O. or the assessee was prevented by sufficient cause for producing such evidence before the A.O. The assessee has failed to bring out on record even a single instance where the evidence sought to be furnished by the assessee was refused to be entertained by the A.O. No evidence was produced by the assessee that he was prevented by sufficient cause for not being able to produce the evidence which he has now produced at the appellate stage.*

*In this case, the assessee has not furnished the complete details in spite of being specifically asked to furnish address, copy of account and confirmations vide order sheet entries dated 22.11.2010 and 29.11.2010. The assessee had been provided time of more than three weeks and since the matter was getting barred by limitation on 31.12.2010, the A.O. had complete the proceedings and passed the order*

*Therefore none of the conditions mentioned in Rule 46A is satisfied as:-*

- (1) *The assessing officer has not refused to admit evidence which ought to have been admitted.*
- (2) *The appellant was not prevented by sufficient cause from producing the evidence which he was called upon to produce by the assessing officer.*
- (3) *The appellant was not prevented by sufficient cause from producing before the assessing officer any evidence which is relevant to any ground of appeal.*
- (4) *The assessing officer has not made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*

*In view of the above, the submissions of the assessee may not be accepted and admitted at the appellate stage during appellate proceedings before your goodself."*

3.3 Copy of the remand report of the AO was provided to the A/R of the appellant for his rejoinder, if any. The A/R of the appellant in his rejoinder dated 29.08.2014 submitted:-

*"For the Assessment year ("AY") under consideration the Appellant filed its return of income on September 29, 2008 declaring a total loss of Rs. 893,051. The said return was selected for scrutiny assessment. The Assessing Officer ("AO") passed an assessment order, dated December 13, 2010, under section 143(3) of the Act. As per the said order, the AO has assessed the total loss of the Appellant at Rs 25,097,000 after making the following additions / disallowances:*

<b>Sr. No.</b>	<b>Nature of Disallowance</b>	<b>Amount (Rs.)</b>
1.	<i>Disallowance under section 41 of the Act on account of unclaimed receipts</i>	1,550,000
2.	<i>Treatment of security deposits received by the Appellant as unexplained credit / deposits under section 68 of the Act</i>	24,440,054

*Aggrieved by the above additions the Appellant has preferred this appeal before your predecessor. Detailed written submission dated 5<sup>th</sup> March 2012 and 23<sup>rd</sup> April 2012 on the respective grounds of appeal has been filed with your office during the course of hearing before your respective predecessors.*

**2. Issue in appeal with respect to addition of Rs 24,440,054 made by the AO to the returned income**

- *The Appellant is inter alia engaged in the business of distribution of mutual fund products and providing business auxiliary services viz. marketing & business promotional services. It is also a sub-broker of Religare Securities Limited ("RSL"). As part of its sub-broking business, it has appointed large number of agents / business partners which have referred clients for trading in stocks and shares. The Appellant earns commission in the form of percentage share in brokerage income earned by RSL from trading done by the said clients.*

- *As per the terms of the agreement entered between the Appellant and business partners, the Appellant took refundable security deposit from its business partners at the time of their association with the Appellant. The said deposit is taken as a security against any possible default committed by the client introduced by the said business partners who traded in securities through the RSL platform provided by the Appellant.*

- *During the assessment year under consideration the Appellant has appointed more than 270 business partners on pan India basis. Further, the Appellant has received securities deposits, aggregating to Rs. 30,091,531/- from the said business partners.*

- *During the course of assessment proceeding, the AO sought details of the parties from whom security deposits of more than Rs 100,000 was received by the Appellant with copy of*

*their accounts and confirmations from the respective parties that they have actually given security deposit.*

- *To prove the genuineness and bona fides of the receipt of security deposit, the Appellant submitted the details of the parties from whom security deposit of more than Rs 100,000 was received. Out of 178 parties, spread across India, which had given security deposit of more than Rs 100,000, the Appellant filed duly signed confirmation letters received from 71 parties from whom security deposit was received. The Appellant vide its submissions dated December 10, 2010 has further requested before the AO that in case more time is provided to the Appellant, it will be able to produce the balance confirmations also.*

- *However, the AO has disregarded the submissions filed by the Appellant and alleged that the Appellant has not been able to prove the genuineness and creditworthiness of the parties from whom the security deposits have been received by the Appellant (exceeding Rs 1 lakhs). The AO has further stated that the confirmations of 71 parties filed by the Appellant have no credence in eyes of law since even the Permanent Account Numbers (PANs) have not been mentioned in such confirmations.*

- *Thus the AO has treated security deposits of Rs 24,440,054 received by the Appellant as unexplained credit / deposits under section 68 of the Act and has added the same to the returned income of the Appellant.*

- *The Appellant has filed 22 additional confirmations which had PANs of the parties out of 178 parties from whom security deposits of more than Rs. 100,000 has been received with your office during the course of hearing before your respective predecessors. In addition, the Appellant has also submitted PANs of 71 confirmations that were filed before AO during the course of assessment proceeding.*

- *Your respected predecessor treated such confirmations which had the PAN of the respective parties as an additional evidence and directed the Appellant to file a petition under Rule 46A of the Income Tax Rules, 1962 ("the Rules"), so that such confirmations can be re-examined by the AO. The Appellant as directed filed a petition dated 12<sup>th</sup> November 2013 under Rule 46A of the Rules.*

- *On such petition, AO has issued a Remand Report under Section 250(4) of the Act dated 3<sup>rd</sup> July 2014. The AO in its remand report has challenge the additional evidence filled under the direction of your respective predecessor on the legal ground stating:*

*"That the assessee is entitled to produce additional evidence before the appellate authorities only in those cases where the assessee was denied opportunity by the AO or the assessee was prevented by sufficient cause for producing such evidence before the AO. The assessee failed to bring out on record even a single instance where the evidence sought to be furnished by the assessee was refused to be entertained by the AO. No evidence was produced by the assessee that he was prevented by sufficient*

*cause for not being able to produce the evidence which he has now produced at the appellate stage."*

*Therefore as per AO, none of the conditions mentioned in Rule 46A are satisfied. Hence, as per AO additional evidence i.e. confirmations having PANs of the parties submitted by the Appellant should not be accepted and admitted at the appellate stage during appellate proceedings before your goodself.*

### **3. Appellant's rejoinder**

*Without prejudice to the fact that the Appellant was directed by your respective predecessor to file a petition under Rule 46A of the Rules, our rejoinder to the remand report issued under section 250(4) of the Act dated 3<sup>rd</sup> July 2014 is as follows:*

*During the course of assessment proceeding, vide order sheet entry dated 26.10.2010 the AO sought details of the parties from whom security deposits were received. Vide submission dated 10.11.2010 the assessee furnished the details of security deposits received from various parties. Further, vide order sheet entry dated 22.11.2010 & 29.11.2010 the Appellant was required to produce complete address of parties from whom security received with copy of their accounts along with confirmations.*

*In response, the Appellant vide submissions dated December 10, 2010 submitted the details of the parties from whom security deposit of more than Rs 100,000 was received along with their names and complete addresses. Further, out of 178 parties, spread across India, which had given security deposit of more than Rs 100,000, the Appellant filed duly signed confirmation letters received from 71 parties from whom security deposit was received and sought time to file the rest.*

*The AO while passing the assessment order has asserted that the Appellant must have the PAN numbers of the depositors at the time of receiving security deposits since quoting of PAN number is a mandatory requirement in case the transaction value exceeds Rs 50,000. It is submitted that under section 206AA of the Act, receipt of security deposit is not a transaction which is liable to deduction of tax at source and in relation to which the payer is liable to furnish PAN number. It is also submitted that such an assertion of the AO is also misplaced since the transaction under consideration i.e. receipt of security deposits is not included in the list of transactions prescribed by the Board in Rule 114B of the Rules, wherein quoting of PAN number is a mandatory requirement. Hence, there was no obligation either on the payer to provide its PAN number or on the Appellant to obtain PAN number at the time of receipt of security deposit. Therefore the assertion of the AO is without any basis.*

*On the basis of above, the appellant therefore, request Your Honor to kindly decide the appeal based on the merits of the case as discussed in our written submission dated 5<sup>th</sup> March 2012 and 23<sup>rd</sup> April 2012 filed with your office during the course of hearing before your respective predecessors.*

*With regard to the PAN numbers of the parties which had given the confirmations and which are filed before the AO during the assessment proceedings, we are attaching herewith, for Your Honor's kind reference a report showing the correctness of such PAN numbers provided by its business partners/ parties. This report is based on the information available on Government of India website i.e. <https://www.tdscpc.gov.in/app/ded/panverify.xhtml>. Please refer Annexure-1.*

*We request you to take the above submissions on record. We would be pleased to furnish any additional details/documents which you may require."*

3.4 Further, the CIT(A) again directed the AO to furnish complete details u/s 68 of the I.T. Act amounting to Rs. 2,44,40,054/-. The appellant submitted a list of 89 persons who had given loans in cash to the appellant company. AO examined only 34 loan creditors. Therefore, the CIT(A) asked the AO to examine the rest of the loan creditors and submit his report. The AO in his report submitted as under:-

*"The relevant provisions of the furnishing of Additional Evidence under Rule 46A are reproduced hereunder:-*

*"(i) The appellant shall not be entitled to produce before the DCIT (A) or, as the case may be, the CIT (A), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the A.O. except in the following circumstances, namely:-*

- (a) Where the A.O. has refused to admit evidence which ought to have been admitted; or*
- (b) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the A.O.; or*
- (c) Where the appellant was prevented by sufficient cause from producing before the A.O. any evidence which is relevant to any ground of appeal; or*
- (d) Where the A.O. has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal."*

*(3) Thus from the above, it is clear that the assessee is entitled to produce additional evidence before the appellate authorities only in those cases where the assessee was denied opportunity by the A.O. or the assessee was prevented by sufficient cause for producing such evidence before the A.O. Here the assessee has provided sufficient opportunity by issue of notice and the assessee's AR attended the proceedings and filed details except the confirmations/evidence for security deposits received.*

*(4) No evidence was produced by the assessee that he was prevented by sufficient cause for not being able to produce the evidence which he has now produced at the appellate stage.*

*(5) Therefore none of the conditions mentioned in Rule 46A is satisfied as:*

- (1) *The Assessing Officer has not refused to admit evidence which ought to have been admitted.*
- (2) *The appellant was not prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer.*
- (3) *The appellant was not prevented by sufficient cause from producing before the assessing officer any evidence which is relevant to any ground of appeal.*
- (4) *The assessing officer has not made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*

*Without prejudice to the above, the point wise reply to the issue raised by the assessee during the appellate proceedings is as under:-*

*Ground No. 1 The A.O. has erroneously made disallowance u/s 68 amounting to Rs.2,44,40,054/- as unexplained credits/deposits.*

*Brief facts of the case are that the assessment in this case was completed u/s 143 (3) on 14.12.10, after making the additions/disallowance on account of disallowance of unclaimed receipts (Rs.1550000) and unexplained credit/deposits u/s 68 (Rs.24440054).*

*During the assessment proceedings, vide order sheet entry dated 26.10.10, the assessee was requested to produce the details of security received. Vide reply dated 10.11.10, the assessee furnished the details of security deposits received from various parties/individual amounting to Rs.3,00,91,531/-. Out of the above sum of Rs.3,00,91,531/- assessee has received security deposits above Rs.1 lacs from 178 parties and a total amount of Rs.56,51,477/- from parties with an amount less than Rs.1 lac. Further vide order sheet entry dated 22.11.10, assessee was required to produce complete address of the parties from whom securities received with their copy of account and confirmation. Since, the assessee did not furnish any documents in this regard, vide order sheet entry dated 29.11.10, the assessee was again requested to furnish the documentary evidences in this regard. In response to this the assessee filed confirmation from 71 parties only. The assessee did not file the PAN details, which is mandatory for providing the identity and genuineness of the party. In absence of PAN details the A.O. did not considered the confirmations from 71 parties as genuine as the A.O. could not verify the transactions. Hence, the A.O. treated Rs.24440054/-as unexplained credits/deposits and added the same to the income of the assessee.*

*Now, the assessee company has requested before your goodself for furnishing of additional evidence under Rule 46A of the Income Tax Rule 1962 by way of confirmation with PAN details of 71 parties alongwith additional confirmations from 22 more parties.*

*Out of the above 93 parties who have advanced security deposit money to the above names assessee co., address/PAN details in respect of 11 parties are either not available on the confirmations or is not legible at all. Information u/s 133 (6) of the Income Tax Act, 1961*

was called from all the remaining 82 persons, vide this office letter dated 27.02.2015, at the addresses provided in the confirmations furnished by the assessee. All the above persons had been directed to furnish the requisite information by 09.03.2015.

Out of the above, letters from 4 parties have returned unserved. Till date, confirmation and other details have been received from only one party i.e., S. Mohit Bhatia r/o B-517, Sudarshan Park, Narela, New Delhi-110015, who had advanced security deposits amount of Rs.1,00,000/- but has not provided the bank statement showing the transaction. One of the parties, Sh. Ravi Kumar Batra, r/o near Ravi Glass House, Patel Marg, Kotdwara has denied having advanced security deposits amount to Rs.1,04,046/- as claimed in the confirmation provided by the assessee. Copies of letters from Sh. Mohit Bhatia & Sh. Ravi Kumar Batra are enclosed herewith for perusal.

In view of the above facts, it is evident that the assessee's claim regarding the security deposits advanced by the persons could not be verified. Hence assessee's submission in this regard seems not acceptable. However, the Ld. CIT (A) may kindly take a decision on the merits."

3.5 Copy of the above remand report of the AO was provided to the A/R of the appellant for his rejoinder, if any. The A/R of the appellant in his rejoinder dated 30.03.2015 submitted:-

"With regard to captioned subject matter we wish to submit as under:

1. **Background**

For the Assessment year ("AY") under consideration the Appellant filed its return of income on September 29, 2008 declaring a total loss of Rs. 893,051. The said return was selected for scrutiny assessment. The Assessing Officer ("AO") passed an assessment order, dated December 13, 2010, under section 143(3) of the Act. As per the said order, the AO has assessed the total income of the appellant at Rs 25,097,000 after making the following additions / disallowances:

Sr. No.	Nature of Disallowance	Amount (Rs.)
1.	Disallowance under section 41 of the Act on account unclaimed receipts	1,550,000
2.	Treatment of security deposits received by the Appellant as unexplained credit / deposits under section 68 of the Act	24,440,054

Aggrieved by the above additions the Appellant has preferred this appeal before your predecessor. Detailed written submission dated 5<sup>th</sup> March 2012 and 23<sup>rd</sup> April 2012 on

*the respective grounds of appeal has been filed with your office during the course of hearing before your respective predecessors.*

**2. Issue in appeal with respect to addition of Rs 24,440,054 made by the AO to the returned income**

- *The Appellant is inter alia engaged in the business of distribution of mutual fund products and providing business auxiliary services viz. marketing & business promotional services. It is also a sub-broker of Religare Securities Limited ("RSL"). As part of its sub-broking business, it has appointed large number of agents / business partners which have referred clients for trading in stocks and shares. The Appellant earns commission in the form of percentage share in brokerage income earned by RSL from trading done by the said clients.*
- *As per the terms of the agreement entered between the Appellant and business partners, the Appellant took refundable security deposit from its business partners at the time of their association with the Appellant. The said deposit is taken as a security against any possible default committed by the client introduced by the said business partners who traded in securities through the RSL platform provided by the Appellant.*
- *During the assessment year under consideration the Appellant has appointed more than 270 business partners on pan India basis. Further, the Appellant has received securities deposits, aggregating to Rs. 30,091,531/- from the said business partners.*
- *During the course of assessment proceeding, the AO sought details of the parties from whom security deposits of more than Rs 100,000 was received by the Appellant with copy of their accounts and confirmations from the respective parties that they have actually given security deposit.*
- *To prove the genuineness and bona fides of the receipt of security deposit, the Appellant submitted the details of the parties from whom security deposit of more than Rs 100,000 was received. Out of 178 parties, spread across India, which had given security deposit of more than Rs 100,000, the Appellant filed duly signed confirmation letters received from 71 parties from whom security deposit was received. The Appellant vide its submissions dated December 10, 2010 has further requested before the AO that in case more time is provided to the Appellant, it will be able to produce the balance confirmations also.*
- *However, the AO has disregarded the submissions filed by the Appellant and alleged that the Appellant has not been able to prove the genuineness and creditworthiness of the parties from whom the security deposits have been received by the Appellant (exceeding Rs 1 lakhs). The AO has further stated that the confirmations of 71 parties filed by the Appellant have no credence in eyes of law since even the Permanent Account Numbers (PANs) have not been mentioned in such confirmations.*

- *Thus the AO has treated security deposits of Rs 24,440,054 received by the Appellant as unexplained credit / deposits under section 68 of the Act and has added the same to the returned income of the Appellant.*
- *The Appellant has filed 22 additional confirmations which had PANs of the parties out of 178 parties from whom security deposits of more than Rs. 100,000 has been received with your office during the course of hearing before your respective predecessors. In addition, the Appellant has also submitted PANs of 71 confirmations that were filed before AO during the course of assessment proceeding.*
- *Your Honor's respected predecessor treated such confirmations which had the PAN of the respective parties as an additional evidence and directed the Appellant to file a petition under Rule 46A of the Income Tax Rules, 1962 ("the Rules"), so that such confirmations can be re-examined by the AO. The Appellant, as directed, filed a petition dated 12<sup>th</sup> November 2013 under Rule 46A of the Rules.*
- *On such petition, AO has issued a Remand Report under Section 250(4) of the Act dated 3<sup>rd</sup> July 2014. The AO in its remand report has challenge the additional evidence filled under the direction of your respective predecessor on the legal ground stating:*

*"That the assessee is entitled to produce additional evidence before the appellate authorities only in those cases where the assessee was denied opportunity by the AO or the assessee was prevented by sufficient cause for producing such evidence before the AO. The assessee failed to bring out on record even a single instance where the evidence sought to be furnished by the assessee was refused to be entertained by the AO. No evidence was produced by the assessee that he was prevented by sufficient cause for not being able to produce the evidence which he has now produced at the appellate stage."*

*Therefore as per AO, none of the conditions mentioned in Rule 46A are satisfied. Hence, as per AO additional evidence i.e. confirmations having PANs of the parties submitted by the Appellant should not be accepted and admitted at the appellate stage during appellate proceedings before your goodself.*

3. *The Appellant in its rejoinder dated August 29, 2014 to the aforesaid remand report submitted that the following:*

- *The Appellant did not consider the PAN as additional evidence which requires a petition under Rule 46A of the Income Tax Rules, because PAN is given by the Revenue Authorities and whether a party, which gave security deposit to the Company, has a PAN or not can be found from the website / database of the Revenue Authorities. Further, the correctness or otherwise of the PAN assuming that the same is not available on website / database of the Revenue Authorities can be checked by the Revenue Authorities. However, the Appellant was directed by your respective predecessor to file a petition under Rule 46A of the Income Tax Rules.*

- *The Appellant, following the direction issued by the AO to submit details of the parties which had given security deposit, submitted confirmations from 71 parties spread across India, which had given security deposit of more than Rs 100,000. These confirmations were duly signed confirmation letters received from these 71 parties from whom security deposit was received and it sought time to file the rest.*
  - *The AO however rejected these confirmations on the ground that PAN was not mentioned.*
  - *It was clarified in the rejoinder that under section 206AA of the Act, receipt of security deposit is not a transaction which is liable to deduction of tax at source and in relation to which the payer is liable to furnish PAN number. It was also submitted that the assertion of the AO that PAN is mandatory is also misplaced since the transaction under consideration i.e. receipt of security deposits is not included in the list of transactions prescribed by the Board in Rule 114B of the Rules, wherein quoting of PAN number is a mandatory requirement. Hence, there was no obligation either on the payer to provide its PAN number or on the Appellant to obtain PAN number at the time of receipt of security deposit. Therefore the assertion of the AO is without any basis.*
4. *The Appellant with the above referred rejoinder attached a report showing the correctness of such PAN numbers provided by its business partners/ parties for Your Honor's respected predecessor. This report is based on the information available on Government of India website i.e. <https://www.tdscpc.gov.in/app/ded/panverify.xhtml>. The same report is attached as Annexure-1.*
  5. *However Your Honor's respected predecessor informed us that she has written to the AO to check the correctness or otherwise of the PAN. We are not aware whether the AO has responded to this request.*
  6. *We have now been given a copy of the report dated March 11, 2015 which the AO has issued pursuant to the directions issued by Your Honor. The Appellant is not aware of what information was requested by Your Honor from the AO pursuant to which the report has been issued.*

*However, in the report the AO has made the following observations:*

- a. *PAN details / addresses of 11 parties are either not legible or not available on the confirmation.*

**Our submission**

*We request that list of these 11 parties may kindly be provided to us so that we can provide the necessary details related to PAN and addresses.*

- b. *Information under section 133(6) of the Act was called for all the parties and that till date reply to such notice under section 133(6) has come only from 1 party which has confirmed that the security has been given however he has not provided the bank statement showing the transaction and that one other party has denied giving such security deposit.*

**Our submission**

*We wish to submit that the Company has provided that confirmation from 93 parties and has also given their PANs. It is further submitted that the receipt of security deposit was in FY 2007-08 which is 7 years back therefore the fact that various parties have not responded to 133(6) notices is possible. The Company vide its submission dated March 05, 2012 has submitted copies of the ledger accounts of such parties showing broking transactions with them, ledger accounts and bank statements showing the refund of security deposit to the parties alongwith the cheques details.*

*Considering the details that the Company has submitted to prove the genuineness of the security deposits received, the fact that the ledger accounts as submitted contains the details of various broking related transactions with these parties and also the fact that the Company has earned broking income through these parties in the subject AY, we request Your Honor to kindly decide the appeal based on the merits of the case as discussed in our written submission dated 5<sup>th</sup> March 2012 and 23<sup>rd</sup> April 2012 filled with your office during the course of hearing before your respective predecessors.*

*We request you to take the above submissions on record. We would be pleased to furnish any additional details/documents which you may require."*

4.1 **FINDINGS:-**

I have carefully considered the facts of the case, the findings of the AO, the submissions made by the A/R of the appellant, the additional evidences placed on record by him, the remand reports of the A.O. and the appellant's rejoinder thereto. The appellant company filed its return of income on 27.09.2008 declaring loss of Rs. 8,93,051/-. The case was selected for scrutiny. The appellant company was engaged in the business of mutual fund distribution and marketing & promotional services during the year under consideration. **Grounds nos. 3 to 3.2 of the appeal** are directed against the addition u/s 41 of the Act of Rs. 15,50,000/- shown as unreconciled/unclaimed receipts by the appellant at the end of the year. The AO in the assessment proceedings observed that the company had shown "security deposits" under Schedule-G: Current Liabilities. AO asked the appellant to produce the details

of these security deposits and from the details filed, the AO observed that the appellant had shown 'unclaimed receipts' amounting to Rs. 15,50,000/- among the details of security deposits. The AO asked the appellant to furnish details of unclaimed receipts of Rs. 15,50,000/- shown among security deposits and to show cause as to why the same be not added to its income u/s 41 of the Act. In reply the appellant filed a list of these receipts which shows that these unclaimed receipts were received during the period Sep'07 to Mar'08 in the appellant's account code GL010000. The appellant also submitted that the cheques received for security deposit were banked but the parties from whom they were received were not known to the accounting team, due to which the amount received was accounted for as unclaimed receipt. As the appellant failed to discharge its onus regarding the unclaimed receipts, the AO disallowed and added Rs. 15,50,000/- to the total income of the appellant. In appeal before me, the appellant has contended that all these 'unclaimed receipts' were reconciled in the subsequent year. In other words, in the next financial year the appellant was able to identify the parties from whom these amounts were received and accordingly they were shifted from the head 'unclaimed receipts'. However, the appellant has not provided the details of the persons to whom these receipts of Rs.15,50,000/- were attributable – their names, addresses, PANs, etc. to prove their identities or copies of their I.T. returns, bank statements and balance sheets in support of their creditworthiness and the genuineness of the transactions. In the absence of these details, the three necessary ingredients of section 68 have not been established by the appellant, who cannot simply get away by stating that the deposits shown under the head 'unclaimed receipts' were ultimately reconciled and the parties from whom they were received were identified. The onus was on the appellant to establish the identities and creditworthiness of these parties as also the genuineness of the transactions which it failed to do both at the assessment and appellate stage. Accordingly, the impugned addition to income made by the Assessing Officer is upheld, but under a different section, namely, section 68 of the I.T. Act. Grounds nos. 3 to 3.2 of the appeal are dismissed.

4.2.1 Coming to **grounds of appeal nos. 4 to 4.4**, the issue is regarding security deposits exceeding Rs.1 lac received by the appellant during the year, aggregating to Rs.2,44,40,054/-. The Assessing Officer had, during the course of assessment proceedings, asked the appellant to furnish details of persons from whom security deposits of Rs.1 lac or more were received during the year, alongwith their copies of accounts and confirmations, etc. There were in all

178 such parties out of which the appellant was able to produce confirmations from 71 parties. Even in the case of these latter 71 parties, Permanent Account Numbers (PANs) were not mentioned in all the confirmations. Accordingly, the Assessing Officer added the entire amount of these deposits as unexplained cash credits u/s 68 of the Act. During appellate proceedings, the appellant contended that it was not provided sufficient time by the Assessing Officer to obtain the requisite details from as many as 178 parties spread all over the country and therefore requested for admission of additional evidence by way of confirmations of 22 more parties as well as PANs of those of the 71 parties which were not furnished before the A.O. Although the Assessing Officer has objected to the admission of this additional evidence stating that none of the conditions laid down in Rule 46A (1) was fulfilled, I am of the opinion that the appellant's case falls under clause (d) of Rule 46A (1) since the Assessing Officer passed the order without giving sufficient time and opportunity (approximately two months' time starting from end of October, 2010) to the appellant to furnish details which were to be gathered from as many as 178 parties all over the country. Hon'ble ITAT, Bench D, New Delhi, have held in the case of *ACIT Vs. Shri Joginder Singh in ITA No. 2942 (Del) of 2011*, that powers of first appellate authority are co-terminus with those of the assessing officer, and that it is incumbent on him to exercise the same if the facts and circumstances justify. Further, Hon'ble Delhi High Court in the case of *CIT vs. Virgin Securities Credit P. Ltd. (2011) 332 ITR 396 (Del)* have held that evidence which is crucial in disposing a case can be admitted. Since the documents filed by the appellant as additional evidences are crucial in nature and go to the root of the matter, in order to adjudicate the issues involved in an effective manner, and in the interest of natural justice, and also because an opportunity has been provided to the AO to examine and comment on them, the same need to be admitted and considered. Therefore, the documents filed as additional evidence in the course of appeal proceedings are **admitted** for consideration and adjudication of the issues on merit.

4.2.2 Perusal of the confirmations of the parties from whom deposits in excess of Rs.1 lac were received by the appellant during the year, whether such confirmations were filed at the assessment or the appellate stage, reveals that these confirmations give very sketchy/minimal details. One such confirmation is reproduced below:-

*"Carol Securities Pvt. Ltd.  
Flat No. 903A, 6 Devika Tower,  
Nehru Place,  
New Delhi-110019.*

*Sub:- Confirmation of the Security Deposit given to Carol Securities Pvt. Ltd. ('the company')"*

*Dear Sir,*

*It is hereby confirmed that I/we have given the security deposit to the company and as on March 31, 2008 the balance of the security deposit with company was Rs.1,50,000-/-.*

*Name:- SARUN KUMAR  
Address:- #596, B/H GOVT MIDDLE SCHOOL,  
NEW EXTN. KADUGODI  
BANGALORE-560067  
PAN:- AVIPK 5020B"*

All confirmations that have been filed are more or less written in the same language. They neither mention the transactions which took place between each of these parties and the appellant during the year nor the mode of receipt of the security deposits but only specify the balance at the end of the financial year relevant to the impugned assessment year. During appellate proceedings, it came to the notice of the first appellate authority that security deposits were received in cash from 89 parties and accordingly a second remand report was called for by the CIT (A) vide letter no. CIT (A)-VI/Report/14-15/722 dated 21.10.2014 with the directions inter-alia to examine and verify the creditworthiness of the creditors. In pursuance of the directions of the CIT (A), the A.O. issued notices to those parties who had filed confirmations with complete/legible addresses (82 such parties), which elicited positive response from only one party, a denial of any transaction with the appellant by another party and no response at all from the other parties. In the remaining cases, it was not possible for the A.O. to conduct any enquiry, for want of details from the appellant company.

4.2.3 The law regarding cash credits is very clear. The onus is on the assessee in whose books an amount is credited to explain the nature and source of the same. Otherwise the

amount is liable to be added to the assessee's income u/s 68 of the I.T. Act. Even presuming that identities of 93 parties were established by the appellant (confirmations of 71 parties having been filed during the assessment proceedings and 22 parties during appellate proceedings, alongwith PANs either at assessment or appellate stage), the appellant is silent throughout about their creditworthiness. Simply furnishing PAN does not prove the creditworthiness of a party, unless copy of its I.T. return(s), balance sheet and bank statement are also filed to prove that it had the income/net worth to invest. These documents which could establish the creditworthiness of the parties have not been furnished even at the appellate and remand stage. Not only this, the appellant had ample time during appeal proceedings to file the confirmations of the balance 107 (178-71) parties but chose to do so only in case of 22 more parties. Thus out of 178 parties from whom security deposits of Rs.1 lac or more were received by the appellant during the year, confirmations of only 93 (71+22) parties could be provided. It is noteworthy that the appeal pertains to the A.Y. 2008-09 and was filed as far back as on 18.01.2011 but in more than five and a half years' time the appellant could not even provide confirmations of all the parties, what to talk of proof of their creditworthiness. With the transactions with as many as 89 parties admittedly having taken place in cash and the parties not replying to the A.O's notices (one party actually denied having had any transaction with the appellant), the genuineness of the transactions is in doubt as well.

4.2.4 The judgements relied upon by the appellant are not applicable to the facts of its case. Many of them, for instance *CIT vs. Dwarkashish Investment (P) Limited* 239 CTR 478 2010 and *M/s. Lovely Exports (2008) 216 CTR 195 2008(SC)* pertain to receipt of share application money/share capital by assesseees whereas in the case of the appellant it is not share capital but security deposits which are stated to have been received from its partners/agents by the appellant whom the appellant must have known quite well. In another case relied upon by the appellant i.e. *ITO v Suresh Kalmadi* 32 TTJ (Pune) TM 300, it was held that the assessee cannot be called upon to prove the worth of his creditor's creditor. In the instant case, the appellant has failed to prove the worth of the creditors (parties giving security deposits) themselves. Then in the case of *CIT v Orissa Corporation Pvt. Ltd* 159 ITR 78(SC), it was held by the Hon'ble Apex Court that when the assessee furnishes full details regarding the creditors, it is upto the Department to pursue the matter further. However, in the appellant's

case, as discussed above, full details of the parties giving the security deposits were lacking. As long as those details were not filed, the onus did not shift upon the A.O./Revenue. Before me, the appellant has also filed copies of TDS certificates as proof that the parties from whom security deposits were received were agents of the appellant and that tax had been deducted at source from payments made to them. But this in no way proves the source of the security deposits claimed to have been received. It may be possible that a relatively small payment, say Rs.10,000/- was made to an agent from whom security deposit of substantial amount e.g. Rs.1 lac was shown to have been received. In other words, payment to an agent and deduction of tax from such payment does not prove the creditworthiness of that agent or the genuineness of the purported security deposit from that agent.

4.2.5 In view of the factual and legal position discussed in the preceding paras, it is clear that the appellant has not been able to discharge the initial onus which lay on it as per section 68 with respect to the security deposits aggregating to Rs.2,44,40,054/- and the ratios of the judicial decisions relied upon by it do not apply to its case. Hence, the action of the Assessing Officer in adding these amounts to the appellant's income u/s 68 is confirmed. Grounds of appeal nos. 4 to 4.4 of the appeal are dismissed. "

**[D]** This present appeal has been filed by the assessee against the aforesaid impugned appellate order dated 08.08.2016 of the Ld. CIT(A). At the time of hearing, Revenue was represented by Shri Dheeraj Garg, the learned Senior Departmental Representative ("Ld. Sr. DR", for short). However, none was present from the assessee's side. In the absence of any representation from assessee's side, at the time of hearing before us, we heard the Ld. Sr. DR; who relied upon the order of the Assessing Officer and the aforesaid impugned order dated 08.08.2016 of the Ld. CIT(A). After perusal of the materials on record, including the order of the AO and the aforesaid impugned order dated 08.08.2016 of the Ld. CIT(A), we find that the Ld.

CIT(A) has passed speaking order on merits. Relevant portion of the impugned order of the Ld. CIT(A) has already been reproduced in foregoing paragraph [C] of this order. We find that the Ld. CIT(A) has given detailed reasons for his decision on merits in the aforesaid impugned appellate order dated 08.08.2016 of Ld. CIT(A). 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 on merit. After hearing the Ld. Sr. DR and after perusal of materials on record, and further, in view of the foregoing discussion, we decline to interfere with the aforesaid impugned appellate order dated 08.08.2016 of Ld. CIT(A), and accordingly, this appeal is dismissed.

**[E] Before we part; we explicitly clarify that the assessee will be at liberty to approach ITAT for restoration of the appeal 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.**

**[F]** In the result, appeal filed by Assessee is dismissed.

Order pronounced in the open court on 06/01/20.

**Sd/-**  
**(K.N. CHARY)**  
**JUDICIAL MEMBER**  
Dated: 06/01/20.  
Pooja/-

**Sd/-**  
**(ANADEE NATH MISSHRA)**  
**ACCOUNTANT MEMBER**

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	