IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH, MUMBAI

BEFORE SHRI R.C. SHARMA, AM AND SHRI RAM LAL NEGI, JM

ITA No. 1835/Mum/2018
Assessment Year 2006-07

M/s. Vodafone India Limited Peninsusla Point, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013	बनाम Vs.	The DCIT Circle-8(3)(2) Mumbai
PAN: AAACH 5332 B		
Appellant		Respondent

Assessee by : Shri P.J. Pardiwala and
Shri Nitesh Joshi

Revenue by: Shri Parag Vyas (Special Counsel of Deptt)

Date of Hearing : 14/01/2020
Date of Pronouncement : 28/08/2020

आदेश / ORDER

PER R.C. SHARMA, AM

This is an appeal filed by the assessee against the order of the ld. CIT(A)-14, Mumbai dated 01-01-2018 for the assessment year 2006-07, in the matter of order passed u/s 143(3) r.w.s. 263 of the Income Tax Act, 1961 (in short, the Act).

2.1 The grounds taken by the assessee reads as under:-

'' Assessee respectfully submits that:

On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-14, Mumbai ['CIT(A)'] has erred in passing the order under section ('u/s') 250 of the Income Tax Act, 1961 ('Act'), confirming the additions made by the Deputy Commissioner of Income Tax, Circle 7(3),

Mumbai (jurisdiction subsequently re-aligned to Deputy Commissioner of Income Tax, Circle 8(3)(2), Mumbai) ('AO') in the assessment order passed u/s 143(3) read with section 263 of the Act ('impugned order').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1 – Order passed is bad in law and void ab-initio

1.1 On the facts and in circumstances of the case and in law, the learned CIT(A) has erred in not treating the impugned order passed by the learned AO as bad in law and void since:

(a) its perverse on facts and in law; and

(b) ignores and contravenes the binding Supreme Court judgments, hence, contravenes Article 141 of the Indian Constitution

Hereinafter all the grounds are without prejudice to Ground 1.

2. Ground No. 2 – Additions under section 68 of the Act – INR 7,959,683,862

2.1 On the facts and in circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned AO in making additions of INR 7,959,683,862 under section 68 of the Act.

2.2 On the facts and in circumstances of the case and in law, the learned CIT(A)/AO has completely ignored/misconstrued the irrefutable documentary evidences submitted by the Assessee which substantiate genuineness, creditworthiness and identity of the shareholders subscribing to the rights issue;

2.3 On the facts and in circumstances of the case and in law, the orders passed by both the learned CIT(A) and AO are based on whims and fancies and do not provide any cogent basis in support of the additions under section 68 of the Act.

2.4 Without prejudice to the grounds 2.1 and 2.2 above, on the facts and in circumstances of the case and in law, there is no requirement under section 68 of the Act read with proviso to section 68, to prove genuineness, creditworthiness and identity of either the source of sum invested by the non-resident entities/persons or the source of such source.

The Assessee prays that the additions under section 68 of the Act of INR 7,959,683,862 be deleted.

Ground No. 3 - Re-raising of demand which was raised in the original order passed u/s 143(3) of the Act

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the AO in re-raising the tax and interest demand in the impugned assessment order on account of the various additions made vide the original assessment order dated February 5, 2011, passed u/s 143(3) of the Act.

3.2 Without prejudice to Ground 3.1, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the AO in not reducing the demand already raised vide the original assessment order dated February 5, 2011 passed under section 143(3) read with section 144C(13) of the Act.

4. Ground No. 4 – Interest under section 220(2) of the Act

4.1 On the facts and circumstances of the case and in law, the learned AO has erred in levying interest under section 220(2) of the Act on the entire demand including the demand raised vide the original assessment order dated February 5, 2011, passed u/s 143(3) of the Act.

5. Ground No. 5 – Levy of penalty under section 271(1)(c) of the Act

5.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in dismissing the ground on initiation of penalty proceedings under section 271(1)(c) of the Act against the Appellant as premature.

The Assessee prays that the learned AO be directed to drop the penalty proceedings so initiated.

The Assessee craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal''.

2.2 Rival contentions have been heard and records perused. Facts in brief are that the assessee, is a company incorporated in India under the Companies Act, 1956 ('Co's Act'), and is engaged in rendering telecommunication services in the Mumbai telecom circle including Navi Mumbai and Kalyan. For the assessment year ('AY') under consideration, the assessee, filed its return of income on 30th November 2006 declaring 'NIL' taxable income under the normal provisions of the

Income tax Act, 1961 ('Act') (after claiming deduction under Section 80IA of the Act) and taxable book profit of Rs 366,30,21,560 under the provisions of Section 115JB of the Act. The tax liability on the book profits amounted to Rs 30,82,43,264. During the subject assessment year, an amount of Rs 11,11,09,816 was withheld at source and advance tax of Rs 23,70,00,000 was deposited by the assessee. Based on the same, a refund of Rs 3,98,66,552 was claimed by the assessee, in the return of the income for the subject AY. During the subject AY, the assessee made a right issue for 7,09,86,318 equity shares of Rs 10 each at a premium of Rs. 237.99 per equity share to all its existing shareholders, in the ratio of 6 equity shares for every 29 equity shares held. For the purpose of issuance of right shares, a letter of offer was given to all the shareholders of the assessee including Infrastructure Development Finance Company Limited ('IDFC'), Vilsat Investment Private Limited ('VIPL') and Essar Teleholdings Limited ('ETL') under the same terms of offer to subscribe to the equity shares issued by the assessee on a rights basis. The letter of offer of right shares specifically contained a clause [as required under section 81(1A) of the Co's Act] that a shareholder may renounce his rights to subscribe to right shares in favour of any third party. The rights were renounced by IDFC and VIPL in favour of ETL, an existing shareholder of the assessee. The assessee received a total amount of Rs 17,603.90 million on account of subscription to the said rights shares (i.e. for 70,986,318

equity shares). Out of the above, 3,44,50,106 shares amounting to Rs 7,959.60 million were subscribed to by nine Mauritius based entities, namely:

- Al-Amin Investments Ltd;
- Asian Telecommunication Investments (Mauritius) Ltd;
- CCII (Mauritius);
- Euro Pacific Securities Ltd
- Hutchison Telecommunications (India) Ltd;
- Mobilvest Ltd;
- Prime Metals Ltd;
- Trans Crystal Ltd; and
- Essar Com Ltd.

The case of the assessee was selected for scrutiny assessment in 2007 and was also referred to the Transfer Pricing Officer for examination of transfer pricing aspects relating to the international transactions entered by the assessee during the subject AY. During the course of detailed scrutiny assessment, the learned Additional Commissioner of Income Tax, Range -1, Chandigarh ('learned Add. CIT') directed the assessee to, inter-alia, file details as regards issue of right shares, which was duly complied with. Additionally, the learned Joint Commissioner of Income Tax (Transfer pricing) ('learned TPO'), also conducted enquiries with respect to issuance of right shares and after considering the details and submissions

furnished by the assessee passed an order dated 29th October 2009 under section 92CA of the Act, wherein, he proposed a transfer pricing adjustment with respect to the issue of right shares by the assessee to its associated enterprises. Subsequently, a draft assessment order dated 30th December 2009 was passed by the learned Add. CIT, against which the assessee preferred objections before the learned Dispute Resolution Panel ('learned DRP'). During the pendency of the DRP proceedings, the learned Add. CIT received certain documents from the Foreign Tax Division ('FTD') with respect to the rights issue transaction, which was forwarded to the learned DRP without any adverse comments. The DRP vide its order dated 4th February 2011, gave partial relief, whereby, inter-alia, the transfer pricing adjustment as regards the rights shares was deleted. However, with respect to FTD documents forwarded by learned Add. CIT, the learned DRP made the following observation:

> *"Incidentally, it may be mentioned that the Assessing Officer had forwarded copies of large number of documents received by him from Mauritius through FT & TR Division of CBDT for necessary action by the DRP without in any manner specifying as to whether any enhancement of income is warranted based on these documents and if yes, to what extent. The DRP is of the considered view that by virtue of powers vested in DRP u/s 144C(5), it cannot take upon itself the entire responsibility of Assessing Officer. The Assessing Officer is therefore, directed to examine the information at his end and take such further action as may be considered appropriate by him in accordance with the provisions of the Income Tax Act."*

The learned Add. CIT thereafter, as per the mandate of section 144C(13)/(5) of the Act, completed the assessment, wherein a demand of Rs 297,26,54,239 was raised, however, no adverse observations/ additions was made with respect to the rights issue.

2.3 Subsequent to the above, the learned Commissioner of Income Tax-1, Chandigarh ('learned CIT') passed an order under Section 263 of the Act, directing the learned AO to examine the 'identity, creditworthiness and genuineness' of the transaction in respect of rights shares subscribed by the nine Mauritius based entities. Entire case of the learned CIT is hinged on the assumed direction of the learned DRP directing the learned AO to make necessary enquiry in respect of issuance of the rights shares. Further, the learned AO passed an order dated 28th March 2013 under Section 143(3) read with Section 263 of the Act, wherein, he has made an addition of Rs 795,96,83,862 under Section 68 of the Act merely on the basis that details regarding the source of source of funds of such rights shareholders has not been provided.

2.4 By the impugned order, the ld. CIT(A) confirmed the action of the AO against which the assessee is in appeal further appeal before us.

2.5 It was argued by the ld. AR that during the course of assessment hearing, the assesee has duly filed the following the documents which prove beyond doubt the identity, creditworthiness and genuineness of such right shareholders:

A. Proof regarding the identity, creditworthiness and genuineness of the nine Mauritius based shareholders of VIL to whom rights shares were allotted in the subject financial year.

B. Explanation regarding the source of funds of such shareholders

C. Bank statements of the aforesaid shareholders for AY 2004-05 till AY 2006-07

D. Proof regarding the identity, creditworthiness and genuineness of the source of funds for the said shareholders.

The assessee had furnished various documentary evidences to substantiate the identity, creditworthiness and genuineness of the right shareholders and also furnished detailed legal submission as to why no circumstances exists to attract provisions of section 68 of the Act. However, the learned AO has passed an order dated 28th March, 2013 under section 143(3) read with section 263 of the Act, wherein, he has made an addition of Rs 7,95,96,83,862 under section 68 of the Act merely on the basis that details regarding the source of source of funds of such rights shareholders has not been provided. Further, this action of the learned AO also undermines the order of learned TPO and learned DRP wherein the right issue made to such shareholders has been examined and verified with no adverse comments.

2.6 Our attention was invited to the judgemnt of Hon'ble Supreme Court in the case of Vodafone International Holding B.V vs UOI (31 ITR 1) wherein the Hon'ble Supreme Court observed as under:-

''A. Evolution of the Hutchison structure and the Transaction

3. *The Hutchison Group, Hong Kong (HK) first invested into the telecom business in India in 1992 when the said Group invested in an Indian joint venture vehicle by the name Hutchison Max Telecom Limited (HMTL) - later renamed as HEL.*

4. *On 12.01.1998, CGP stood incorporated in Cayman Islands, with limited liability, as an "exempted company", its sole shareholder being Hutchison Telecommunications Limited, Hong Kong ["HTL" for short], which in September, 2004 stood transferred to HTI (BVI) Holdings Limited ["HTIHL (BVI)" for short] vide Board Resolution dated 17.09.2004. HTIHL (BVI) was the buyer of the CGP Share. HTIHL (BVI) was a wholly owned subsidiary (indirect) of Hutchison Telecommunications International Limited (CI) ["HTIL" for short].*

5. *In March, 2004, HTIL stood incorporated and listed on Hong Kong and New York Stock Exchanges in September, 2004.*

6. *In February, 2005, consolidation of HMTL (later on HEL) got effected. Consequently, all operating companies below HEL got held by one holding company, i.e., HMTL/HEL. This was with the approval of RBI and FIPB. The ownership of the said holding company, i.e., HMTL/HEL was consolidated into the tier I companies all based in Mauritius. Telecom Investments India Private Limited ["TII" for short], IndusInd Telecom Network Ltd. ["ITNL" for short] and Usha Martin Telematics Limited ["UMTL" for short] were the other shareholders, other than Hutchison and Essar, in HMTL/HEL. They were Indian tier I companies above HMTL/HEL. The consolidation was first mooted as early as July, 2003.*

7. *On 28.10.2005, VIH agreed to acquire 5.61% shareholding in Bharti Televentures Ltd. (now Bharti Airtel Ltd.). On the same day, Vodafone Mauritius Limited (subsidiary of VIH) agreed to acquire 4.39% shareholding in Bharti Enterprises Pvt. Ltd. which indirectly held shares in Bharti Televentures Ltd. (now Bharti Airtel Ltd.).*

8. *On 3.11.2005, Press Note 5 was issued by the Government of India enhancing the FDI ceiling from 49% to 74% in telecom sector. Under this Press Note, proportionate foreign component held in any Indian company was also to be counted towards the ceiling of 74%.*

B. Ownership Structure 54. *In order to understand the above issue, we reproduce below the Ownership Structure Chart as on 11.02.2007. The Chart speaks for itself.*

55. *To sum up, CGP held 42.34% in HEL through 100% wholly owned subsidiaries [Mauritius companies], 9.62% indirectly through TII and Omega [i.e. pro rata route], and 15.03% through GSPL route.*

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68. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in Salomon v. Salomon [1897] A.C. 22 that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of Holding Structures. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes……..

Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit.

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73. ……. Applying these tests to the facts of the present case, we find that the Hutchison structure has been in place since 1994. It operated during the period 1994 to 11.02.2007. It has paid income tax ranging from Rs. 3 crore to Rs. 250 crore per annum during the period 2002-03 to 2006-07. Even after 11.02.2007, taxes are being paid by VIH ranging from Rs. 394 crore to Rs. 962 crore per annum during the period 2007-08 to 2010-11 (these figures are apart from indirect taxes which also run in crores). Moreover, the SPA indicates "continuity" of the telecom business on the exit of its predecessor, namely, HTIL. Thus, it cannot be said that the structure was created or used as a sham or tax avoidant. *It cannot be said that HTIL or VIH was a "fly by night" operator/short time investor. If one applies the look at test discussed hereinabove, without invoking the dissecting approach, then, in our view, extinguishment took place because of the transfer of the CGP share and not by virtue of various clauses of SPA. In a case like the present one, where the structure has existed for a considerable length of time generating taxable revenues right from 1994 and where the court is satisfied that the transaction satisfies all the parameters of "participation in investment" then in such a case the court need not go into the questions such as de facto control vs. legal control, legal rights vs. practical rights, etc.*

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97. We are, therefore, of the view that in the absence of LOB Clause and the presence of Circular No. 789 of 2000 and TRC certificate, on the residence and beneficial interest/ownership, tax department cannot at the time of sale /disinvestment/ exit from such FDI. deny benefits to such Mauritius companies of the Treaty by stating that FDI was only routed through a Mauritius company, by a company/principal resident in a third country; or the Mauritius company had received all its funds from a foreign principal/company; or the Mauritius subsidiary is controlled/managed by the Foreign Principal; or the Mauritius company had no assets or business other than holding the investment/shares in the Indian company; or the Foreign Principal/100% shareholder of Mauritius company had played a dominant role in deciding the time and price of the disinvestment/sale/transfer; or the sale proceeds received by the Mauritius company had ultimately been paid over by it to the Foreign Principal/ its 100% shareholder

either by way of Special Dividend or by way of repayment of loans received; or the real owner/beneficial owner of the shares was the foreign Principal Company. Setting up of a WOS Mauritius subsidiary/SPV by Principals/genuine substantial long term FDI in India from/through Mauritius, pursuant to the DTAA and Circular No. 789 can never be considered to be set up for tax evasion.''

2.7 Our attention was also invited to the *Judgment of Justice K.S. Radhakrishnan wherein it was held:-*

''43. Corporate structure is primarily created for business and commercial purposes and multi-national companies who make offshore investments always aim at better returns to the shareholders and the progress of their companies. Corporation created for such purposes are legal entities distinct from its members and are capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. Multi-national companies, for corporate governance, may develop structures, affiliate subsidiaries, joint ventures for operational efficiency, tax avoidance, mitigate risks etc. On incorporation, the corporate property belongs to the company and members have to direct proprietary rights to it but merely to their "shares" in the undertaking and these shares constitute items of property which are freely transferable in the absence of any express provisions to the contrary.

44. Corporate structure created for genuine business purposes are those which are generally created or acquired: at the time when investment is being made; or further investments are being made; or the time when the Group is undergoing financial or other overall restructuring; or when operations, such as consolidation, are carried out, to clean-defused or over-diversified. Sound commercial reasons like hedging business risk, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structures. In transnational investments, the use of a tax neutral and investor-friendly countries to establish SPV is motivated by the need to create a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain countries are partially exempted and, in certain countries, there is nil tax on capital gains. Such factors may go in creating a corporate structure and also restructuring.

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50. Investment under foreign Direct Investment Scheme (FDI scheme), investment by Foreign Institutional Investors (FIIs) under the Portfolio Investment Scheme, investment by NRIs/OBCs under the Portfolio Investment Scheme and sale of shares by NRIs/OBCs on non-repatriation basis; Purchase and sale of securities other than shares and convertible debentures of an Indian company by a non-resident are common. Press Notes are announced by the Ministry of Commerce and Industry and the Ministry issued Press Note no. 2, 2009 and Press Note 3, 2009, which deals with calculation of foreign investment in downstream entities and requirement of ownership or control in sectoral cap companies. Many of the offshore companies use the facilities of Offshore Financial Centres situate in Mauritius, Cayman Islands etc. Many of these offshore holdings and arrangements are undertaken for sound commercial and legitimate tax planning reasons, without any intent to conceal income or assets from the home country tax jurisdiction and India has always encouraged such arrangements, unless it is fraudulent or fictitious.

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125. The Revenue has no case that HTIL structure was a device or an artifice……."

2.8 In view of the above judgement, it was contended by the ld. AR of the assessee that the Hon'ble Court has categorically validated not only such investments but also the structure of such investments. Hence, the adverse finding as to the identity, genuineness and creditworthiness of the Mauritius entities by the learned AO is clearly contrary to the findings and conclusion of the Hon'ble Apex Court.

2.9 Our attention was also invited to the recent judgment of the Hon'ble Bombay High Court in the case of Vodafone India Service Private Limited vs UOI & Ors (WP 488 of 2012), wherein the Hon'ble jurisdictional High Court has categorically laid down that the judgment of the Hon'ble Supreme Court has to be taken into cognizance by the Assessing officer and any failure to do so would amount to judicial indiscipline. Relevant observation of aforesaid judgment is as under:

> *207. As Mr. Salve rightly submitted, the Supreme Court did consider the Framework agreements.* ***One of the reasons it was necessary for us to refer to the relevant portions of the judgment of the Supreme Court in detail was to indicate that the provisions of the Framework agreements were not only considered but were not only considered but were also construed by the Supreme Court in detail. We cannot accept the respondents suggestion. It is not possible for a High Court to come to the conclusion that the Supreme Court did not consider the same. It is irrelevant whether each of the terms of the Framework agreements were individually set out or analyzed by the Supreme Court or not.*** *In any event, clause 4.4 was specifically referred to. The construction of the provisions per se without anything more and in the absence of anything else is a question of law and a decision in respect thereof would be binding on all Courts, Tribunals and authorities.*

208. Nor are we inclined to accept the Advocate General's submission that the observations in paragraph 88 of the Vodafone judgment that the "call and part options were not transferred vide the SPA dated February 11, 2007 or any other document whatsoever" were observations on facts in issue and are, therefore, neither ratio nor obiter and not binding in subsequent proceedings even between the same parties. We are not entitled to restrict the ambit of the words of the Supreme Court "any other document" to mean a document prior to the transfer of the CGP share on 8 th May, 2007. The words "any other document" would certainly include the 2007 Framework agreements which were so elaborately dealt with in the judgment. If there is an ambiguity, it is for the parties to have the same clarified by the Supreme Court.

209. The judgment of the Supreme Court would undoubtedly be the petitioner's main plank and supports its case to a considerable extent, especially as it is the very agreements that fall for consideration even in the proceedings relating to the petitioner's assessment. Mr. Salve rightly contended that the Supreme Court had analyzed the Framework Agreements and held that the call options are contractual rights; that they vested and continue to vest in the petitioner and that they had not been transferred or assigned by the petitioner. ***We proceed, as indeed we must, that before the ITAT, a very heavy burden would rest upon the Revenue even regarding the petitioner's assessment in view of the judgment in Vodafone's case. Every Court, Tribunal, authority or person is bound to give the observations of the Supreme Court, including in respect of the Framework Agreements, their full effect. The suggestion that they are casual observations is rejected. A view to the contrary would tantamount to judicial indiscipline. This is not just our prima facie view. Needless to say it would be necessary to consider the judgment even in the present proceedings****. That, however, can and in the facts of this case ought to be done by the authorities under the Act. It could have been done even by the TPO and the AO. Their orders were, however, passed prior to the judgment of the Supreme Court and the occasion for them to consider this judgment does not arise at this stage. It will, however, be necessary for the ITAT to do so. We see no reason to short-circuit the proceedings in this regard as there are or are likely to be other aspects including facts which will also require consideration.''*

Ld. AR further contended that the decision of the higher authority is binding on the lower authority in the judicial hierarchy. It is a well-settled principle of law that the junior incumbent is supposed to obey and carry out the order and/or observations made by the superior authority, be it a judicial forum or a quasi-judicial forum or even in any administrative field. Reliance in this regard was placed on the decision of the Hon'ble Supreme Court in the case of Union of India vs Kamalakshmi Finance Corporation Ltd (AIR 1992 SC 711) and Hon'ble Bombay High Court decision in the case of Vodafone India Service Private

Limited vs UOI & Ors (WP 488 of 2012). Thus, in view of the above, the ld. AR requested to treat the assessment order as bad in law as it clearly tends to over reach and circumvent the judgment of the Hon'ble Apex Court, which is clearly violative of Article 141 of the Constitution of India. As per ld. AR the impugned order is also contrary to direct judicial precedents of the Hon'ble Supreme Court and hence is perverse in law and on facts. Further as per ld. AR, the only reason as to why the addition under section 68 of the Act has been made is the fact that the assessee has allegedly not proved/established the source of source i.e. ultimate source of funds of such right shareholders, who have subscribed to right shares issued by the assessee during the subject financial year. In this connection, it should be noted that the learned AO in arriving at such finding has not only ignored the facts which proves the case otherwise but has also contravened the law laid down by the Hon'ble Apex court that where the identity of the shareholders or persons who have subscribed to share application/share capital of a corporate entity is established, no addition u/s 68 of the Act can be made in hands of such corporate assesse. Reliance was placed on following judicial pronouncements.

CIT v Lovely Exports 216 CTR 195. The relevant extract of the judgment is under:

"Can the amount of share money be regarded as undisclosed income under s. 68 of IT Act, 1961 ? 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 names 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."

CIT v Steller Investments Ltd 251 ITR 263. The relevant extract of the judgment is under

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

5. *In our opinion, no question of law arises and the petition is, therefore, dismissed."*

CIT vs Pondy Metal and Rolling Mill (Supreme Court) SLP(C) 12680/2007. The aforesaid SLP arose from the judgment of the Hon'ble Delhi High Court in the case of **CIT vs Pondy Metal and Rolling Mill (ITA 788 of 2006)** which dealt with a case similar to the present one i.e. investments made by a Mauritius based company. The Hon'ble Delhi High Court categorically held that once the identity of the investor has been manifest and is proved, the investment cannot be said to be the undisclosed income of the assessee. It is noteworthy that the departmental SLP against the aforesaid Delhi High Court decision has been dismissed by the Hon'ble Supreme Court (SLP(C) 12680/2007

2.10 In view of the above, it was argued by the ld. AR of the assessee that since the entire case of the learned AO is based on the premise that it has an authority under the Act to examine the source of source i.e. ultimate source of the investor and make additions under Section 68 of the Act in case of investee is totally against the settled principle of law and hence the order passed is bad in law.

2.11 It was also submitted by the ld. AR of the assesee that during the course of hearing before the AO, following documents were filed.

<u>For identity and genuineness</u>

- Financial Statements (attached as **Annexure 8a to 8i**)
- Tax Returns (attached as **Annexure 9a to 9i)**
- Letters of Mauritius Revenue Authorities (attached as **Annexure 10a to 10i);**
- Bank Statements (attached as **Annexure 11a to 11h**);

- Certificate of Incorporation (attached as **Annexure 12a to 12i**);
- Tax Residency Certificates (attached as **Annexure 13a to 13i**);
- FIPB application and approval thereon is attached as **Annexure 14 and 15 respectively;**

As regards creditworthiness of the shareholders and source of source of funds

- Letters issued by Mauritius Revenue Authorities. The letters categorically establish the following:

    - The payment of right shares was made by telegraphic transfer;
    - The funds enabling investment were obtained through financing transaction with other group companies;
    - The entity is a tax resident of Mauritius.

Financial Statements (attached as **Annexure 8a to 8i**). It may be noted that from perusal of such financial statements of the respective entities, it is apparent that the loan was received from their intermediate holding companies.

2.12 In view of above documentary evidences filed before the AO, it was argued by the ld. AR of the assessee that the source of funds utilized by the shareholders of the assessee to subscribe to the rights issue was clearly established.

2.13 The ld. AR further contended that all the above documents were obtained by the Indian Revenue Department itself from the Mauritius Revenue Authorities after conducting a detailed investigation. Despite of the same, the learned AO has not been able to create an iota of doubt that the share subscription money actually belonged to the Appellant or has a source in India.

2.14 As per ld. AR of the assessee that the AO has recognized and accepted that the money have been received by companies incorporated in Mauritius i.e. non-residents and such investor companies have taken loan from their sister/group concern to finance the same, however, after accepting such fact the AO has

exceeded his jurisdiction to examine the source of source of such non-resident companies and in essence has tried to bring into the Indian Tax net the alleged undisclosed foreign income of the non-resident which has no nexus with an Indian source.

2.15 Our attention was invited to Circular No 5 of 1969, dated 20th February 1969 issued by Central Board of Direct Taxes, wherein it is categorically mentioned that income/funds brought into India by a non-resident, cannot be liable to taxed in India. Relevant extracts of the circular is as under:

> ***1.*** *It has been represented to the Board that persons of Indian origin residing abroad but intending to return to India and settle here permanently, apprehend that the money brought in or remitted from abroad by such persons might be subjected to income-tax in India.* ***The apprehension appears to be due to lack of information regarding the correct legal position about the taxability of the remittances of money from abroad. The general position, in this regard, is clarified below.***
>
> ***2.*** ***Money brought into India by non-residents for investment or other purposes is not liable to Indian income-tax. Therefore, there is no question of a remittance into the country being subjected to income-tax in India. The question of assessment to tax arises only when there is no evidence to show that the amount, in question, in fact represents such remittance. In other words, in the absence of proper supporting evidence, the taxpayers' story that the money has been brought into India from outside may be disbelieved by the Income-tax Officer who may then proceed to hold that the money had in fact been earned in India.***
>
> ***3. If the money has been brought into India through banking channels or in the form of assets like plant and machinery or stock-in-trade, for which the necessary import permits had been obtained, no questions at all are asked by the Income-tax Officers as to the origin of the money or assets brought in. It is only in case where the money is claimed to have been brought from outside otherwise than through banking channels and there is no evidence regarding the transfer of the money, that the department has to make enquiries about the source thereof.*** *Even in these cases, ……"*

2.16 In view of the above submissions, it was vehemently argued by the ld.AR that legal position is well settled and applying the same to the facts of the instant case of the asessee , no income can be brought to tax under Indian Tax laws as it is undisputed that money/subscription have come from proper banking channels after due approval of Reserve Bank of India ('RBI') and Foreign Investment Promotion Borad ('FIPB') and it is only the source of source of the non-resident right shareholders which is being doubted. Reliance in this regard is placed on the following judicial precedents:

- **M/s Russian Technology Center (P) Ltd Vs DCIT, New Delhi, 145 ITD 88 (Tribunal Delhi),** wherein, after examining the judicial precedents on the subject and after recording that fact that share application money received from the non-residents, Hon'ble Tribunal held that such money cannot come under the ambit of Section 68 or can be taxed in India in any case. The relevant observation of the Tribunal is as under:

  "11.5 We find merit in the contentions of learned counsel and reliance on the decisions of the Tribunal in the cases of Finlay CorporationLtd. (supra), Smt. Susila Ramasamy (supra) and Saraswati Holding Corpn. Inc. (supra) and the import of CBDT circular referred to above. Whenever remittances are made by the non-resident holding company for purchase of shares of its subsidiary in India, the money undoubtedly is capital in the nature and if documents like FIRC etc. are produced, it can safely be stated that the said money came in through banking channels.
  11.6 In the absence of any evidence to show that the money remitted by the non-resident accrued in India, it cannot be held to be taxable in India. Hence, moneys remitted by non-residents whose identity is not in question through their bank accounts outside India have to be held as capital receipts not exigible to tax. It therefore naturally follows that if the identity of the non-resident remitter is established and the money has come in through banking channels, it would constitute a capital receipt and ordinarily cannot be treated as deemed income under s. 68 or 69 of the Act. This is clarified by the CBDT circular itself.
  "

- ***DCIT v Finlay Corporation Limited 86 ITD 626 [Delhi Tribunal].*** The Tribunal after considering the scope of Section 5(2) of the Act and relying on the Circular 5 of 1969 categorically held that Section 68 of the Act has no application to the non-residents. The relevant observation of the Hon'ble Tribunal is as under:

"As regards the question whether there is any conflict between provisions of section 5(2) and provisions of section 68 or 69, it is the settled legal position that burden is on the revenue to prove that income of an assessee falls within the net of taxation. Once it is so proved, then the burden is on the assessee to prove that such income is exempt from taxation. Section 5(2) being charging section, the burden is on the revenue to prove that the income of the non-resident falls within the ambit of such section. On the other hand, the Legislature has cast the onus on the assessee to explain the source of money falling within the ambit of section 68 or 69. These sections are of universal application and do not make any distinction between a resident or non-resident. Therefore, there is a conflict between the provisions of section 5(2) on the one hand and the provisions of section 68 or 69 on the other hand with reference to the burden of proof. Hence, if there is any cash credit in the books of account of the non-resident, then the source and genuineness of the same will have to be proved by him. For the similar reasons, the non-resident would be required to prove the source of investment made by him in India.

However, the conflict between the provisions is only with reference to the onus and not to the issue of taxability of income. The onus is shifted under section 68 or 69 only with reference to the income, which is otherwise taxable in the hands of non-resident under section 5(2). Therefore, the issue whether the income of a non-resident is taxable or not is still to be decided with reference to the provisions of section 5(2) and the provisions of section 68 or 69 cannot enlarge the scope of section 5(2). What is not taxable under section 5(2) cannot be taxed under the provisions of section 68 or 69. Under section 5(2), the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. If such income is shown in the books of account then it cannot be taxed in India merely because the assessee is unable to prove the source of such entry. Therefore, the same cannot be taxed under section 68 merely on the ground that the assessee fails to prove the genuineness and source of such cash credit. Therefore, the provisions of section 68 or 69 would be applicable in the case of non-resident only with reference to those amounts whose origin of source can be located in India. Therefore, the provisions of section 68 or 69 have limited application in the case of a non-resident."

2.17 As per ld. AR of the assessee in view of the above discussion, it is clear that where the identity of non-resident is established and the genuineness of the transaction is proved, no addition u/s 68 of the Act can be made.

2.18 It was further contended by the ld. AR of the assessee that even where it is assumed that such non-resident investors did not have a valid source, then too, no addition can be made into the hands of Indian taxpayer, unless it is established by the tax department that the source of such funds was in India and

through the subject assessee only, otherwise, any addition of such income will make the Act extra-jurisdictional i.e. making a sum taxable in India, which neither has any source nor has been received in India by such non-resident.

2.19 By inviting our attention to the amendment made by Finance Act, 2012, which was effective from 01-04-2013, it was contended by the ld. AR that as per amended provisions the assessee is required to establish just the first leg of the source of investor [not applicable for the subject AY], the AO is still not empowered or have jurisdiction to examine the source of funds for a non-resident investor whose identity is manifest. Hence, any exercise to examine the same is entirely ex-jurisdictional and ultra-vires the Act. The same is evident from the perusal of section 68 of the Act.

2.20 It was argued by the ld. AR of the assessee that as per the provisions of the Section 68 of the Act (as it prevailed for the year under consideration), addition can be made under the said section where the assessee does not offer any explanation regarding the nature and source of sums received or the explanation provided by the assessee is not satisfactory in the opinion of AO which in turn is required to be formed objectively with reference to the material available on record. The aspects which require consideration are identity and creditworthiness of the creditor and genuineness of the transaction. In the instant case, the assessee has filed sufficient documentary evidence

which establishes beyond doubt, the identity of the existing shareholders, genuineness of the transaction and creditworthiness of these investors.

2.21 With regard to the identity and genuineness of the transactions, the contention of the ld. AR was that increase in share capital was not on account of new shareholders being brought in, rather it was a rights issue which was extended to the existing shareholders. Thus, the balance sheet of the Assesee and the shareholders register evidence that these same parties were already subscribers to the share capital and hence such shareholders already stood identified and accepted. Therefore, once in earlier years the AO had accepted such fact then there remains no question of any doubt on the same. As per the ld. AR of the assessee the shareholding structure and investment through Mauritius based entities (in respect of which additions has been made under section 68 of the Act) has already been validated by the Hon'ble Apex Court in the landmark judgment in the case of Vodafone International Holding B.V v UOI (341 ITR 1) – refer page 30 and 31 of the case law wherein the investment structure has been reproduced. The structure clearly identifies:

- Hutchison Telecommunications International Ltd, as the ultimate holding company;
- Hutchison Telecommunications International (Cayman) Holdings Limited, as an intermediate holding company; and
- 8 Hutchison group entities [viz., Trans Crystal Ltd, Al-Amin Investments Ltd, Euro Pacific Securities Ltd, Prime Metals Ltd, Mobilvest Ltd, CCII (Mauritius), Asian Telecommunication Investments (Mauritius) Ltd and Hutchison Telecommunications (India) Ltd)] as shareholders in the assessee. It is humbly submitted that the investment by Hutchison was subject matter of

consideration before the Hon'ble Supreme Court and hence, investment by Essar Com Ltd, which was a part of the Essar Group was not reflected in the ownership structure.

2.22 In this regard, the Hon'ble Apex Court has categorically not only validated such investments in the assessee but also the shareholding structure for such investments. Further the Hon'ble Court in the context of corporate structure had made the following observations and had acknowledged legality of multi-layer corporate structure as under:-

> *''Corporate structure created for genuine business purposes are those which are generally created or acquired; at the time when investment is being made or further investments are being made; or at the time when Group is undergoing financial or other overall restructuring' or when operations, such as consolidation, are carried out, to clean-defused or over-diversified. Sound commercial reasons like hedging business risks, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structure. In transnational investments, the use of a tax neutral and investor-friendly countries to establish SPV is motivated by the need to create a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain counties are partially exempted and, in certain countries, there is nil tax on capital gain. Such factors may go in creating a corporate structure and also restructuring.''*

2.23 By inviting our attention to the following documents filed before the lower authorities, the ld. AR of the assessee contended that the identity and genuineness of the right shareholders is clearly established from the following irrefutable documentary evidences *(enclosed in paperbook volume II and III)*:

- Letter of offer issued to all the shareholders for issuance of right shares;
- Letter of acceptance issued by the right shareholders accepting the offer:
- Letter issued by the Assessee intimating allotment of right shares;

- Financial Statements of all such right shareholders for Calendar Year ('CY') 2005 and 2006 (covering CY 2004 to 2006) which demonstrates that loan taken from the intermediate holding company was utilized for the purpose of subscribing to the rights shares;
- Tax Returns of all such right shareholders for Mauritian AY 2006-07 (Period 1 July 2005 to 30 June 2006) and 2007-08 (Period 1 July 2006 to 30 June 2007);
- Letters of Mauritius Revenue Authorities stating that such rights shareholders have subscribed to the rights issue through proper banking channels and are tax residents of Mauritius;
- Bank Statements of all such rights shareholders at least covering period 30 September 2003 to 27 March 2007 (except for Essar Com Ltd.);
- Certificate of Incorporation of all such right shareholders;
- Tax Residency Certificates of all such right shareholders;

2.24 With regard to the creditworthiness of the shareholders, the ld. AR of the assessee contended that the letters issued by Mauritius Revenue Authorities which not only establish, beyond doubt, the identity and genuineness of the aforesaid entities, but also establish the source of funds/ creditworthiness. The letters categorically establish the following:

- the payment of right shares was made by telegraphic transfer;
- the funds enabling investment were obtained through financing transaction with other group companies;
- the entity is a tax resident of Mauritius.

Additionally, it may be noted that Mauritius Revenue Authorities in their letter have not given any adverse comments on the identity and working of the entities or source of their funds. In this context, the ld. AR of the assessee highlighted that a perusal of the financial statements of the eight rights shareholders (all except Essar Com Ltd.) for financial year ending December 2005 makes it evident that the source of funds utilized by the said shareholders to subscribe to the rights issue

was loan taken from the intermediate holding company, Hutchison Telecommunications International (Cayman) Holdings Limited.

2.25 The ld. AR of the assessee further submitted that the assessee along-with their fellow subsidiaries and holding companies, were part of the Hutchison Whampoa Group, a Hong Kong based conglomerate which was listed on the main board of the Hong Kong Stock Exchange at relevant point in time and operated five core business divisions in 42 countries including ports and related services; telecommunications, property and hotels, etc. Thus, there cannot be an iota of doubt regarding the creditworthiness of the said companies and their ability to subscribe to the rights issue of the assessee's equity shares. A perusal of the balance sheet of Hutchison Whampoa Group for the year ended December 31, 2005 *(Page 560 and 561 of the Paperbook- Volume II)* reveals the following information:

Hutchison Whampoa Limited (Extract from Financial Statements for the year ended December 2005)		
Particulars	**Year 2004 (HK$ Millions)**	**Year 2005 (HK$ Millions)**
Gross Turnover	134,595	182,584
Profit before taxation	3,706	11,527
Total Asset less current liabilities	555,934	512,058
Total non-current liabilities	276,140	258,429
Net Worth	279,794	253,629

Also, the fact that Hutchison Telecommunications International Limited ('HTIL'), besides being a part of the Hutchison Whampoa Limited ('HWL') Group and

ultimate holding company of the eight Hutchison group right shareholders, is a leading international provider of mobile and fixed-line telecommunications services with operations in eight countries and territories, amply proves the creditworthiness of HTIL. A perusal of the balance sheet of HTIL for the year ended December 31, 2005 *(Page 758 and 759 of the Paperbook- Volume II)* reveals the following information:

Hutchison Telecommunications International Ltd (Extract from Financial Statements for the year ended December 2005)		
Particulars	**Year 2004 (HK$ Millions)**	**Year 2005 (HK$ Millions)**
Gross Turnover	14,845	24,356
Profit before taxation	479	636
Total Asset	40,720	59,591
Total Liabilities	25,854	39,769
Net Worth	14,866	19,822

It is apparent from the above information that the shareholding entities subscribing to the rights shares of the assessee were a part of a large conglomerate of companies with abundant financial resources. This clearly establishes the identity of such shareholders sand their creditworthiness and the ability to subscribe to the rights issue of the assessee's equity shares.

2.26 As regards investment by Essar Com Ltd, the creditworthiness and source of the funds is evidenced from the financial statement as under:

- The financial statement for the period 1st January 2005 to 31st March 2006 *(refer page 1569 and 1572)*, shows that Essar Com Ltd raised the following loans:

- loan amounting to USD 2,47,86,471 from Essar Infrastructure Holdings Limited.
- loans amounting to USD 14,00,00,000 were raised from financial institutions

- Investments in the right shares were financed from the aforesaid loans.

Thus, based on the above, it is manifest that the assessee has not only furnished irrefutable documentary evidence to establish identity and genuineness of shareholders but has also established the source of funds of such shareholders. Therefore, since the assessee has fully discharged its onus in this regard, there is clearly no case of unexplained credit in the present case**.**

2.27 Further, addressing the scope of first proviso to Section 68 of the Act w.e.f. 01-04-2013, the ld. AR contended that first of all the proviso is not applicable for the year under consideration, since it applies for and from the Assessment Year 2013-2014. Secondly, even otherwise it is submitted that the said first proviso to section 68 is applicable only in cases where the share application money/share capital is received from a "resident". In the instant case, the amounts have been received from "non-residents" and hence even on this count the said proviso would not apply. Reliance in this regard is placed on the following:

1. The CBDT through its Circular No.5 in F.No.73A/2(69)-IT (A-11), dated. 20th Feb,1969 has clarified the following:

> *"money brought into India by non-resident for investment or other purposes is not liable to Indian Income-tax. Therefore, there is no question of a remittance into the country being subjected to Income-tax in India (Para 2). If the money has been brought into India through banking channels or in the form of assets like plant and machinery or stock-in-trade, for which the necessary import permits had been obtained, no question at all are asked by the ITOs as to the origin of the money or assets brought in (Para 3)."*

2. The jurisdictional Mumbai Bench of the Tribunal in the case of **Syntensia Network Security India Pvt. Ltd. (ITA No.2927/Mum/2017)** on analyzing the first proviso to section 68 of the IT Act has held that first proviso to section 68 is not applicable in case the remitter is a non-resident assesse. We have reproduced the relevant extract of the findings as under:

> *"19. Furthermore, the law is section 68 is not apply to remittances made in India by non-resident is strengthened by the proviso to u/s.68 inserted w.e.f. asst. yr. 2013-14. According to the said proviso, if an assessee company, in which public are not substantially interested, receives money by way of share capital, then the source of funds of resident shareholder has to be established by the assessee in order to get out of the kin of the deeming provision under s. 68. Hence, the proviso talks of the source being established only when the shareholder is a resident of India. There is no such requirement if shareholder is a non-resident. Therefore, the creditworthiness of the shareholders, if he is a non-resident, does not have to be established by the assessee in respect of remittance received by him."*

2.28 On the other hand, it was argued by the ld. Counsel appearing on behalf of the Revenue that the assessee was unable to prove the genuineness and creditworthiness of the share applicants. Therefore, applying the judicial pronouncement laid down by Hon'ble Supreme Court in the case of NRA Steel, 607 CTR 353, the AO is duty bound investigate the creditworthiness of the creditor/ subscriber, verify the identity of the subscribers and ascertain whether the transaction is genuine or these are bogus entries of name-lenders. He further contended that while investigation in terms of the principles laid down by the Hon'ble Supreme Court in NRA case may be necessary in respect of the eight entities where funds are stated to have been transferred from Hutchison Telecommunications International Ltd. By way of loan from ABN Ambro Bank

(which itself is stated to have been repaid by another loan from a group company). In respect of investment from Essar Com Ltd. as can be observed from page 1569 of the compilation submitted by the assessee, the liabilities of Essar Comm Ltd. at the relevant period are around 20 times the shareholder's interest and the creditworthiness of Essar Com Ltd. is in serious doubt and the ultimate source of investment is not satisfactorily proved. Hence, the addition to that extent may be sustained.

2.29 We have considered the rival contentions and carefully gone through the orders of the authorities below. We have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the ld. AR and ld DR during the course of hearing before us in the context of factual matrix of the case. From the record, we found that during the subject AY, the assessee made a rights issue of 7,09,86,318 equity shares of Rs 10 each at a premium of Rs 237.99 per equity share to all its existing equity shareholders in the ratio of 6 equity shares for every 29 equity shares held by them. For the purpose of issuance of right shares, a letter of offer was given to all the shareholders of the assessee. The assessee received a total amount of Rs 17,603.90 million on account of subscription to the said rights shares (i.e. for 70,986,318 equity shares). Out of the above, 3,44,50,106 shares amounting to Rs 7,959.60 million were subscribed to by nine Mauritius based entities, namely:

- Al-Amin Investments Ltd;
- Asian Telecommunication Investments (Mauritius) Ltd;
- CCII (Mauritius);
- Euro Pacific Securities Ltd
- Hutchison Telecommunications (India) Ltd;
- Mobilvest Ltd;
- Prime Metals Ltd;
- Trans Crystal Ltd; and
- Essar Com Ltd

During the course of assessment proceedings, the Assessee was asked to substantiate the identity, creditworthiness and genuineness of such right shareholders and also asked to explain the identity, creditworthiness and genuineness of such source of right shareholders. In reply, the Assessee furnished the following documentary evidences:-

- Financial Statements of all such right shareholders for FY 2004-05 and 2005-06
- Tax Returns of all such right shareholders for FY 2004-05 and 2005-06;
- Letters of Mauritius Revenue Authorities stating that such rights shareholders have subscribed to the rights issue through proper banking channels and are tax residents of Mauritius;
- Bank Statements of all such rights shareholders for AY 2004-05 and 2006-07;
- Certificate of Incorporation of all such right shareholders;
- Tax Residency Certificates of all such right shareholders;
- Copy of the application made by VIL before the Foreign Investment Promotion Board ('FIPB') and approval thereof.

However, the AO despite of the various irrefutable documentary evidences furnished before his office during the course of hearing has summarily rejected the submissions of the Assessee, merely on the basis that details regarding the source of source of funds of such rights shareholders i.e ultimate origin of funds have not

been provided and has made addition of Rs 7,95,96,83,862 under Section 68 of the Act.

2.30 It is evident from a bare reading of Section 68 that the section seeks to tax sums found credited in the books of accounts of an assessee which satisfy the following conditions:

- Where the assessee does not offer any explanation regarding the nature and source of such sum; or
- If the explanation is not satisfactory in the opinion of the assessing officer.

Thus, the provisions of Section 68 of the Act suggests that there has to be credit of amounts in the books maintained by the assessee, that such credit has to be of a sum during the previous year, and that the assessee offers no explanation about the nature and source of such credit found in the books or the explanation offered by the assessee, in the opinion of the AO, is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. Further, the expression 'the assessee offers no explanation' means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. Additionally, the opinion of the AO is

required to be formed objectively with reference to the material available on record. Application of mind is the *sine qua non* for forming the opinion. Reference in this regard is placed Hon'ble Apex court judgment in the case of CIT v P.Mohanakala (291 ITR 278), wherein the Hon'ble Apex Court held as under

> ***"14.*** *The question is what is the true nature and scope of section 68 of the Act? When and in what circumstances section 68 of the Act would come into play? That a bare reading of section 68 suggests that there has to be credit of amounts in the books maintained by an assessees; such credit has to be of a sum during the previous year; and the assessees offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessees in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessees of that previous year. The expression "the assessees offer no explanation" means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."*

Applying the above principle in the instant case of the Assessee, it is apparent from the perusal of the impugned order that the conclusion arrived by the AO is not only subjective but also completely ignores the material available on record and the explanation offered by the Assessee. The AO in the impugned order has not been able to contravene the facts and/or the explanation offered by the Assessee but has merely based his order on the following two patently wrong assumptions:

1. Firstly, the identity, creditworthiness and genuineness of the source of source of i.e., the ultimate origin of such funds have not been established; and

2. Secondly, Mauritius is a tax heaven.

2.31 We also observed that the increase in share capital was not on account of any new shareholders being brought in, rather it was a rights issue which was extended to the existing shareholders. The balance sheet of the Assessee and the Shareholders register evidence that these same parties were already subscribers to the share capital and hence already stood identified and accepted. Therefore, once in earlier year the AO has accepted such fact then there remains no question of any doubt on the same.

2.32 From the record, we found that the identity and genuineness of the said entities is clearly established from the following documents which has been conveniently ignored by the AO.

- Financial Statements (attached as Annexure 8a to 8i of paper book)
- Tax Returns (attached as Annexure 9a to 9i of paper book)
- Letters of Mauritius Revenue Authorities (attached as Annexure 10a to 10i);
- Bank Statements (attached as Annexure 11a to 11h)

Additionally, to further establish the identity and genuineness of the shareholding entities, the Certificate of Incorporation and Tax Residency Certificates of each of the said entities were also furnished by the Assessee. The Copies of the same are attached as Annexure 12a to 12i and 13a to 13i respectively. Further, we observed that the Foreign Investment Promotion Board ('FIPB'), Ministry of Finance, Government of India has also granted approval in respect of such entities, which

itself establishes the identity and genuineness of such shareholders. Copy of FIPB application made by the assessee and approval is placed on record as per Annexure 14 and 15 respectively.

2.34 As per our considered view, the aforesaid documents clearly establishes the identity and genuineness of the shareholders, and in any case the letters issued by Mauritius Revenue Authorities to the Foreign Tax Division, categorically prove that aforesaid parties are tax residents of Mauritius and hence the identity and genuineness of these entities is beyond doubt.

2.35 We further observed that the letters issued by Mauritius Revenue Authorities (Annexure 10a to 10i), not only establish, beyond doubt, the identity and genuineness of the aforesaid entities, but also establish the source of funds/creditworthiness. The letters categorically establish the following:

- The payment of right shares was made by telegraphic transfer;
- The funds enabling investment were obtained through financing transaction with other group companies;
- The entity is a tax resident of Mauritius.

Additionally, it may be noted that Mauritius Revenue Authorities in their letter has not given any adverse comments on the identity and working of the entities or source of their funds. Further, from a perusal of the financial statements of the aforesaid nine shareholders for Financial Year ending December 2005 (Annexure 8a to 8i), it is apparent that the source of funds utilized by the said shareholders to

subscribe to the rights issue was the recovery of a loan given by eight of the nine shareholders, i.e. all except Essar Com Ltd, to their respective fellow subsidiaries. This fact is evident from the notes to accounts appearing in the financial statements of the respective entities. Relevant extracts of the financial statements are attached as Annexure 8a to 8i. It is also apparent from the financial statements of the respective entities that the loan was extended to the fellow subsidiaries by utilizing funds arising out of a loan taken, by the respective entities, from their intermediate holding companies. To illustrate, in the case of Mobilvest Ltd, the flow of the transaction was as under:

- In the period 1st January 2005 to 31st December 2005, Mobilvest Ltd raised a loan amounting to USD 3,72,15,000 from its intermediate holding company.
- In the same period, a loan of USD 3,72,14,249 was extended, by Mobilvest, to its fellow subsidiary.
- The loan amount was recovered from the fellow subsidiary on 19th December 2005 and the same amount, i.e. USD 3,72,14,249 was invested in the shares of VIL, issued on a rights basis, on the same day.

A similar flow of transactions took place in all of the shareholding entities and is fully reflected in the financial statements of the respective entities. Thus, the source of funds utilized by the shareholders of the appellant to subscribe to the rights issue is clearly established from the above discussions and illustration. In the instant case, since the identity of the shareholders has already been established, the

office of the learned AO did not have locus standi to make an addition under section 68 of the Act. Reliance in this regard is placed on the the recent judgment of Hon'ble Delhi High Court in the case of CIT vs Pondy Metal and Rolling Mill (ITA 788 of 2006) which dealt with a case similar to the present one i.e. investments made by a Mauritius based company. The Hon'ble Delhi High Court held that once the identity of the investor has been manifest and is proved, the investment cannot be said to be the undisclosed income of the assessee. It is noteworthy that the departmental SLP against the aforesaid Delhi High Court decision has been dismissed by the Hon'ble Supreme Court (SLP(C) 12680/2007).Further, it is well settled that where the proper identity of such shareholders has been provided by the recipient company, no additions can be made in hand of the recipient company. Reliance in this regard is placed on the Hon'ble Supreme Court judgment in the case of CIT v Lovely Exports 216 CTR 195, wherein it has been held that where the names of the shareholders are given, the department cannot treat such subscription of shares as undisclosed income under section 68 of the Act of the recipient company. Further, reliance in this regard is also placed on the Hon'ble Supreme Court judgment in the case of CIT v Steller Investments Ltd 251 ITR 263**,** wherein, the Hon'ble Supreme Court affirmed the following conclusion of the Hon'ble Delhi High Court:

"In the present case, the subscribed capital of the assessee had been increased. The ITO assessed the company and accepted the increase in the subscribed capital. The Commissioner came to the conclusion that the Assessing Officer did not carry out detailed investigation inasmuch as there is a device of converting black money by issuing shares with the help of formation of investment company. The Commissioner further held that the Assessing Officer did not make enquiries with regard to the genuineness of the subscribers of the share capital. He thereupon set aside the order of assessment.

3. *The Tribunal reversed this decision for reasons which we need not go into.*

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

5. *In our opinion, no question of law arises and the petition is, therefore, dismissed."*

Further reliance is laid on the very recent decision of the Hon'ble Delhi Tribunal in the case of M/s Russian Technology Center (P) Ltd Vs DCIT, New Delhi, ITA 4932, 4933/Del/2011, wherein on the similar facts, the Tribunal has categorically held that share application money received from the non-residents after due approval by FIPB cannot be taxed under Section 68 of the Act. The relevant facts and conclusion as recorded by the Tribunal is as under :

"8. Apropos the merits of the additions on account of cash credits /share application money, learned counsel for the assessee contends that soon after its incorporation, the assessee company sought approval of the Foreign Investment Promotion Board (FIPB) for raising share capital up to USD 3 lacs. The approval was granted vide letter dt. 16th Sept., 1998 by FIPB. An amendment in the said approval was sought by the assessee for permitting RTCHL to acquire equity of the assessee company to the extent of 94.97 per cent and also allow the foreign company called M/s Protex Trading Company Ltd. to

acquire 5 per cent of the total capital in the assessee company. This approval was granted by FIPB on 9th June, 2004.

8.1 The FIPB further authorized the assessee company to raise capital up to Rs. 600 crores without approaching it for further approvals. This approval was given vide letter dt. 20th Dec., 2005. The assessee also filed the certificate of incorporation of RTCHL and a detailed confirmation by RTCHL and M/s Protex Trading Company Ltd. confirming the remittance of Rs. 54,44,000 towards share capital of the assessee company. The assessee contended that the money came in through banking channels and a copy of the FIRC was also filed wherein it was specifically stated that the monies have come in towards share capital in the assessee company and the same had been remitted by RTCHL. The name of the bank involved was also given in the certificate. The assessee company filed documentary evidence to show that the increase in share capital was intimated to the RoC in the requisite form.

8.2 This was sought to be explained by the assessee by submitting following documents before the AO :

(i) FIPB approval dt. 16th Sept., 1998 authorising the company to raise share capital up to USD 3 lakhs.
(ii) Amendment to FIPB approval dt. 9th June, 2004.
(iii) FIPB approval dt. 20th Dec., 2005 received by the company authorizing to raise share capital up to Rs. 600 crores.
(iv) Copy of certificates of incorporation of shareholders.
(v) Confirmation given by remitter towards remittance for share capital.
(vi) Copy of FIRC.
(vii) Copy of bank statements.
(viii) Copy of Form 2 filed with ROC.

8.3 Thus, the assessee before AO provided all possible information which was humanly possible in the matter to discharge primary onus cast by s. 68. The moneys have undisputedly come through banking channels, approvals by the highest investment board i.e. FIPB has been sought before bringing capital in the country, all statutory compliances relating to share capital received from foreign company had been duly made and the source of the source had also been established in as much as the balance sheet of RTCHL clearly shows that the investment in the assessee company was funded out of loans from shareholders.

8.4 According to the assessee, all the moneys received by way of share capital had been utilized for as establishment cost and towards selling and marketing expenses. Although the assessee had procured orders running into many crores of rupees, but the same could not fructify into revenue because of various business exigencies.

8.5 Thus, assessee had filed sufficient documents before AO to discharge its onus of establishing identity, genuineness and creditworthiness of the shareholders. AO,

however, added the amount holding that the assessee did not provide the bank statements of the shareholders. To overcome the further inquiries of AO, assessee filed following additional documents before CIT(A), which are referred to :

(i) Attested copy of the certificate of good standing of M/s Russian Technology Centre Holdings Ltd.
(ii) Director certificate of M/s Russian Technology Centre Holdings Ltd.
(iii) Balance sheet of M/s Russian Technology Centre Holdings Ltd.

……..
11.7 Taking into consideration of all the above, we find merit in the argument of the learned counsel for the assessee that the primary burden cast on the assessee was duly discharged. The issue of primary onus is to be weighed on the scale of evidence available on the record and the discharge of burden by the assessee is also to be decided on the basis of documents filed by the assessee and facts and circumstances of each case and on that basis a reasonable view is to be taken as to whether the assessee has discharged the primary onus of establishing the identity of share applicant, its creditworthiness and genuineness of the transaction. From the documents filed during the course of assessment and before CIT(A), the independent existence of the share applicants in Russia is clearly established. The assessee's application to FIPB for raising the capital contains all the relevant details which is favourably accepted by the Board, particularly by allowing the assessee to raise further capital without approaching the FIPB. The transactions are through banking channels. Thus, the gamut of evidence does not leave any doubt in the discharge of primary burden of the assessee. On the issue CBDT circular and Finlay Corporation Ltd.Judgment (supra) also we are in agreement with the learned counsel for the assessee that in these circumstances of the case, moneys remitted by non-residents through banking channel outside India have to be held as capital receipts, not exigible to tax and cannot be treated as deemed income on the fictions created by ss. 68 and 69 of the Act. In consideration of all these observations, we are inclined to hold that the share application money as raised in the grounds of appeal cannot be held as non-genuine and added as income of the assessee under s. 68 of the Act. Consequently, additions made on this count as raised in grounds of appeal are deleted. Assessee's grounds of appeal on this issue are allowed."

Similar, observations have been made in the following cases.

- CIT v Creative World Telefilms Ltd (333 ITR 100) (Jurisdictional Bombay High Court)
- CIT v. Dwarkadhish Investment (P) Ltd. ITA No.911/2010 – Del HC
- S. Hastimal v. CIT[1963] 49 ITR 273 (Mad.)
- Tolaram Daga v. CIT[1966] 59 ITR 632 (Assam)
- CIT v. Daulat Ram Rawatmull [1973] 87 ITR 349 (SC)
- Sarogi Credit Corpn. v. CIT [1976] 103 ITR 344 (Pat.)

2.37 We also place reliance on the judgment of the Hon'ble Supreme Court in P. K.Noorjahan (237 ITR 570) (SC) to bring home the point that every case of cash credit does not have to be taxed under Section 68 of the Act. The word used in the section is 'may' and Section 68 cannot be applied mechanically in the case of the assessee. The AO must also consider the attending circumstances before pressing into service Section 68. In the case of the assessee, there could possibility be no allegation that the assessee was earning money outside the books of account and bringing it as its share capital. Hence, Section 68 would not apply to the case of the assessee. Further Hon'ble Delhi High Court in the case of CIT Vs Divine Leasing & Finance Limited (158 Taxmann 440) laid down following proposition in the context whether receipt of share capital is genuine one or not

- The identity of the subscriber;
- The genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels;
- The creditworthiness or financial strength of the subscriber;
- If relevant details of the address or PAN identity of the subscriber are furnished to the department along with copies of the shareholders register, share application forms, share transfer register, etc., it would constitute acceptable proof or acceptable explanation by the assessee.

Applicability of the principles enunciated in the instant case

- In the instant case as discussed above, the Appellant during the assessment proceedings proved the identity and genuineness of the right issue by submitting various documents as mentioned above, which is even acknowledged by the learned AO in his assessment order.

- Further, regarding the creditworthiness of the transaction, the appellant submitted the bank statements and financial statements showing the source of the funds in the hands of the shareholders which very clearly proved the creditworthiness of the transactions. Further apart from the above documents the appellant also submitted the letters of the Mauritius Revenue Authorities, Tax residency certificates of the right shareholders, certificate of incorporation and copy of the application made by the Appellant before the Foreign Investment Promotion Board and its approval.

- However the learned AO without proper appreciation of the material on record and other attending circumstances available on record formed an opinion on the realm of surmises, conjectures and suspicion that the appellant has not proved the creditworthiness of the shareholders.

2.38 With regard to the Revenue's arguments regarding genuineness of the transactions, we observed that the assessee had filed letters issued by Mauritius Revenue Authorities which not only establish, beyond doubt, the identity and genuineness of the aforesaid entities, but also establish the source of funds/ creditworthiness. The letters categorically establish the following:

- The payment of right shares was made by telegraphic transfer;
- The funds enabling investment were obtained through financing transaction with other group companies;
- The entity is a tax resident of Mauritius.

Additionally, it may be noted that Mauritius Revenue Authorities in their letter have not given any adverse comments on the identity and working of the entities or source of their funds. The assessee had also submitted the financial statements of

the aforesaid nine shareholders for Financial Year ending December 2005 from which it is apparent that the source of funds utilized by the said shareholders to subscribe to the rights issue was the recovery of a loan given by eight of the nine shareholders, i.e. all except Essar Com Ltd, to their respective fellow subsidiaries. This fact is evident from the notes to accounts appearing in the financial statements of the respective entities. It is also apparent from the financial statements of the respective entities that the loan was extended to the fellow subsidiaries by utilizing funds arising out of a loan taken, by the respective entities, from their intermediate holding companies. To illustrate, in the case of Mobilvest Ltd, the flow of the transaction was as under:

- In the period 1st January 2005 to 31st December 2005, Mobilvest Ltd raised a loan amounting to USD 3,72,15,000 from its intermediate holding company.
- In the same period, a loan of USD 3,72,14,249 was extended, by Mobilvest, to its fellow subsidiary.
- The loan amount was recovered from the fellow subsidiary on 19th December 2005 and the same amount, i.e. USD 3,72,14,249 was invested in the shares of VIL, issued on a rights basis, on the same day.

A similar flow of transactions took place in all of the shareholding entities and is fully reflected in the financial statements of the respective entities which are placed on record. Thus, the source of funds utilized by the shareholders of the assessee

to subscribe to the rights issue is clearly established from the above discussions and illustration.

2.39 Further more, we observed that that Section 68 would not apply to remittances made in India by non-resident is strengthened by the proviso to Section 68 inserted w.e.f. A.Y. 2013-14. According to the said proviso, if an assessee company, in which public are not substantially interested, receives money by way of share capital, then the source of funds of resident share holder has to be established by the assessee in order to get out of the kin of the deeming provision under section 68. The proviso talks of the source being established only when the shareholder is a resident of India. There is no such requirement if shareholder is a non-resident. Hence, the creditworthiness of the shareholders, if he is a non-resident, does not have to be established by the assessee in respect of remittance received by him. For this purpose, reliance is placed on the judgment of the Hon'ble Delhi Tribunal in the case of M/s Russian Technology Center (P) Ltd Vs DCIT, New Delhi, (supra), wherein the Hon'ble tribunal observed that the provisions of Section 68 though inserted w.e.f. 01.04.2013 also reveals the legislative intent that if the shareholder is a non-resident and the money is by way of remittance from his account, the rigor of Section 68 would not be applicable.

2.40 From the record, we also found that assessee submitted the bank account statements for the nine Mauritius entities for the period relevant to AY 2004-05 to

2006-07. From the perusal of the same it is evident that all these entities had received funds from their group companies, through proper banking channels. In this connection, it is observed that during the subject financial year, the assessee (earlier known as Hutchison Essar Limited) and the aforesaid nine shareholders of the assessee, along-with their fellow subsidiaries and holding companies, were all part of the Hutchison Whampoa Group. Hutchison Whampoa is a well known Hongkong based conglomerate which is listed on the main board of the Hong Kong Stock Exchange and operates five core business divisions in 42 countries including ports and related services; telecommunications, property and hotels, etc. This fact is evident from the annual report and financial statements of Hutchison Whampoa for year ending December 2005.

2.41 Further more the perusal of the notes to accounts of the Financial Statements of each of the nine right shareholders of the Appellant (copies of financial statements attached as Annexure 8a to 8i), it is apparent that Hutchison Telecommunications International Ltd ('HTIL'), a part of the Hutchison Whampoa Group, was the ultimate holding company for such entities. Hutchison Telecommunications International Ltd ('HTIL') is a company incorporated in the Cayman Islands and was listed on the Honk Kong Stock Exchange as well as the New York Stock Exchange during such period. The fact that HTIL, besides being a part of the Hutchison Whampoa Group, is a leading international provider of

mobile and fixed-line telecommunications services with operations in eight countries and territories, amply proves the creditworthiness of HTIL. A perusal of the balance sheet of HTIL for the year ended December 2005 reveals the following information:

Hutchison Telecommunications International Ltd (Extract from Financial Statements for the year ended December 2005)		
Particulars	**Year 2004 (HK$ Millions)**	**Year 2005 (HK$ Millions)**
Gross Turnover	14,845	24,465
Total Asset	40,720	59,591
Total Liabilities	25,584	39,769
Net Worth	15,136	19,822

It is apparent from the above information that the shareholding entities subscribing to the rights shares of the assessee were a part of a large conglomerate of companies with abundant financial resources. There arises no doubt regarding either the identity or genuineness of such shareholders or their creditworthiness and ability to subscribe to the rights issue of the assessee's equity shares. Hence, there does not arise any occasion to question the source of funds used by these entities for subscribing to right shares of the asessee. In light of our above discussions, it is abundantly clear that the assessee has fully complied with all the conditions laid down by Section 68 of the Act by providing all explanations regarding the receipt of funds on account of issue of rights shares to its existing shareholders.

2.42 In the instant case, from the documents furnished before lower authorities it is abundantly clear that the assessee has not only furnished irrefutable documentary evidence to establish identity and genuineness of shareholders but has also established the source of funds of such shareholders. Therefore, since the assessee has fully discharged its onus in this regard, there is clearly no case of unexplained credit.

2.43 We further observed that the observation of the AO is totally unjustified inasmuch as the learned AO has not brought on record any material to substantiate his allegation that the appellant had taken a route of tax haven for issue of share capital in VIL. We also observed that the entire shareholding structure of the assessee including the entities to whom the right shares were allotted, were examined by the Hon'ble Supreme Court in the case of Vodafone International Holding B.V v UOI 341 ITR 1. Wherein the Hon'ble Supreme Court has categorically not only validated such investments in the appellant but also the shareholding structure for such investments.

2.44 We further observed that the recent judgment of the Hon'ble Bombay High Court in the case of Vodafone India Service Private Limited vs UOI & Ors (WP 488 of 2012), wherein the Hon'ble jurisdictional High Court has categorically laid down that the judgment of the Hon'ble Supreme Court has to be taken into

cognizance by the AO and any failure to do so would amount to judicial indiscipline .

2.45 Further more, the landmark judgment of the Hon'ble Apex court in the case of UOI v. Azadi Bachao Andolan [2003] 132 Taxman 373 (SC), wherein the Hon'ble Court has validated the investments made through Mauritius and has held taking advantage of existing provision of Double Taxation Avoidance Agreement is, per se, not illegal. In any case, the Hon'ble Supreme Court in the case of Vodafone International Holding B.V (supra) has already validated their investment structure, hence the learned AO was clearly precluded from questioning the same.

2.46 With regard to the observations of the AO that the balance in the bank accounts on a day before the funds were invested in the assessee and the day after the investment was made was meager which establishes the fact that the transaction was undertaken by the assessee to evade taxes. We observed that this finding of the AO nowhere establishes that the transaction was undertaken by the assessee to evade taxes. The AO has failed to take into consideration the submission of the assessee as well as the letters of the Mauritius Revenue Authorities where it is evidently mentioned that the source of funds enabling the investments in the assessee was obtained through financing transaction with other group companies.

2.47 Before parting, it is noted that the order is being pronounced after ninety (90) days of the hearing. However, taking note of extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days to be excluded. For coming to such a conclusion, we rely upon the decision of the Coordinate Bench of the Mumbai Tribunal in the case of DCIT vs JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018, Assessment Year 2013-14, order dated 14th May, 2020. As a result, the appeal of assessee is allowed.

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

Order pronounced by listing the result on the Notice Board of the Bench under Rule 34(4) of the Appellate Tribunal Rules, 1963.

Sd/-	Sd/-
(RAM LAL NEGI)	(R.C. SHARMA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai
दिनांक/Dated:- 28/08/2020.
*Mishra.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- M/s. Vodafone India Limited, Mumbai
2. प्रत्यर्थी/ The Respondent- The DCIT,Circle- 8(3)(2), Mumbai
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, /DR, ITAT, Mumbai.
6. गार्ड फाईल/ Guard File {ITA No. 1835/Mum/2018}

By order,

Asstt. Registrar