IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER

ITA No.2562/Mum/2018
(**Assessment Year: 2010-11)**

Rukmani Agencies Private Limited, 4th Floor, Silver Metropolis, Jaicoach Compound, Opposite Bimbisar Nagar, Western Express, Highway Goregaon (E), Mumbai-400063.	Vs.	D.C.I.T., Central Circle-5(1), 19th Floor, Air India Building, Nariman Point, Mumbai-400021.
PAN/GIR No.AAACR 4998 P		
(Appellant)	..	**(Respondent**)

Assessee by	Ms. Ritu Kamal Kishor (AR)
Revenue by	Shri Akhtar H Ansari (DR)
Date of Hearing	**21/01/2020**
Date of Pronouncement	**02/03/2020**

आदेश / O R D E R

PER: R.C. SHARMA, A.M.

This appeal by the assessee is directed against the order dated 07/03/2018 of ld. CIT(A)-53, Mumbai for the A.Y. 2010-11 in the matter of order passed u/s 143(3) r.w.s. 153A of the Income Tax Act, 1961 (in short, the Act). Following grounds have been taken by the assessee:

> *"1. The ld. CIT(A) has erred in law and on facts in upholding the additions made by the A.O. u/s 143(3) r.w.s. 153A of the Income Tax Act, 1961 which is invalid and bad in law.*
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> *2. The ld. CIT(A) has erred in upholding the addition of Rs. 22,10,000/- made by the A.O. U/s 68 of the Act.*

3. *The ld. CIT(A) has erred in upholding the addition of Rs. 16,575/- made by the A.O. being alleged unexplained expenditure @ 0.75% on aforesaid alleged capital introduced of Rs. 22,10,000/-.*

4. *The ld. CIT(A) has erred in law and on facts in upholding the disallowance made by the A.O. u/s 14A of the Act read with Rule 8D of the IT Rules, 1962.*

5. *The order passed by the ld. CIT(A) is in violation of principles of natural justice and bad in law.*

6. *The appellant craves leave to add, to amend alter or delete all or any of the foregoing grounds of appeal."*

2. Rival contentions have been heard and record perused. Brief facts of the case are that a search & seizure action u/s.132(1) of the I.T. Act, 1961 was conducted in the Anand Rathi Group alongwith the other group concerns on 24/09/2013. During the course of search proceeding, it was noticed that the assessee had raised preference share capital of Rs. 2,60,000/- in the form of 26,000 redeemable preference shares bearing face value of Rs.10/- each on which the assessee has shown to have received share premium of Rs. 19,50,000/- as on 31.03.2010. The assessee company issued preference shares to M/s. Ken Securities and M/s Nexus Software Ltd. AO observed that in A.Y.2010-11, 14 companies including the assessee company of Anand Rathi Group (hereinafter: (ARG') had raised the capital of Rs. 13,67,25,000/-. Therefore, 14 companies of ARG subscribed the shares with face value of Rs. 10/- along with the premium that vary from Rs.30 per share to Rs. 75 /- per share. The 14 companies of the ARG controlled directly or thorugh the

employee of the ARG subscribed the shares from total 32 entities, out of which 20 companies were having address at Mumbai, while the rest were located at Kolkata. Not satisfied with the genuineness of transaction, AO added Rs.22,10,000/- u/s.68 in respect of these shares and also made addition of Rs.16,575/- on account of unexplained expenditure incurred for procuring such share capital. AO has also made disallowance u/s.14A amounting to Rs.28,114/-.

3. By the impugned order, CIT(A) confirmed the action of the AO against which assessee is in further appeal before us. At the outset, ld. AR placed on record the order of the Tribunal in case of other group concerns of Anand Rathi group wherein in respect of same search on 24/09/2013 addition made on account of issue on preference shares at premium was decided by the Tribunal in assessee's favour vide order dated 29/08/2019.

4. We have gone through the order of the Tribunal in group cases wherein exactly similar addition so made by the AO and confirmed by CIT(A) was deleted by the Tribunal after threadbare dealing with all the judicial pronouncements referred by lower authorities in their respective orders as well as cited by ld. AR and DR during the course of hearing. Precise observation of the Tribunal was as under:-

> *"12. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The Ld. AO has made additions towards share capital and share premium, on the ground that although, the assessee has filed various details to prove identity,*

genuineness of transactions and creditworthiness of the parties but, on perusal of details filed by the assessee, it was noticed that the assessee has failed to establish transactions between the parties are genuine in nature and also the subscriber to the share capital are having capacity to explain huge investments in assessee company. According to the AO, mere furnishing confirmation letters from the parties along with their PAN Number and ITR acknowledgement is not sufficient enough to discharge ,the onus cast upon u/s 68 of the I.T.Act, 1961 and what is relevant is to discharge the true identity of the investors. Although, the assessee has filed certain documents, including PAN number and ITR acknowledgement and financial statements along with bank statement of subscribers, but when, it comes to genuineness of transactions and creditworthiness of the parties, except filing financial statements, no other evidences has been filed to prove that share capital received from subscribers is genuine in nature, which is supported by necessary evidences. The AO has also taken support from the findings recorded, during the course of survey and statement recorded from certain persons, including director and key employee of Anand Rathi Group to come to the conclusion that the assessee has entered into an arranged transactions with certain companies, in order to convert its own unaccounted income in the form of share capital, which is evident from the fact that the assessee has issued share capital with a huge premium of Rs. 30 to Rs. 72 per share, even though, the financial of those companies is not supporting such a huge valuation. Further, the AO has taken support from the statement of Director, during the course of search where, he had not explained share capital, including premium received for the year under consideration.

13. The provision of section 68 of the Income Tax Act, 1961 deals with a cases, where any sum found credited in the books of accounts of an assesee, in any previous year, for which the assesee offered no explanation about the nature and source, thereof or the explanations offered by the assessee, in the opinion of the AO is not satisfactory, then sum so found credited may be charged to income tax, as income of the assesse of that previous year. In order to fix any credit within the ambit of section 68 of the I.T Act, 1961, the AO has to examine three ingredients i.e., identity, genuineness of transactions and creditworthiness of the parties. In this factual and legal background, if you examine, the present case in the light of various evidences filed by the assessee, in order to prove credit found in the form of share capital and share premium, one has to see, whether the assessee has discharged its initial onus cast upon u/s 68 of the I.T.Act, 1961 or not. In this case, the assesee has filed various details, including share application form, copy of declaration, board resolution, bank statement of Investor Company, PAN card, acknowledgment of return of income, financial

statement of Investor Company, form No. 2 for allotment of equity shares and bank statement reflecting, the amount received through banking channels. Once, the assessee has discharged its initial onus by filing various details, then the onus shift to the AO to carry out further verification, in the light of evidences filed by the assessee to ascertain true nature of transactions between the parties before, he come to the conclusion that the transactions between the parties are genuine or not. In this case although, the AO has issued 133(6) notices to the parties, no further enquiry has been conducted, including issue of summons u/s 131. No doubt, none of the investors companies have responded to 133(6) notices issued by the AO, but fact of the matter is when, assessee has filed complete set of documents, including name and address of the parties, it is for the AO to carry out further investigation by exercising all possible options available to him, but non attendance of parties in response to 133(6) cannot be attributed to the assessee, because due to time lag certain persons might have left the place and for this no responsibility can be fastened upon the assessee. In this case, the assessee done what best it could do and filed, whatever information available with it, in order to satisfy the AO. In case, the AO is not satisfied with documents furnished by the assessee, then he is free to carry out his own investigations by exercising powers conferred u/s 131 or u/s 133(6) of the I.T.Act, 1961. In this case, the AO, except issue of 133(6) notices nothing has been done to find out, the nature of transactions between the parties. Therefore, we are of the considered view that when, assessee has filed complete details to prove identity, genuineness of transactions and creditworthiness of the parties, then there is no reason for the AO to came to the conclusion that share capital and share premium is unexplained only for the reason that during the search proceedings, the director of the company had admitted that he cannot explain reasons why blank forms are kept in his possession, ignoring the fact that such admission has been retracted by filing affidavit along with letter explaining reasons fro such admission during search proceedings. Further, additions made by the AO cannot be sustained even on this count because, the AO has relied upon statement of third paryies to make additions towards share capital, but when the present director of the assessee company asked for copies of statement of third party and also opportunity for cross examination of person who gave such statement, the AO has denied, the opportunity of cross examination and also not furnished copies of statement. It is a settled position of law that once, any third party information/statements is relied upon to make additions, it is the obligation of the AO to provide copies of such statements/information and also to provide an opportunity of cross examination of the person, who gave the statement, when such opportunity has been availed by the person against whom, such statements are used. This legal proposition is supported by the decision of Hon'ble Supreme Court in the case of Kishanchand Chellaram vs CIT 1980 125 ITR 713 (SC), where it was

held that when, third party information is relied upon to draw an adverse inference against the assessee, the same needs to be provided and also opportunity of cross examination shall be given, if such opportunity is availed by the assessee. The Hon'ble Supreme Court in the case of Andaman Timber Industries Ltd Vs CCE, Kolkata II in Appeal No 4228 of 2006 has vide order dated 02.09.2015 had also upheld a similar legal position and held that not allowing the assessee to cross-examine the witnesses by the adjudicating the authority, though the statements and those witnesses were made the basis of the impugned order is a serious flaw, which makes the order nullity in, as much as, it amount to violation of principle of natural justice, because of which, the assessee was adversely affected. Therefore, on this count also the additions made by the AO cannot be sustained.

14. Coming to the other aspect of the issue, the AO has invoked the provisions of section 56(2)(viib) of the I.T. Act, 1961. We find that the said provision has been inserted by Finance Act, 2012 w.e.f 10.04.2013, where it provides that where a closely held company issues its shares at a price which is more than its fair market value, then amount received in excess of fair market value will be charged to tax in the hands of the company as income from other sources. We, further noted that the provisions of section 56(2)(viib) was inserted by Finance Act,2012 w.e.f. 1.04.2013 is applicable from A.Y. 2013-14 onwards. In fact, a similar amendment has been made in section 68 by insertion of a proviso by the Finance At 2012 w.e.f. 01.04.2013 as per which the assessee company (not being a company in which public are substantially interested) and sums so credited consists of share application money, share capital , share premium or any such amount by whatever name called, any explanation offered by such assessee company shall be deemed to be not satisfactory, unless the person being, a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited and such explanation in the opinion of the AO aforesaid has been found to be satisfactory. On perusal of amendments brought out by Finance Act 2012, w.e.f. 01.04.2013 to the provisions of section 56(2)(viib) and section 68 of the Act, it is very clear that where the assessee has issued shares at premium and also received share capital and if such company do not offer any explanation about the nature and source, then sum so received may be regarded as income of the assessee from undisclosed sources. In other words, the purpose of insertion of proviso is to examine the source of investment by subscriber to the share capital. This amendment has been examined by the Hon'ble Bombay High Court in the case of CIT vs. Gagandeep Infrastructure (P) Ltd. (2017) 394 ITR 680, where the court observed that proviso inserted to section 68 w.e.f. 01.04.2013 is considered to be prospective in nature and is applicable from A.Y. 2013-14 onwards. From the above, it is very clear that similar

amendment has been made to provisions of section 56(2) by insertion of clause (viib) so as to bring share premium within the ambit of section 56(2) of the I.T Act, 1961. Since, the proviso inserted to section 68 is considered to be prospective in nature, obviously sub clause (viib) inserted to section 56(2) is also considered to be prospective and cannot be applied to the assessment year in question. Even otherwise, assuming for a moment above provisions are applicable for the year under consideration, in order to apply said amended provisions, the AO has to prove that the assessee has not proved capacity of the investors and also not offered any justification for issue of shares at premium. In this case, from the facts on record, it is clear that the assessee has proved identity and genuineness of the transactions by filing necessary evidences. The assessee has filed valuation report from registered valuer as per which the share price of the company is over and above premium charged by the assessee. Therefore, we are of the considered view that provisions of section 56(2)(viib) has no application.

15. Coming to the case laws relied upon by the assessee. The assessee has relied upon plethora of judgements, including the decision of Hon'ble Supreme Court in the case of CIT vs Lovely Exports Pvt Ltd (2008) 216 CTR 195 (SC). In the case laws relied upon by the assessee, the issue has been dealt as under:-

CIT vs. Goa Sponge and Power Ltd (13/02/2012) Tax Appeal No. 16 of 2012 (High Court-Bombay)

"Once the authorities have got all the details, including the name and addresses of the shareholders, their PAN/GIR number, so also the name of the Bank from which the alleged investors received money as share application, then, it cannot be termed as "bogus". The controversy is covered by the judgements rendered b y the Hon'ble Supreme Court in the case of Lovely Exports Pvt Ltd, vs. CIT, (2008) 216 CTR (SC) 195, as also by this Court in CIT vs. Creative World Tele films Ltd, (2011) 333 ITR 100 (Bom). In such circumstances, we are of the view that the Tribunal's finding that there is no justification in the addition made under Section 68 of the Income Tax Act,, 1961 neither suffers from any perversity nor gives rise to any substantial question of law."

CIT vs. Creative World Tele films Ltd (2011) 333 ITR 100 (Born-High Court)

"The question sought to be raised in the appeal was also raised before the Tribunal and the Tribunal was pleased to follow the judgment of the apex Court in the case of CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195. wherein the apex Court observed that if the share application money is received by the assessee-company from alleged bogus

shareholders, w hose names are given to the AO, then the Department can always proceed against them and if necessary reopen their individual assessments. In the case in hand, it is not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the AO to make proper investigation and reach the shareholders. The AO did nothing except issuing summons which were ultimately returned back with an endorsement "not traceable In our considered view, the AO ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the AO. In the above circumstances, the view taken by the Tribunal cannot be faulted."

CIT vs. Lovely Exports (P) Ltd (2008) 216 CTR 195 (SC)

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

CIT vs. Steller Investment Ltd (2001) 251 ITR 263 (SC) (civil appeal)

"That the increase in subscribed capital of the respondent company could not be a device of converting black money into white with the help of formation of an investment company, on the round that, even if it be assumed that the subscribers to the increased capital were not genuine, tinder no circumstances could the amount of share capital be regarded as un disclosed income, an appeal was taken by the Department to th e Supreme Court. The Supreme Court dismissed the appeal holding that the Tribunal had come to a conclusion on facts and no interference was called for."

CIT vs. Nav Bharat Duolex Ltd (2013) 35 Taxmann.com289 (All-High Court)

"We have considered the arguments of the counsel for the parties. CIT(A) found that five companies subscribing the equity shares amounting to Rs. 25,00.000/- were identified and they had submitted their bank statements, cash extracts and returns filing receipts. As such identity of the share applicant companies and purchase of share had been proved by the assessee. Supreme Court in the cases of CIT v. Steller Investments Ltd. [2001] 251 ITR 263 and Lovely Exports case (supra), has held that the identity of the shareholder alone is

required to be proved, in case of the capital contributed by the shareholders. Accordingly CIT(A) and the Tribunal has not committed any illegality in allowing the appeal of the assessee. We do not find any illegality in the judgment of the CIT(A) and the Tribunal."

CIT vs. JayDee Securities & Finance Ltd (2013) 32 Taxmann.com91 (All-High Court)

"The Tribunal recorded findings that the assessee had produced the return of income filed by the relevant shareholders who had paid share application money. The assessee had also produced the confirmation of share holders indicating the details of addresses, PAN and particulars of cheques through which the amount was paid towards the share application money. The Tribunal thereafter relied upon the judgment of the Supreme Court in CIT V. Lovely Exports (P.) Ltd wherein it was held that if the assessee produces the names, addresses, PAN details of the share holders then the onus on the assessee to prove the source o f share application money stands discharged. If the Assessing Authority was not satisfied with the creditworthiness of the shareholders, it was open to the Assessing Authority to verify the same in the hands of the shareholders concerned, The Tribunal has relied upon an order of the Supreme Court in case o f CIT v. Divine Leasing & Finance Ltd. In view of the decision 'of the Supreme Court, we dismiss the appeals with observations that the department is free to proceed to reopen their individual assessments of the shareholders whose names and details were given to the Assessing Officer."

ACIT vs. Venkateshwarlspat Pvt Ltd (2009) 319 ITR 393 (Chhatisgarh-High Court)

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

Mod Creations Pvt Ltd vs. ITO (2013) 354 ITR 282 (Del-High Court)

"Held, allowing the appeal, (i) that the assessee had discharged the initial onus placed on it. In the event the Revenue still had a doubt with regard to the genuineness of the transactions in issue or as regards the creditworthiness of the creditors, it would have had to discharge the onus which had shifted on to it. A bald assertion by the Assessing Officer that the credits were a circular route adopted by the assessee to plough back its own undisclosed income into its accounts, could be of n o avail. The Revenue was required to prove this

allegation. An allegation by itself which is based on assumption will not pass muster in law. The Revenue would be required to bridge the gap between the suspicions and proof in order to bring home this allegation. The Tribunal without adverting to the principle laid stress on the fact that despite opportunities, the assessee and/or the creditors had not proved the genuineness of the transaction. Based on this it construed the intentions of the assessee as being mala fide. The Tribunal ought to have analysed the material rather than be burdened by the fact that some of the creditors had chosen not to make a personal appearance before the Assessing Officer. If the Assessing Officer had any doubt about the material placed on record, which was largely bank statements of the creditors and their income-tax returns, it could gather the necessary information from the sources to which the information was attributable.....If it had any doubts with regard to their creditworthiness, the Revenue could always bring the sum in question to tax in the hands of the creditors or sub- creditors."

CIT vs. Al Anam Agro Foods (P.) Ltd (2013) 38 Taxmann.corn 375 (All-High Court)

Tribunal, however, held that since identity of share holders stood proved on record, amount of share application money could not be added to income of assessee. According to Tribunal, in such a case amount could be taxed in hands of persons who had invested"

CIT vs. Dwarkadhish Investment (P) Ltd (2011) 330 ITR 298 (Del-High Court)

"Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke s. 68— Revenue has all the power and wherewithal to trace any person—Moreover, it is settled law that the assessee need not to prove the 'source of source'— In the instant case, the Tribunal has confirmed the order of the CIT(A) deleting the impugned addition holding that the assessee has been able to prove the identity of the share applicants and the share application money has been received by way of account payee cheques."

CIT vs. Namastey Chemicals Pvt Ltd (2013) 33 Taxmann.com271 (Guj-High Court)

"In the present case also, the respondent assessee has received share application money from different sub scribers. It was found that large number of subscribers had responded to the letters issued by the Assessing Officer or summons issued by him and submitted their affidavits. In some cases such replies were not received through posts. Rs. 9 lacs represented those assessees who denied having made any investment altogether. The issue thus would fall sq uarely within the ambit of the

judgment of the Supreme court in the case nf Lovely Exports (supra). No error of law can be stated to have been committed by the Tribunal. Tax Appeal is therefore dismissed."

CIT vs. Peoples General Hospital Ltd (2013) 356 ITR 65 (MP-High Court)

" Held , dismissing the appeals , that it the assessee had received subscriptions to the public or rights issue through banking channels and furnished complete details of the shareholders, no addition could be made tinder section 68 of the Income-tax Act, 1961, in the absence of any positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that any part o f the share capital represented the company's own income from undisclosed sources. It was nobody's case that the non resident Indian company was a bogus or non-existent company or that the amount subscribed by the company by way of share subscription was in fact the money of the assessee. The assessee had established the identity of the investor who had provided the share subscription an d that the transaction was genuine. Though the assessee's contention was that the creditworthiness of the creditor was also established, in this case, the establishment of the identity of the investor alone was to be seen. Thus, the addition was rightly deleted."

CIT vs. Shree Rama Multi Tech Ltd (2013) 34 Taxmann.com177 (Guj-HC)

"It is noted that Commissioner (Appeals) as well as the Tribunal have duly considered issue and having found complete details of the receipts of share application money, along with the form names and addresses, PAN and other requisite details, they found complete absence of the grounds noted for invoking the provision of section 68. Moreover, both rightly had applied the decision of CIT vs. Lovely Exports (P) Ltd to the case of the assessee. Therefore, no reason was found in absence of any illegality much less any perversity too to interfere with the order of the both these authorities, who had concurrently held the due details having been proved. The assessee company had presented the necessary worth proof bef ore both the authorities and it was not expected by the assesseecompany to further prove the source of the deceased."

CIT vs. Nikunj Eximp Enterprises (P.) Ltd (2013) 35 Taxmann.com384 (Bom)

"Whether merely because suppliers had not appeared before Assessing Officer or Commissioner (Appeals), it could not be concluded that purchases were not made by assessee - Held, Yes.... Further, there were confirmation letters filed by the suppliers, copies of invoices for purchases as well as copies

of bank statement all of which would indicate that the purchases were in fact made. In our view, merely because the suppliers have not appeared before the Assessing Officer or the CIT(A), one cannot conclude that the purchases were not made by the respondent- assessee"

CIT vs. Samir Bio- Tech Pvt Ltd (2010) 325 ITR 294 (Del-High Court)

"Identities of the subscribers are not in doubt. The transactions have also been undertaken through banking channels inasmuch as the application money for the shares was given through account payee cheques. The creditworthiness has also been established, as indicated by the Tribunal. The subscribers have given their complete details with regard to their tax returns and assessments. In these circumstances, the Department could not draw an adverse inference against the assessee only because the sub scribers did not initially respond to the summons. The subscribers, however, subsequently gave their confirmation letters as would be apparent from the impugned order. The identity of the subscribers stands established and it is also a fact that they have shown the said amounts in their audited balance sheets and have also filed returns before the IT authorities. The decision of the Tribunal deleting the addition cannot befaulted."

16. Coming to the case laws relied upon by the learned DR. Althogh, the ld. DR placed his reliance on plethora of judgments, but he had heavily relied upon the decision of the Hon'ble Supreme Court in the case of DCIT vs. NRA Iron & Steel Pvt. Ltd. (supra). Insofar as most of case laws relied upon by the ld. DR we, noticed that the issue involved is factual and has to be examined ratios of case laws in light of facts of present case. When we had examined case laws relied upon by the ld. DR in light of facts of present case, we find that the coordinate benches have considered all those case laws and held that most of cases are not applicable to facts of present case. Therefore, we do not wish to discuss those case laws. But when it comes to Hon'ble Supreme Court decision in case of PCIT vs. NRA IRON & STEEL PVT LTD, we find that co-ordinate Bench of ITAT vide its order dated 03.05.2019 in the case of Shree Laxmi Estate Pvt. Ltd. in ITA No. 6557/Mum2017 for A.Y. 2013-14 had considered the decision of Hon'ble Supreme Court in the case of NRA Iron & Steel P. Ltd. and held that the facts of the case before the Hon'ble Supreme Court are entirely different, where on the basis of facts of that case Hon'ble Supreme Court came to the conclusion that mere furnishing of certain documents is not sufficient enough and what is relevant is all three ingredients, i.e. identity, genuineness of transactions and creditworthiness of the parties should be proved beyond doubt. We find that in the case before the Hon'ble Supreme Court the parties never

responded to 133(6) notices. The AO has carried out inquiries by issuing notices u/s. 133(6), for which none of the companies have replied. None of the companies produced bank statements to establish source of funds for making such huge investments in shares, even though they were declaring a very meagre income in the return. None of the investors appeared before the AO, but merely sent response through Dak. In this case, from the facts on record, it is clear that the assessee has filed complete set of documents, but the AO neither carried out any investigation nor issued notices u/s. 133(6) or summons u/s. 131(1) to examine the veracity of documents furnished by the assessee. Unless, the AO carried out further investigations to ascertain true nature of transactions, he cannot come to the conclusion merely on the basis of documents submitted by the assessee. Therefore, after considering relevant facts, the co-ordinate Bench came to the conclusion that decision rendered by Hon'ble Supreme Court in the case of NRA Iron & Steel Pvt. Ltd. (supra) has no application, where the AO has not carried out any inquiries. The relevant findings of the Tribunal re as under:

"8. We have heard the rival submissions and perused the materials available on record. It is not in dispute that the assessee had borrowed loans from the aforesaid loan creditors and had duly repaid the same in subsequent years by account payee cheques, for which evidences are already on record before us. It is also not in dispute that the assessee had paid interest on the aforesaid loans which had been allowed as a deduction by the lower authorities. We are unable to persuade ourselves as to how the interest portion on loan alone could be treated as genuine transactions after treating the principal portion of loan as ingenuine. We also find that the interest paid on such unsecured loans to aforesaid loan creditors have been duly subjected to deduction of tax at source. Notice issued u/s 133(6) of the Act by the ld AO had been duly replied by the concerned loan creditors directly before the ld AO and no deficiencies were noticed by the ld AO thereon. After this, the ld AO did not proceed to make further enquiry on the subject mentioned loan creditors. It is not in dispute that the assessee and the concerned loan creditors had duly filed their respective bank statements to prove the immediate source of credit for advancing loans to the assessee company, confirmation of having given loans to the assessee company, together with their income tax return acknowledgements and other requisite details called for by the ld AO in the notice u/s 133(6) of the Act. In case if the ld AO had any doubt on the veracity of the documents submitted by the loan creditors, the same could have been confronted on the said loan creditors by issuing summons u/s 131 of the Act and examine them on oath or correspondingly verify the same through the Assessing Offficers of the concerned loan creditors through the internal source of the department. The ld AO did not do either of these in

the instant case and merely disregarded the evidences submitted on record before him both by the assessee as well as by the loan creditors directly to him. The written submissions filed by the ld DR in this regard is repetition of various contentions already available on record by the lower authorities, apart from placing reliance on certain decisions. We find that both the aforesaid loan additions were confirmed by the ld CITA by placing reliance on the decision taken by his predecessor in Asst Year 2012-13. We find that this tribunal in assessee's own case for the Asst Year 2012-13 in ITA No. 5954/Mum/2016 dated 29.12.2017 in respect of loan transactions of entities controlled by Shri Pravin Kumar Jain and others had elaborately dealt this issue and held as under:-

"5. We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The AO made addition towards unsecured loans received from Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd on the basis of information received from Investigation Wing which revealed that the assessee is the beneficiary of bogus accommodation entries provided by Shri Praveenkumar Jain through his bogus companies. The AO has made additions u/s 68 of the Income-tax Act, 1961 on the ground that though the assessee has furnished necessary evidences to prove identity of the parties, but failed to establish genuineness of transactions and creditworthiness of parties in the backdrop of clear findings of Investigation Wing that those companies are hawala companies involved in providing M/s Shree Laxmi Developers accommodation entries. The AO has brought out facts in the light of statement of Shri Pravinkumar Jain deposed before the Investigation Wing to make addition. Except this, there is no contrary evidence in the possession of the AO to disprove the loan transactions from Josh Trading Company Pvt Ltd and Viraj Mercantile Pvt Ltd. On the other hand, the assessee has furished various details including confirmation letters from the parties, their bank statements alongwith their financial statements to prove identity, genuineness of transactions and creditworthiness of the parties. The assessee also furnished evidences to prove that the parties have responded to the notices issued u/s 133(6) by AO by filing various details. The assessee also filed bank statements to prove that the said unsecured loans have been repaid in the subsequent financial years. Therefore, we are of the view that there is no reason for the AO to doubt the genuineness of transactions despite furnishing necessary evidences including their financial statements, bank statements and IT returns.

6. The AO has made addition u/s 68 of the Act, on the ground that the unsecured loans are bogus accommodation entries provided by Shri Pravinkumar Jain through his hawala companies. The

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

7. Coming to the case laws relied upon by the assessee, the assessee has relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Gagandeep Infrastructure Pvt Ltd (2017) 394 ITR 680 (Bom). We have gone through the case laws relied upon by the assessee in the light of the facts of the present case and find that the Hon'ble High Court categorically observed that the Proviso to section 68 has been inserted by the Finance Act, 2012 wef 01-04-

2013 is applicable from AY 2013-14 onwards. The Court further observed that the Parliament did not introduce the proviso to section 68with retrospective effect nor does the Proviso introduced states that it was introduced for removal of doubts. Therefore, it is not open to give retrospective effect. The relevant portion of the order of High Court is extracted below:-

"The proviso to section 68 has been introduced by the Finance Act, 2012 with effect from 1-4-2013. Thus, it would be effective only from the assessment year 2013-14 onwards and not for the subject assessment year. In fact, before the Tribunal, it was not even the case of the Revenue that section 68 as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1-42013 was its normal meaning. The Parliament did not introduced to proviso of section 68, with retrospective effect nor does the proviso to introduced states that it was introduced 'for removal of doubts' or that it is 'declaratory'. Therefore, it is not open to give it retrospective effect, by proceeding the basis that the addition of the proviso to section 68is M/s Shree Laxmi Developers immaterial and does not change the interpretation of section 68 both before and after the adding of the proviso.

In view of the matter the three essential tests while confirming the section 68 laid down by the Court namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on fact it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders, i.e., they are bogus. The Apex Court in a case in this context to the pre-amended section 68 has held that where the revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income-tax Officer to proceed by reopening the assessment of such shareholder and assessing them to tax in accordance with law. It does not entitle the revenue to add the same to the assessee's income as unexplained cash credit." [Para 3]

8. The assessee has also relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Archid Industries Pvt Ltd in ITA No1433/Mum/2014 dated 5th July, 2017. The Hon'ble Bombay High Court, after considering relevant facts and also by following judgement in the case of CIT vs Gagandeep Infrastructure Pvt Ltd (supra) held as under:_ 6] The Tribunal has considered that the Assessee has produced on record the documents to establish the

genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of share i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P) Ltd (supra) would M/s Shree Laxmi Developers be applicable in the facts and circumstances of the present case."

9. The assessee has also relied upo the decision of Hon'ble Supreme Court in the case of CIT vs Lovely Exports Pvt Ltd (2008) 216 CTR 195 (SC). The Hon'ble Apex Court while deleting the addition made u/s 68 observed that if the share application money is received by the assessee company from alleged bogus shareholders whose names are given to the AO, then the department is free to proceed to reopen their individual assessments in accordance with law, but this amount of share application money cannot be regarded as undisclosed income u/s 68 of the Income-tax Act, 1961.

10. Coming to the case laws relied upon by the Ld.DR. The Ld.DR relied upon the decision of Hon'ble Delhi High Court in the case of Principal CIT vs Bikram Singh in ITA No.55/Del/2017 dated 25-03-2017. We have gone through the case law relied by the Ld.DR in the light of facts of the present case and find that the facts of case before Hon'ble Delhi High Court are entirely different from facts of the present case. The Hon'ble Delhi High Court, has considered the fact that the individuals, who advanced loans had no financial strength to lend such huge sum of money to the assessee, that too, without any collateral security without interest and without a lender agreement. Under these facts, the Hon'ble Court held that mere establishing of their identity and the fact that the amounts have been transferred through cheque payment does not by itself mean that the transactions are genuine. In this case, the assessee has furnished all evidences and also the parties personally responded to the notices M/s Shree Laxmi Developers issued by the AO u/s 133(6) by filing various details, therefore, case law relied upon by the Ld.DR cannot be applicable to the facts of the present case.

11. In this view of the matter and considering the ratio of the case laws discussed above, we are of the considered view that the

assessee has discharged identity, genuineness of transactions and creditworthiness of the parties. Therefore, there is no reason for the AO to make addition towards loan u/s 68 of the Act. Hence, we direct the AO to delete addition made towards loans alongwith interest u/s 68 of the Act.

8.1. We find that the ld DR vehemently placed reliance on the recent decision of Hon'ble Supreme Court in the case of PCIT vs NRA Iron & Steel Pvt Ltd arising out of SLP(Civil) No. 29855 of 2018 dated 5.3.2019 in support of contentions of the revenue on the impugned issue. In this regard, we find that the facts before the Hon'ble Supreme Court are clearly distinguishable on the following grounds:-

a) In Para 3.6. of the said judgement of Hon'ble Supreme Court, it was mentioned that the entire share capital had been received by the assessee through normal banking channels by account payee cheques / demand drafts, and produced documents such as income tax return acknowledgements to establish identity and genuineness of the transaction. It was submitted that, there was no cause to take recourse to section 68 of the Act, and that the onus on the Assessee Company stood fully discharged.

b) In Para 3.7. of the said judgement of Hon'ble Supreme Court, it was mentioned that the AO had issued summons to the representatives of the investor companies. Despite the summons having been served, nobody appeared on behalf of any of the investor companies. The Department only received submissions through dak, which created a doubt about the identity of the investor companies.

c) In Para 3.8. of the said judgement of Hon'ble Supreme Court, it was mentioned that the AO independently got field enquiries conducted with respect to the identity and credit-worthiness of the investor companies, and to examine the genuineness of the transaction. Enquiries were made at Mumbai, Kolkata and Guwahati where these Companies were stated to be situated.

In the aforesaid case before the Hon'ble Supreme Court, the result of the enquiry by the AO revealed the following:-

a) Notice were duly served on certain investor companies, but no reply was received from them ;
b) Some of the investor companies were found to be closed at their correct address ;
c) Notice could not be served on some of the investor companies ;
d) Some of the investor companies replied to notice u/s 133(6) of the Act wherein they had confirmed having made investment in share

application money in NRA Iron & Steel Pvt Ltd but had limited income as per their income tax returns which in turn resulted in doubting of creditworthiness ;

e) Most of the investor companies though confirmed the fact of having made investment in share application money in NRA Iron & Steel Pvt Ltd , but had not filed their bank statements to prove the immediate source of credit available to them for making the said investment.

8.1.1. In the instant case before us, the ld AO did not issue any summons u/s 131 of the Act or make further enquiries to examine the veracity of the evidences filed on record before him by the assessee as well as by the loan creditors in response to notice u/s 133(6) of the Act. Moreover, all the loan creditors had duly furnished their respective bank statements proving the immediate source of credit for them to justify that they had sufficient creditworthiness to advance loan to the assessee company. From the perusal of the balance sheet of all investor companies, all the loan creditors had sufficient own funds in their kitty which prove their creditworthiness to advance loan to the assessee company. As has been stated hereinabove, the most excruciating point of difference in facts vis a vis the facts of the case before the Hon'ble Supreme Court supra that the investor companies had not even furnished their bank statements to prove their immediate source of credit for making investment in share application monies of NRA Iron & Steel Pvt Ltd. From the bank statements furnished by the loan creditors in the case of the assessee herein, we find that there were no cash deposits in the bank accounts of the lenders prior to issuance of loan to the assessee company. In the case before the Hon'ble Supreme Court, the AO in that case had made field enquiries at Mumbai, Kolkata and Guwahati where those investor companies were stated to be situated to examine their identity and credentials and the result of such enquiry had been summarized hereinabove. Whereas in the instant case before us, no such enquiries were conducted by the ld AO to doubt the veracity of the details and evidences filed by the loan creditors in response to notice u/s 133(6) of the Act directly before him. In the instant case before us, all the notices u/s 133(6) of the Act were duly served on all the aforesaid loan creditors and all of them had independently filed their replies directly before the ld AO. The bank statements were also duly furnished by the loan creditors to prove that they had sufficient creditworthiness to advance loan to the assessee company and since all the transactions were routed through regular banking channels by account payee cheques and in view of the fact that there were no cash deposits prior to issuance of loan to the assessee company, the genuineness of transactions also stand clearly established. This goes to prove their identity,

creditworthiness and genuineness of transactions of all the loan creditors. In this scenario, it could be safely presumed that the ld AO was apparently satisfied with the replies given thereon by the loan creditors directly before him in response to notice u/s 133(6) of the Act and hence there is no need to make any examination further.

8.2. In view of the aforesaid distinguishing features on facts of the assessee company vis a vis the facts before the Hon'ble Supreme Court, we hold that the reliance placed by the ld DR on the decision of Hon'ble Supreme Court supra does not come to the rescue of the revenue.

8.3. At the cost of repetition, we would like to state that the ld CIT(A) had merely placed reliance on the decision taken by his predecessor in Asst Year 2012-13 in assessee's own case in similar set of facts. We find that this decision for Asst Year 2012-13 in assessee's own case has been reversed by this tribunal vide its order dated 29.12.2017 referred to supra. In view of our aforesaid findings in the facts and circumstances of the case and respectfully following the decision of this tribunal in assessee's own case for Asst Year 2012-13, we hold that the assessee company had duly proved the nature and source of credit in the form of unsecured loan and had duly satisfied the three necessary ingredients of section 68 of the Act viz, the identity of the loan creditors , creditworthiness of loan creditors and genuineness of loan transactions. Hence we direct the ld AO to delete the addition made in the sums of Rs 50 lacs and Rs 25 lacs towards unsecured loan u/s 68 of the Act. Accordingly, the Grounds 1 to 6 raised by the assessee are allowed."

17. In the case of PCIT vs. Hi-Tech Residency Pvt. Ltd. (2018) 257 Taxman 335, Hon'ble Supreme Court has considered identical issue and held that where an assessee company had discharged the onus of establishing identity, genuineness of transaction and creditworthiness of investors, no additions could be made u/s. 68 of the I.T. Act, 1961. We, further, noted that although the Apex Court has not expressed any opinion, because of dismissal of SLP filed by the assessee, the fact of the matter is that this issue has been considered by the Hon'ble Supreme Court in the case of CIT vs. Lovely Exports (P) Ltd (supra), where the issue has been thoroughly examined in the light of provisions of section 68 of the Act, and held that if the share application money is received by the assessee company from alleged bogus share holders, whose names are given to the AO, then the department is free to proceed to reopen their assessment in accordance with law, but sum received from share holders cannot be regarded as undisclosed income of the assessee.

18. In this view of the matter and considering the facts and circumstances of this case and also taking into consideration various case laws as discussed hereinabove, we are of the considered view that the assessee has discharged its initial onus to prove identity, genuineness of transactions and creditworthiness of the parties by filing various documents. The AO, without carrying out further inquiries in order to ascertain the claim of the assessee, jumped into conclusion on the basis of financial statements of the subscribers that none of them had enough source of income to establish creditworthiness. Therefore, we are of the view that the AO was erred in making additions towards share capital u/s 68 of the Income Tax Act, 1961. The learned CIT(A) without appreciating relevant facts has confirmed additions made by the AO towards share capital u/s 68 of the Income Tax Act, 1961. Hence, we reverse findings of ld. CIT(A) and direct the AO to delete the additions made towards share capital u/s. 68 of the Income Tax Act, 1961.

19. Insofar as, additions towards probable commission payment to entry provides, we find that since, we have deleted additions made by the AO towards share capital, consequent additions made towards probable commission @ 0.75%, on total transactions is also incorrect and accordingly, direct the AO to delete additions made towards commission estimation."

5. I have carefully gone through the order of the Tribunal and found that with respect to the very same search and very same modus operandi as alleged by the AO, additions so made was deleted by the Tribunal. As the facts and circumstances in the case of present assessee with same A.Y.2010-11 are same, respectfully following the order of the Co-ordinate Bench, we do not find any merit for the addition so made on account of share capital and the alleged commission paid for obtaining the same.

6. An addition u/s.14A was also made by the A.O. in the group cases, and the same has been deleted by the Tribunal after observing as under:-

"20. The next issue that came up for our consideration from ground No.4 of assessee's appeal is additions towards disallowances of expenditure incurred in relation to exempt income. We find that the AO has made additions towards disallowances of expenditure in the assessment framed u/s 143(3) r.w.s. 153A of the I.T.Act, 1961, without reference to any incriminating material found as a result of search. It is settled position of law that in order to make any additions in the assessments, which are framed u/s 153A, the additions qua incriminating material is a must. Unless, the AO has incriminating material in his possession to prove that any item of addition is supported by incriminating material found, as a result of search, no additions could be made in the assessments framed u/s 153A, if such assessment has been completed /unabated as on the date of search. In this case, the facts with regard to no reference to incriminating material, in respect of additions towards disallowances of expenditure u/s 14A r.w.Rule 8D is not disputed by the revenue. When, the bench has specifically asked the Ld. DR about incriminating material, the Ld. DR failed to prove that the additions made by the AO towards disallowances of expenditure is supported by any incriminating material. Therefore, we are of the considered view that in absence of any incriminating material found as a result of search, no additions could be made in the assessment framed u/s 153A of the I.T.Act, 1961. This legal proposition is supported by the decision of Hon'ble jurisdictional Bombay High Court in the case of CIT vs Continental warehousing corporation (Nhava Sheva Ltd. (2015) 374 ITR 645, where the Hon'ble High Court clearly held that in absence of incriminating material no additions could be made, in respect of assessment which become final and no proceedings is pending, as on the date of search. Therefore, we are of the considered view that the AO was erred in making additions towards disallowances of expenditure, in relation to exempt income u/s 14A r.w.Rule 8D(2), in absence of seized materials. The Ld. CIT(A) without appreciating the facts simply upheld the additions made by the AO. Therefore, we reverse the findings of Ld.CIT(A) and delete additions made by the AO towards disallowance of expenditure incurred in relation to exempt income u/s 14A of the I.T.Act, 1961.

21. In the result, appeal filed by the assessee is allowed"

6. I have gone through the orders of the authorities below and found that while framing assessment U/s 153A r.w.s 143(3) of the Act. The

A.O. has made disallowance U/s 14A of the Act amounting to Rs. 28,114/- However, no incriminating material was referred by the A.O. while making addition U/s 14A of the Act. This issue has also been dealt with by the Tribunal kin the group cases as stated above and after observing that in absence of any incriminating material, no addition can be made in respect of the assessment which become final and no proceeding is pending as on the date of search. In the Tribunal order also as stated above, search was also taken on 24/09/2013 and with reference to the very same search, the A.O. as made disallowance U/s 14A of the Act. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in the group case, we do not find any merit for the addition made u/s.14A of the IT Act.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 02nd March, 2020.

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 02/03/2020
Karuna

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.

4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai