IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A' KOLKATA

[BEFORE SHRI J. SUDHAKAR REDDY, HON'BLE ACCOUNTANT MEMBER & SHRI A.T. VARKEY, HON'BLE JUDICIAL MEMBER]

[THROUGH VIRTUAL COURT]

I.T.A. No. 1530/Kol/2019
Assessment Year: 2012-13

ITO Ward – 4(1), Kolkata……Appellant
P-7, Chowringhee Square,
Kolkata – 700 069.

VS.

M/s. RKB Services Pvt. Ltd. ……Respondent
Rampushp Nilay, 86, Paresh Mazumdar Road,
Ground Floor, Indu Park Kasba,
Kolkata – 700 107.
[PAN : AABCR 2691 C]

Appearances by:
Smt. Ranu Biswas, Addl CIT appearing on behalf of the Revenue.
Shri Manish Tiwari, AR appearing on behalf of the Assessee.

Date of concluding the hearing : November 23rd, 2020
Date of pronouncing the order January 22nd, 2021

ORDER

Per J. Sudhakar Reddy, AM

This is an appeal filed by the revenue directed against the order of the Commissioner of Income Tax-(A) - 7, Kolkata dated 28.03.2019 passed u/s 250 of the Income Tax Act, 1961 (the 'Act ') relating to A.Y. 2013-14.

2. There is delay of 16 days in filing of the appeal. After perusing the petition for condonation of delay, we are convinced that the revenue was prevented from reasonable cause for filing of the appeal in time. Hence we condone the delay and admit the appeal.

3. The assessee is a company and it filed its return for A.Y. 2012-13 on 30.09.2012 declaring NIL income. The Assessing Officer completed the assessment u/s 143(3) of the Act on 11.03.2015 determining the total income of the assessee at Rs. 2,55,00,000/-, making an addition of Rs. 2,55,00,000/- (share capital of Rs. 8,50,000/- + share premium of Rs. 2,46,50,000/-) as unexplained income. The Assessing Officer in its order has not invoked any specific section for making this addition. He termed the addition as "Unexplained Income". Summons u/s 131 of the Act were issued by the AO the directors of the assessee company, as well as to the directors of all the investor companies. In view of the non-compliance to the summons, an addition was made of the amount, as unexplained income. The assessee carried the matter in appeal. The first appellate authority deleted the addition for the various reasons given in the order. Aggrieved the revenue is in appeal before us.

4. We have heard the ld. departmental representative on behalf of the revenue and the learned counsel for the assessee. On a careful consideration of the facts and circumstances of the case and the case law cited we hold as follows:

5. The Ld. CIT(A), in his order has held as follows:

> *"6. I have gone through the assessment order as well as the written submissions filed by the AR of the appellant. I have also examined the paper book containing 253 pages. I have also considered the case laws relied upon by the AO as well as the AR in support of their arguments. The sole issue for my consideration remains that whether sum of T2,55,00,000/- received by the appellant as share capital including share premium invites the mischief of section 68 of the Act or not. I find from the audited accounts of the appellant is a Non-Banking Finance Company registered with the Reserve Bank of India. It is engaged in the business of trading in equity shares of*

listed companies and investment in mutual funds and granting loans and advances to other companies since its incorporation in 1992. I find that in course of assessment proceedings the AO sought details of share capital raised by the appellant. The appellant furnished details of sucji share holder which is tabulated as follows:-

Sl. No.	*Name & Address*	*PAN*	*Amount (Rs)*
1	*I.P.B. Dealers (P) Ltd.* *9, Lal Bazar Street, 1st Floor, R/No. 1076A, Block-A, Kolkata – 700001.*	*AACCI6393P*	*1,05,00,000/-*
2	*P&K Dealers (P) Ltd.* *C/o. Kamal Textile, 18, Rabindra Sarani, Poddar Court, Gate No. 4, Shop No. 10, Kolkata – 700001.*	*AAGCP0815M*	*75,00,000/-*
3	*P.K.K. Dealers (P) Ltd.* *C/o. Kamal Textile, 18, Rabindra Sarani, Poddar Court, Gate No. 4, Shop No. 10, Kolkata – 700001.*	*AAGCP3691M*	*75,00,000/-*
	TOTAL		*2,55,00,000/-*

7. I find that during the relevant assessment year the appellant has allotted 85,000 equity shares of ₹ 10/-- each at a premium of ₹290/- per share to three group companies mentioned herein above. As regards the addition of money received from these companies the appellant has filed complete details before the AO vide its letter dated 17.07.2014 placed at paper book page 42. It has filed copy of Form-2 and Form-5 along with list of allottees in the same letter. I find that these are returns of share allotment filed with the Registrar of Companies as an evidence towards allotment of shares to these companies belonging to the same group of share holders. The AR also drew my attention to letter dated 09.02.2015 filed by the appellant in course of assessment proceedings which is placed at page 51 of the paper book filed by the appellant. I find that in this letter the appellant has again submitted various details in respect of share application money raised during the year along with various other details as called for by the AO. I find that the AO has issued notices u/s 133(6) of the Act to these shareholders independently. Copies of such notices are placed in paper book at pages 52 to 54. In response to such 133(6) notices the share allotees have independently filed their replies. Copies of such replies are placed at pages 55, 88 & 121 of the paper book. On perusal of such replies I find that the share applicants in their replies have furnished copies of share application form, confirmed the application made by them towards share capital of the appellant company, copy of allotment advice issued to them by appellant, details of cheques given towards share subscription money along with name of the bank ' and amount and date, source of fund for making investment, their respective audited accounts etc, I find

that the summon issued u/s 131 to the director of the appellant company was also complied with by filing the letter dated 09.02.2015 containing complete details as asked for by the AO/The copy of such reply is placed at page 51 of the paper book. I find that the appellant in the same letter had given details of other directorships of the directors of the appellant company. However the AO did examine this issue properly. From the perusal of details of shareholders holding more than 5% shares of the company In the audited accounts of each – hareholder company, I find that there are common shareholders and thus there cannot be any dispute to the fact that the appellant as well as shareholder companies are Group companies. On perusal of details furnished in paper book in respect of share allottee companies I find that to establish the identity and creditworthiness of share applicants as well as genuineness of the whole transaction the appellant as well as the share allottees have filed certificate of incorporation, memorandum & articles of association, PAN details, copy of Income Tax Return acknowledgement, copy of bank statement, copy of share application form, payments details through RTGS, share allotment letter and delivery of shares, confirmation from the share applicant explaining the source of making investment, audited accounts etc. I also find that the AO has independently issued notice u/s 133(6) to all the share allottees. In response to the notice u/s 133(6) all the share allottees duly responded. On perusal of such reply, it is found that the parties have furnished the source of funds for making investment in the appellant company, they have also furnished their bank statements, Return of Income, Directors Report, auditors Report, Balance Sheet, Profit & loss account, list of investments etc. I am surprised to find that the AO has not considered any of these documents filed by the share allottees in course of assessment proceedings. There is no adverse findings by the AO in the assessment order on any of these evidences filed in record. In fact the AO's sole assertion in the entire assessment order is that there was no compliance by the appellant which I decline to agree with. On the contrary I find that the appellant has completely discharged its onus u/s 68 of the Act. Therefore in my considered opinion without rejecting any of the evidences filed by the appellant or without even finding any discrepancy in any of the evidences filed by tie appellant the entire share capital including share premium could not have been added as appellant's income more so when the money has been received from the same group company and not from any outsider. ' '

8. I further find that the identity of the share allotees is not in dispute and also that both the appellant-as well as the 'said share allotees are group concerns having common Directors and common shareholders. The first component of identity therefore vis-a-vis Section 68 of the Act duly stands satisfied. It is evident thereafter that the appellant's paper book forming part of record before me contain all

necessary details of its copy of return and computation for the impugned assessment year with Auditor's report, audited accounts, its replies to the AO during the course of assessment proceedings, along with bank statement indicating the money in question to have come through banking channel, reply to AO's notice u/s 133(6) to share allotees have been received. The AO's observation cannot be accepted particularly in view of the fact that the share applicants and the appellant are group companies having common Directors and shareholders who has made the impugned investment into the equity shares of the appellant company. I do not find any material on record to agree to the AO's plea that the share capital is unexplained in nature. I do not find any cogent material indicating all the share allottees to have first deposited cash sums followed by its reinvestment in appellant's equity shares.

9. In course of the appellant proceedings the appellant has filed copies of scrutiny assessment orders passed u/s 143(3) in respect of all the share allottee companies. I find that in the case of IPB dealers (P) Ltd. the assessment order is passed by ITO, ward 6(2), Kolkata vide order dated 17.03.2015. I find from the said order that the entire share capital raised by IPB Dealers (P) Ltd. amounting to ₹2,23,10,000/- has been added back in its income. Thus, I am of the considered opinion that once an addition of capital raised has been made in the hands of IPB Dealers (P) Ltd. there remains no scope for making any addition in the hands of the appellant company on account of money received as share capital from IPB Dealers (P) Ltd. Similarly in the case of PKK Dealers (P) Ltd. & P&K Dealers (P) Ltd., I find from their respective scrutiny assessment orders passed u/s 143(3) by ITO Ward 5(2), Kolkata that there is an addition of ₹55,00,000/- & ₹82,00,000/- as unexplained cash credit in their hand respectively made on account of share capital raised by those share allottee companies, thus in my considered opinion no addition of capital received from these share allottee companies in the hands of the appellant can be made as which will only tantamount to double addition of same money.

10. I find that the total net worth of each share allottee companies out of which they have-invested in the shares of the appellant company are very high, thus I find no reason to doubt about the creditworthiness of these share allottee companies belonging to the same group. I find that the said share applicants possessed sufficient net worth out of which share subscription amounts were paid through banking channels. I find from paper book that the entire transaction were through account payee cheques and had the AO wanted, the entire source till the destination of this money could have been verified by him since the payments were from banking channels. I further find that the investment made by all the share applicants are duly recorded as investment in their respective balance sheet furnished before the AO as

well as in the paper book filed before me, thus in my considered opinion the genuineness of the transactions regarding receipt of share capital along with share premium is got to be accepted. From the perusal of bank statements I find that there was no cash deposit before issuing cheques to the appellant. Thus the genuineness of transaction is held to be beyond any controversy I find that the AO has failed to indicate any infirmity of evidence during the course of assessment proceedings. I find that the AO relied on some case laws discussed in the assessment order which I find to be irrelevant since there is no instance therein dealing with a group entity as in the case of the assessee company under consideration. Thus the case iaws are held to be not relevant to the issue at hand. I find that the A/R has placed reliance in the case of Pr.CIT-2 Vs. Gyscoal Alloys Ltd. in R/Tax Appeal No. 180 of 2018 wherein the Gujarat High Court has upheld the order; of ITAT who deleted the addition of share capital received from group companies. I conclude in light of all these facts and circumstances that the appellant has been able to prove all three criteria of identity, and creditworthiness and genuineness of the transaction from its group companies. In view of the foregoing discussion as well as the judicial decision as referred to, I do find any merit in the action of the AO in making the impugned addition of ^2,55,00,000/- and hence the same is directed to be hereby deleted. These grounds of appeal are therefore allowed in favour of the appellant.

11. In the result, the appeal of the appellant is treated as allowed."

6. We find no infirmity in the order. It was three group companies which had applied for allotment of share capital and got allotted the same. These companies and the assessee company had common directors. When group companies invest in each other, the considerations are not necessarily commercial but would be for management control and other such reasons. The assessee is a non-banking financial company. Each of the share allottee company, is a income tax assessee. The AO has issued notices u/s 133(6) of the Act to each of the share-holders and in response on each of these three companies filed the detailed replies and documents such as (a) copies of share application form (b) confirmation of transaction (c) copy of allotment advice (d) copy of bank statement evidencing the payment of funds through banking

channels (e) evidence on source of funds for making investment (f) their audited statement of accounts including balance sheet (g) certificate of incorporation (h) memorandum & articles of association, PAN details, copy of Income Tax Return acknowledgement etc.

7. The Ld. CIT(A) states that the directors of the appellate company complied with the summons issued u/s 131 of the Act by filling of letter dated 09.03.2015 along with details. He also records finding of facts that there are common directors and common shareholders and hence these are group companies which have invested. The Ld. CIT(A) states that the Assessing Officer has not considered any of these documents and that there is no adverse material with the AO, to controvert the information or document filed by the assessee. Under such circumstances, he held that money received from the shareholder companies cannot be considered as unexplained income.

8. The most important finding of the Ld. CIT(A) is that scrutiny assessment order were passed u/s 143(3) of the Act, in respect of all the three share allottee companies. Copies of these assessment order filed before the Assessing Officer. This bench of the Tribunal as in the following cases held that no addition can be sustained u/s 68 of the Act where the assessment of the share allottee companies is completed u/s 143(3) of the Act.:-

11. The Kolkata 'C' Bench of the Tribunal in the case of *M/s. Sanmin Trading & Holding Pvt. Ltd. vs. ITO* in ITA No. 2020/Kol/2019 for AY 2010-11 order dated 13/11/2020, from para 11 onwards, held as follows:

> *"11. The Kolkata'A' Bench of the Tribunal in the case of ITO vs. M/s. Goodpoint Commodeal Pvt. Ltd. in ITA No. 1204/Kol/2015 for AY 2012-13, order dated 07.06.2019 held as follows:-*

6. Thus, we note that we find all the four share subscribers have been assessed by the Department and that too u/s. 143(3) of the Act and the genuineness of the transactions, cannot be disputed since the payments have been made through banking channel and we note that there cannot be any dispute in respect to creditworthiness of the share subscribing companies since they had sufficient net worth/own fund in its kitty to invest in the assessee company. It would be worthwhile to take note of the observation by Hon'ble Justice A. K. Sikri while delivering the judgment in CIT Vs. Mayawati when His Lordship then was in Hon'ble Delhi High court reported in 338 ITR 563 (Del) observed that –

> *"The capacity of any person does not mean how they earn monthly or annually but the term capacity is a wide term and that can be pursued by how wealthy he is. All the formalities, as per the law are made by the assessee and donors as well."*

Therefore, the Hon'ble High Court was pleased to uphold the action of the Tribunal in deleting the addition made by the Department against the assessee Mayawati.

7. Section 68 under which the addition has been made by the Assessing Officer reads as under:

> *"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."*

The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570. We note that against the said decision of Hon'ble Gujarat High Court the special leave petition filed by the Revenue has also been dismissed by the Hon'ble Apex Court.

8. The main plank on which the AO made the addition was because the directors of the share subscribers did not turn up before him. In such a case the Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd. (supra) 159 ITR 78 and the Hon'ble Gujarat High Court, in the case of Dy. CIT v. Rohini Builders [2002] 256 ITR 360 /[2003] 127 Taxman 523 , has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

> *"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the*

enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by' treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.

9. In the case of Nemi Chand Kothari 136 Taxman 213, (supra), the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of onus on assessee under section 68, by holding that the same should be decided by taking into consideration the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the report are reproduced herein below:-

"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:

"Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden) of proving that fact is upon him."

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What, thus, transpires from the above discussion is that white section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s)of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where

he has himself received the credit and IT is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been. eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the assessee. "

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" ... If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor... "

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"In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee ...."

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"Keeping in view the above position of law, when we turn to the factual matrix of the present case, we find that so far as the appellant is concerned, he has established the identity of the creditors, namely, Nemichand Nahata and Sons (HUF) and Pawan Kumar Agarwalla. The appellant had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from. undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness."

10. Further, in the case of CIT v. S. Kamaljeet Singh [2005] 147 Taxman 18(All.) their lordships, on the issue of discharge of assessee's onus in relation to a cash credit appearing in his books of account, has observed and held as under:-

"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AA C, setting aside the assessment order."

11. We also take note of the decision of the Hon'ble High Court, Calcutta in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata 347 ITR 347 wherein the Court held as follows:

"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.

16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."

12. In a case where the issue was whether the assessee availed cash credit as against future sale of product, the AO issued summons to the creditors who did not turn up before him, so AO disbelieved the existence of creditors and saddled the addition, which was overturned by Ld. CIT(A). However, the Tribunal reversed the decision of the Ld. CIT(A) and upheld the AO's decision, which action of Tribunal was challenged by the Hon'ble High Court, Calcutta in the case of Crystal Networks (P.) Ltd. v. Commissioner of Income-tax 353 ITR 171 wherein the Tribunal's decision was overturned and decision of Ld. CIT(A) upheld and the Hon'ble High Court has held that when the basic evidences are on record the mere failure of the creditor to appear cannot be basis to make addition. The court held as follows:

> *8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).*
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> *9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of Udhavdas Kewalram v. CIT [19671 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.*
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> *10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:*
>
> > *"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the*

material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "

11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

12. Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed.

13. When a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, it is now well settled by the decision of the Calcutta High Court that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this regards our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the COMMISSIONER OF INCOME TAX, KOLKA TA-Ill Versus DATAWARE PRIVATE LIMITED ITAT No. 263 of 2011 Date: 21st September, 2011 wherein the Court held as follows:

"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."

14. Our attention was also drawn to the decision of the Hon'ble Supreme Court while dismissing SLP in the case of Lovely Exports as has been reported as judgment delivered by the CTR at 216 CTR 295:

"Can the amount of share money be regarded as undisclosed income under section 68 of the Income tax 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.

15. Our attention was also drawn to the decision of the Hon'ble Calcutta High Court while relying on the case of Lovely Exports, in the appeal of COMISSIONER OF INCOME TAX, KOLKATA-IV Vs ROSEBERRY MERCANTILE (P) LTD., ITAT No. 241 of 2010 dated 10- 01-2011 has held:

> *"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT (A) ought to have held that the assessee had not established the genuineness of the transaction. "*
>
> *It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4, 00, 000/- and Rs.20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00, 000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.*
>
> *On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.*
>
> *As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.*
>
> *After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.*

16. Our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner Of Income Tax vs M/s. Nishan Indo Commerce Ltd dated 2 December, 2013 in INCOME TAX APPEAL NO.52 OF 2001 wherein the Court held as follows:

> *"The Assessing Officer was of the view that the increase in share capital by RS.52,03,500/- was nothing but the introduction of the assessee's own undisclosed funds/income into the books of accounts of the assessee company. The Assessing Officer accordingly treated the investment as unexplained credit under Section 68 of the Income Tax Act and added the same to the income of the assessee.*
>
> *Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) being the First Appellate Authority and contended that the Assessing Officer had no material to show that the share capital was the income of the assessee company and as such the addition made by the Assessing Officer under Section 68 of the Act was wrong.*
>
> *The learned Commissioner of Income Tax (Appeals) after hearing the department and the Assessee Company deleted the addition of Rs. 52, 03,500/- to the income of the assessee company during the Assessment Year in question. The learned Commissioner of Income*

Tax Appeals found that there were as many as 2155 allottees, whose names, addresses and respective shares allocation had been disclosed.

The Commissioner of Income Tax Appeals, further found that the Assessee Company received the applications through bankers to the issue, who had been appointed under the guidelines of the Stock Exchange and the Assessee Company had been allotted shares on the basis of allotment approved by the Stock Exchange. The Assessee Company had duly filed the return of allotment with the Registrar of Companies, giving complete particulars of the allottees.

The Commissioner of Income Tax (Appeals) found that inquires had confirmed the existence of most of the shareholders at the addresses intimated to the Assessing Officer, but the Assessing Officer took the view that their investment in the Assessee Company was not genuine, on the basis of some extraneous reasons. The Commissioner of Income Tax (Appeals) took note of the observation of the Assessing Officer that enquiry conducted by the Income Tax Inspector had revealed that nine persons making applications for 900 shares were not available at the given address and rightly concluded that the total share capital issued by the Assessee Company could not be added as unexplained cash credit under 'Section 68 of the Income Tax Act. Moreover, if the nature and source of investment by any shareholder, in shares of the Assessee Company remained unexplained, liability could not be foisted on the company. The concerned shareholders would have to explain the source of their fund.

The learned Commissioner on considering the submissions of the, respective parties and considering the materials, found that the Assessing Officer had applied the provisions of Section 68 of the Income Tax Act arbitrarily and illegally and in any case without giving the assessee adequate opportunity of representation and/or hearing.

Learned Tribunal agreed with the factual findings of the learned Commissioner and accordingly the learned Tribunal dismissed the appeal of the Revenue and affirmed the decision of the learned Commissioner.

Mr. Dutta appearing on behalf of the petitioners cited judgment of the Division Bench of this Court in Commissioner of Income Tax Vs. Ruby Traders and Exporters Limited reported in 236 (2003) ITR 3000 where a Division Bench of this Court held that when Section 68 is resorted to, it is incumbent on the assessee company to prove and establish the identity of the subscribers, their credit worthiness and the genuineness of the transaction.

The aforesaid judgment was rendered in the context of the factual background of the aforesaid case where, despite several opportunities being given to the assessee, nothing was disclosed about the identity of the shareholders. In the instant case, the assessee disclosed the identity and address and particulars of share allocation of the shareholders. It was also found on the facts that all the shareholders were in existence. Only nine shareholders subscribing to about 900 shares out of 6, 12,000 shares were not found available at their addresses, and that too, in course of assessment proceedings in the year 1994, i.e., almost 3 years after the allotment.

By an order dated 2nd May, 2001, this Court admitted the appeal on three questions which essentially centre around the question of whether the Appellate Commissioner erred in law in deleting the addition of Rs. 52, 03, 500/- to the income of the assessee as made by the Assessing Officer. We are of the view that there is no question of law involved in this appeal far less any substantial question of law.

The learned Tribunal has concurred with the learned Commissioner on facts and found that there were materials to show that the assessee had disclosed the particulars of the shareholders. The factual findings cannot be interfered with, in appeal. We are of the view that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds."

17. Further, our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner of Income Tax vs M/s. Leonard Commercial (P) Ltd on 13 June, 2011 in ITAT NO 114 of 2011 wherein the Court held as follows:

"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.

In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under section 68 of the Income- tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

18. From the details as aforesaid which emerges from the paper book filed before us as well as before the lower authorities, it is vivid that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income, (iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements, (vi) in none of the transactions the AO found deposit in cash before issuing cheques to the assessee

company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above.

19. As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share capital with premium from share applicants. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and investments. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. For proving the identity of share applicants, the assessee furnished the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, as we noted supra, these Companies are having capital in several crores of rupees and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants, so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application. Hence the source of source of source is proved by the assessee in the instant case though the same is not required to be done by the assessee as per law as it stood/ applicable in this assessment year. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.

20. We also note that recently the ITAT Kolkata in several cases has deleted the addition on account of share application in similar circumstances. The relevant portion of the decisions are as follows:

> *(a) The Ld ITAT Kolkata. in DC IT Vs Global Mercantiles Pvt.Ltd in ITA No. 1669/Kol/2009 dated 13-01-2016. In this the decision the Ld. Tribunal held as follows:*
>
> > *"3.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. The facts stated hereinabove remain undisputed are not reiterated herein for the sake of brevity. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned Ld. CIT(1) on the decision of the Hon'ble Apex Court in the case of CIT vs Lovely Exports (P) Ud reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.*
> >
> > *3.4. 1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT vs Roseberry Mercantile (P) Ltd in*

GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the-questions raised before their lordships and decision rendered thereon is as under:-

> *"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction. "*

IT A No. 1669/KoI/2009-C-AM M/s. Global Mercantiles Pvt. Ltd 11 Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT vs M/s Lovelv Exports Pvt Ltd, we are at one with the tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

3.4.2. In view of the aforesaid findings and respectfully following the decision of the apex court (supra) and Jurisdictional High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the ground no.2 raised by the Revenue is dismissed.

4. The last ground to be decided in this appeal of the Revenue is as to whether the Learned CIT(A) is justified in deleting the addition u/s 68 of the Act made in respect of allotment of shares to 20 individuals for an amount of Rs.57,00,000/- in the facts and circumstances of the case.

4. 1. The brief fact of this issue is that the assessee had received share application monies from 20 individuals in the earlier year which were kept in share application money account. During the asst year under appeal, the assessee allotted shares to these 20 individuals out of transferring the monies from share application money account to share capital account. The details of 20 individuals are reflected in page 6 & 7 of the Learned CIT(A) order. The Learned AO asked the assessee to produce the shareholders before him. He found that the assessee did not do so but furnished copies of pay orders used for payments to the assessee company and also furnished income tax particulars and balance sheets of all the shareholders. The Learned AO on analyzing all the balance sheets observed that the shareholders have paltry income and small savings and none of them have any bank account and huge cash balances were shown in their hands out of which Pay orders were obtained. Based on this, the Learned AO concluded that these shareholders do not have creditworthiness to invest in the assessee company and brought the entire sum of Rs. 57,00,000/- to tax as unexplained cash credit u/s 68 of the Act.

4.2. On first appeal, the Learned CIT(A) observed that entire share application monies of Rs. 57,00,000/- we received during the previous year 2004-05 relevant to Asst Year 2005-06 from 20 persons and the shares were allotted to them during the asst year under appeal. He observed that the assessee had furnished details of the share applicants giving the date wise receipts, mode of payment, amount, name, address, income tax returns, PA No. of share applicants along with their balance sheet. The Learned CITA also observed that the assessee in its reply to show cause notice before the Learned AO had requested him to use his power and authority for the physical appearance of the shareholders which was not exercised by the Learned AO. Instead the Learned AO continued to insist on the assessee to produce the shareholders before him. He ultimately concluded that the assessee

had duly discharged its onus of providing complete details of the shareholders and in any case, no addition could be made u/s 68 of the Act in the asst year under appeal as no share application monies were received during the asst year under appeal. Aggrieved, the Revenue is in appeal before us by filing the following ground:-

> *"That in the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made u/s 68 in respect of the allotment of shares to 20 numbers of individual investors for an amount of Rs. 57 lakhs, where genuineness of the transactions and creditworthiness of the investors were not established."*

4.3. The Learned DR prayed for admission of the additional ground raised before us and vehemently supported the order of the Learned AO. In response to this, the Learned AR fairly conceded to admission of this additional ground and vehemently supported the order of the Learned CIT(A).

4.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the additional ground raised by the assessee separately before us vide its covering letter dated 9. 12.2011 is admitted as it appears to be a genuine and bonafide error of omission on the part of the Revenue from not raising this ground in the original grounds of appeal filed along with the memorandum of appeal. Moreover, it does not require any fresh examination of facts. Hence the same is admitted herein for the sake of adjudication.

4.4. 1. We find from the details available on record that the share application monies from 20 individuals in the sum of Rs.57,00,000/- has been received by the assessee during the financial year 2004-05 relevant to Asst Year 2005-06 and only the shares were allotted to them during the asst year under appeal. Admittedly no monies were received during the asst year under appeal and hence there is no scope for invoking the provisions of section 68 of the Act. Hence we hold that the order passed by the Learned CITA in this regard does not require any interference. Accordingly the ground no. 3 raised by the Revenue is dismissed.

(b) The ITAT Kolkata in R.B Horticulture & Animal Projects Co. Ltd, ITA No. 632/Koll2011 dated 13-01-2016. In this the decision the Ld. Tribunal held as follows:

> *"6. We have heard the Learned DR and when the case was called on for hearing , none was present on behalf of the assessee. However, we find from the file that the assessee had filed a detailed paper book and written submissions. Hence the case is disposed off based on the arguments of the Learned DR and written submissions and paper book already available on record. The facts stated in the Learned CIT(A) were not controverted by the Learned DR before us. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned CITA on the decision of the Hon'ble Apex Court in the case of CIT vs Lovelv Exports (p) Ltd reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.*

6. 1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT vs Roseberrv Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the questions raised before their lordships and decision rendered thereon is as under:- -

> *"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction." Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT vs M/s Lovely Exports Pvt Ltd, we are at one with the tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed."*

6.2. We find that the issue is also covered by the decision of Hon'ble Delhi High Court in the case of CIT vs Value Capital Services P Ltd reported in (2008) 307 ITR 334 (Del) , wherein it was held that:

> *"In respect of amounts shown as received by the assessee towards share application money from 33 persons, the Assessing Officer required the assessee to produce all these persons. While accepting the explanation and ITA No. 632/KoI12011--C-AM M/s. R.B Horticulture 6 & Animal Proj. Co. Ltd the statements given by three persons the Assessing Officer found that the response from the others was either not available or was inadequate and added an amount of Rs. 46 lakhs pertaining to 30 persons to the income of the assessee.*
>
> *The Commissioner (Appeals) upheld the decision of the Assessing Officer. On appeal, the Tribunal set aside the order of the Commissioner (Appeals) and deleted the additions. On further appeal:*
>
> *Held, dismissing the appeal, that the additional burden was on the department to show that even if the share applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose. "*

6.3. We find that the argument of the Learned DR to set aside this issue to the file of the Learned AO for verification of share subscribers would not serve any purpose as the ratio decided in the above cases is that in any case, no addition could be made in the hands of the recipient assessee. In view of the aforesaid findings and respectfully following the decision of the apex court (supra), Jurisdictional High Court (supra) and Delhi High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the grounds raised by the Revenue are dismissed."

(c) The Ld. ITAT Kolkata in ITA No.1061/Ko1/2012 in the case of ITO Wd.3(2) Kol, vs. M/s. Steel Emporium Ltd dated 05-02-2016. In this the decision the Ld. Tribunal held as follows:

> *"10. We have heard both the rival parties and perused the materials available on record. The Ld. DR vehemently supported the order of the AO. Before us the Ld. AR submitted that the assessee raised share application money during the year from 25 applicants. The AO was furnished with the copy of Form 2 of Allotment of Shares to the Applicants as filed with the Registrar of Companies, West Bengal. On the date of receipt of Share applications from the Applicants, they furnished their addresses, which were recorded in the Register of*

Members. The AO observed that as per ROC records the addresses of the nine companies were different from the address as per Form filed with him. The AO issued notices u/s.133(6) to all the companies at the addresses furnished in Form 2 as filed with him, which were duly served at the given addresses. The A0 argued that the letters should not have been served at the given address by the assessee. He served a show a cause notice dated 09.12.2011 asking for the explanation from the assessee as to how the notices u/s. 133(6) could be served to these nine companies who had different address as per ROC records. The AO was explained vide letter dated 20.12.2011 of the assessee that those companies had changed their addresses since filing of Form 2 with the Registrar. Further, it was none of the business of the assessee to question the addresses of the applicants as long as they affirm the address. The applicants were duly incorporated bodies under the Companies Act. 1956 since long. They have been regularly filing their returns of income under the Income Tax Act and are being assessed by the Revenue since long. Some of them are even registered as Non-Banking Financial Companies with Reserve bank of India. They have been filing returns regularly with Registrar of Companies and RBI since long. The letters might have been received at their old addresses because in case of change in the address, people instruct the incumbents at old addresses not to refuse the receipt of letters and receive the same. Just because, a letter was received at the old address instead of present address, it cannot be said that the identity of the applicant has not been verified. All of these companies had duly replied to notice u/s. 133(6) and confirmed the transaction with all the evidences. The AO has not raised any objection on any of the information furnished before him. The AO has not asked the respective Company applicants also to explain the alleged discrepancy in the address. The AO has not brought any material on account of record to disbelief the evidences furnished with him and treat the transaction as not genuine. The assessee submitted the following material at the time of assessment.

a) Copy of share applications from the share applicants (copies enclosed)

b) Copy of Form 2 filed with Registrar of Companies, West Bengal (copy enclosed)

c) Copy of Form 18 about the Registered Office of the applicants for change of address subsequent to the date of allotment, i.e. 31.03.2009 (copies enclosed)

d) Members register

e) Share application & Allotment Register

f) Copy of board resolution.

g) Replies from Share applicants to the notice u/s. 133(6) issued to them by the AO seeking information and documents about the sources and to examine their identity, genuineness of the transaction and their creditworthiness. (copy enclosed).

h) Copy of audited accounts.

i) Copy of bank statements.

j) Copy of Income tax acknowledgment of return filed for AY 2009-

k) Copy of PAN Card.

l) Details of sources of funds.

m) Copy of covering letter for delivery of shares.

n) Copy of master data as per ministry of Company Affairs records.

o) Copy of Annual return.

p) Copy of Memorandum and articles of Association.

Finally the Ld. AR relied on the order of the Ld. CIT(A 10. 1 From the aforesaid discussion we find that the AO has made the addition of the share application money because all the nine companies were having the common address and the notice sent under section 133(6) was received by the single person. Accordingly the AO opined that the assessee has used its unaccounted money in the share application transactions. However we find that all the money received in the form of share capital is duly supported with the requisite document as discussed above. To our mind the basis on which the addition was made by the AO is not tenable. The Ld. DR also could not brought anything on record to controvert the findings of the Ld. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Accordingly the ground raised by Revenue is dismissed."

(d) The Ld ITAT Kolkata in ITO vs Cygnus Developers (I) P Ltd in ITA No. 282/Kol/2012 dated 2.3.2016. In this the decision the Ld. Tribunal held as follows:

"6. On appeal by the assessee the CIT(A) deleted the addition made by the AO observing as follows

"6) I have considered the submission of the appellant and perused the assessment order. I have also gone through the details and documents filed by the appellant company in the course of assessment: proceedings vide letter dt. 3-10-2007. On careful consideration of the facts and in law I am of the opinion that the AO was not justified in making, the addition aggregating to Rs.54,00,000/- u/s.68 of the Act being the amount of share application money by holding that the appellant company has failed to prove the identity, and creditworthiness of The creditors as well as the genuineness of transactions. It is observed that all the three share applicant companies i.e. M/s. Shree Shyam Trexim Pvt. Ltd., M/s Navalco Commodities Pvt. Ltd. and M/s. Jewellock Trexim Pvt. Ltd. had filed their confirmations wherein each of them confirmed that they had applied for shares of the appellant -company. All the three companies provided- the cheque number, copy of bank statements and their PAN. It is observed that these companies also filed, copies of their return of income and financial statements for as well as copy of their assessment order u/s. 143(3) of the I. T Act for AY 2005-06. In the case of M/s. Jewellock Trexim Pvt. Ltd. the assessment for AY 2005-06 was completed by the ITO Ward 9(3), Kolkata and the assessments in the case of M/s. Navalco Commodities Pvt. Ltd. and M/s. Shree Shyam Trexim Pvt. Ltd. for A. Y.2005-06 and AY.2004-05 respectively were completed by the I TO, Ward 9(4), Kolkata. Under the circumstances, I am of the opinion that the AO was not justified in holding that the share applicant companies were not in existence. The assessment orders were completed on the address as provided by the appellant company in the course of assessment proceedings. It is not known as to how the AO's inspector had reported that the aforesaid companies were not in existence at the given address. Since the appellant company had provided sufficient documentary evidences in support of its claim of receipt of share application money, I am of the opinion that the no addition u/s.68 could be made in the hands of appellant company. On going through the various judicial pronouncements relied upon by the appellant, it is observed that the view taken as above is also supported by them. In view of above the AO is directed to delete the addition of Rs.54,00,000/ -. The ground Nos. 2 and 3 are allowed."

7. Aggrieved by the order of CIT{A) the Revenue is in appeal before the Tribunal.

8. We have heard the submissions of the learned DR, who relied on the order of AO. The learned counsel for the assessee relied on the order of CIT(A) and further drew our attention to the decision of Hon'ble Allahabad High Court in the case of CIT vs Raj Kumar Agarwal vide ITA No. 179/2008, dated 17. 11.2009 wherein the Hon 'ble Allahabad High Court took a view that non production of the director of a Public Limited company which is regularly assessed to Income tax having PAN, on the ground that the identity of the investor is not proved cannot be sustained. Attention was also to the similar ruling of the ITAT Kolkata bench in the case of ITO vs Devinder Singh Shant in IT A No.20BIKo112009 vide order dated 17.04.2009.

9. We have considered the rival submissions., We are of the view that order of CIT(A) does not call for any interference. It may be seen from the grounds of appeal raised by the Revenue that the Revenue disputed only the proof of identity of the shareholder. In this regard it is seen that for A Y.2004-05 Shree Shyam Trexim Pvt. Ltd., was assessed by ITO, Ward- 9(4), Kolkata and the order of assessment u/s/143(3) dated 25.01.2006 is placed in the paper book. Similarly Navalco Commodities Pvt. Ltd., was assessed to tax u/s 143(3) for A Y.2005-06 by I TO, Ward- 9(4), Kolkata by order dated 20.03.2007. Similarly Jewellock Trexim Pvt. Ltd was assessed to tax for A Y.2005-06 by the very same ITO- Ward-9(3), Kolkata assessing the Assessee. In the light of the above factual position which is not disputed by the Revenue, it cannot be said that the identity of the share applicants remained not proved by the assessee. The decision of the Hon'ble Allahabad High Court as well as ITA T Kolkata Bench on which reliance was placed by the learned counsel for the assessee also supports the view that for non production of directors of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been established. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal of the Revenue. "

21. Reliance in this regard is also placed on the decision of the Delhi High Court in the case of CIT Vs Gangeshwari Metal (P) Ltd (ITA No. 597 of 2012) dated 21.01.2012. In this case the assessee had received share application money of Rs.55.50 lacs during the year in question. The assessee filed the complete names, addresses of the share applicants, confirmatory letters from them, copies of bank statements of both the company as well as the share applicants and copies of share application forms. In spite of the aforesaid documentary evidences the AO held the explanation to be unacceptable and treated the share application as unexplained cash credit thereby making addition under Section 68 of the Income-tax Act, 1961. On appeal the CIT(Appeals) deleted the aforesaid addition holding that the identity of the share applicants stood established beyond doubt, all the payments were through account payee cheques and the share applicants were regular income-tax assessees. The CIT(Appeals) further held that the Revenue did not bring any evidence on record to suggest that the share application had been received by the assessee from its own undisclosed sources nor any material was brought on record to show that .the applicants were bogus. The Revenue was neither able to controvert the documentary evidences filed by the appellant nor prove that the share application were ingenuine or the applicants were non-creditworthy. The findings of the CIT(Appeals) were upheld by the Income-tax Appellate Tribunal. On appeal to the High Court, the Revenue placed strong reliance on the decision of another coordinate Bench of the same Court in the" case of CIT Vs Novo Promoters & Finlease (P) Ltd (342 ITR 169). The High Court however held that the aforesaid judgment was distinguishable from the facts of the present case. The Court observed that in that judgment the Assessing Officer had brought on record enough corroborative evidence to show that the assessee had routed unaccounted monies into its books through medium of share subscription. The share applicants had confessed that they were "accommodation entry providers". The Assessing Officer in the latter case was able to prove with enough material that the share subscription was a pre-meditated plan to route unaccounted monies. In the present case however the Department was unable to bring any material whatsoever shows that share application was in the nature of accommodation entries. The Court observed that the appellant had filed sufficient documentary evidences to establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. The AO

however chose to sit back with folded hands till the assessee exhausted all the evidence in his possession and then merely reject the same without conducting any inquiry or verification whatsoever. The Court thus held that the decision of CIT Vs Novo Promoters & Finlease (P) Ltd (342 ITR 169) was not applicable to the facts of the case. Instead it was held that the issue in hands was on the lines of the decision of the Supreme Court in the case of CIT Vs Lovely Exports Pvt Ltd (319 ITR 5). Accordingly the addition made under Section 68 on account of share application was deleted.

22. We would like to reproduce the Hon'ble High Court order in CIT vs. Gangeshwari Metal P.Ltd. in ITA no. 597/2012 judgement dated 21.1.2013, the Hon'ble High Court after considering the decisions in the case of Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169 and judgement in the case of CIT vs. Lovely Exports 319 ITR (Sat 5)(5. C) held as follows:-

> *"As can be seen from the above extract, two types of cases have been indicated. One in which the Assessing Officer carries out the exercise which is required in law and the other in which the Assessing Officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer after noting the facts, merely rejected the same. This would be apparent from the observations of the Assessing Officer in the assessment order to the following effect:-*
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> > *''Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tries to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance4 sheet etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.5~50/000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income/ penalty proceedings under Section 271(1)(c) are being initiated separately.*
>
> *The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case. However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under Section 68 of the Income Tax Act 1961. Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law"*

23. The case on hand clearly falls in the category where there is lack of enquiry on the part of the A. O. as in the case of Ganjeshwari Metals (supra).

b) In the case of Finlease Pvt Ltd. 342 ITR 169 (supra) in ITA 232/2012 judgement dt. 22.11.2012 at para 6 to 8/ it was held as follows.

> *"6. This Court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income Tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the ROC in relation to the share application affidavits of the directors, form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing Officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahes Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr.Mahesh Garg that the income sought to be added fell within the description ofS.68 of the Income Tax Act 1961. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (supra).*
>
> *The decision in this case is based on the peculiar facts which attract the ratio of Lovely Exports (supra). Where the assessee adduces evidence in support of the share application monies, it is open to the Assessing Officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators, such a link was shown to be present in the case of Nova Promoters & Finlease (P) Ltd. (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under Section*
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> *the ratio of Lovely Exports (supra) is attracted, irrespective of the facts, evidence and material. "*

24. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we hold that addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to uphold the order of the Ld. Commissioner of Income Tax (Appeals)

25. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax assessments u/s 143(3) were placed on record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case

as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do not want to interfere in the impugned order of Ld. CIT(A) which is confirmed and consequently the appeal of Revenue is dismissed.

12. Applying the propositions of law laid down in this case, to the facts of this case and as M/s. Mahakal Shoppers (P) Ltd., has been assessed to income tax u/s 143(3) of the Act by the Income Tax Department and as the documents filed by the assessee as well as by M/s. Mahakal Shoppers (P) Ltd. directly with the AO in response to a direct enquiry, prove the identity and creditworthiness of the applicant for share and as similar applicant for share from this very share holder has been accepted as genuine by the AO in the immediately preceding assessment year, and the addition in question, in our view, cannot be sustained. Hence, we delete the same."

9. In fact, in this case huge additions were made in the hands of the share allottee companies in their scrutiny assessment u/s 143(3) of the Act. Again making the addition in the case of the assessee company would tantamount to double addition. The Ld. CIT(A) relied on the judgement of the Hon'ble Supreme Court in the case of *Pr. CIT vs Gyscoal Alloys Ltd. in R/Tax Appeal No. 180 of 2018* for the proposition that addition cannot be made of share capital received from group companies. We find no infirmity in the finding of the Ld. CIT(A). The Ld. DR could not point out any factual inefficiency in the order of the Ld. CIT(A). The order of the Ld. CIT(A) is in accordance with law.

10. In the result, the appeal of the Revenue is dismissed.

Order Pronounced in the Open Court on **January 22nd, 2021**.

Sd/-	***Sd/-***
(A.T. Varkey)	**(J. Sudhakar Reddy)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 22/01/2021
SC, Sr. PS

Copy of order forwarded to:

1. *M/s. RKB Services Pvt. Ltd., Rampushp Nilay, 86, Paresh Mazumdar Road, Ground Floor, Indu Park Kasba, Kolkata – 700 107.*

2. *ITO, Ward -4(1), Kolkata.*

3. *The CIT(A)*

4. *The CIT*

5. *DR*

True Copy
By order

Assistant Registrar
ITAT, Kolkata