

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'A' BENCH, KOLKATA  
(Virtual Court)**

**(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)**

**I.T.A. No. 2183/Kol/2019  
Assessment Year: 2012-13**

***Ninestar Merchants Pvt. Ltd.....Appellant***  
***[PAN: AACCN 3123 A]***

***Vs.***

***ITO, Ward-3(3), Kolkata.....Respondent***

**Appearances by:**

*Sh. Manish Tiwari, FCA, appeared on behalf of the Assessee.*

*Sh. Jayanta Khanra, JCIT, appeared on behalf of the Revenue.*

Date of concluding the hearing : November 26<sup>th</sup>, 2020

Date of pronouncing the order : February 3<sup>rd</sup>, 2021

**ORDER**

**Per J. Sudhakar Reddy, AM:**

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals)-17, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 20.08.2019 for the Assessment Year 2012-13.

2. The assessee is a company and e-filed its return of income for the assessment year 2012-13 declaring total income of ₹62,736/-. The assessment was completed u/s 143(3) of the Act on 29/03/2015 determining the total income at ₹1,25,62,740/- inter alia making an addition of ₹1,25,00,000/- of share capital received by the assessee at a premium. The AO records that the notices u/s 131 of the Act sent to the assessee requiring its directors to appear and to produce the principal officers and directors of all investor companies and/all individual investors as the case may be before the AO for the purpose to primarily verify the identity and creditworthiness of the shareholders and the genuineness of the transaction. The assessee filed various documents in support of the genuineness of the share capital received and the identity and creditworthiness of the shareholders. This was rejected by the AO. On appeal, the assessee submitted that it had furnished all the documents required in support of the fresh share capital received

and that summons were issued with only two days' notice for attendance and due to this reason none would appear before the AO. The Id. CIT(A) rejected the contentions of the assessee and upheld the order of the AO. Aggrieved, the assessee is in appeal before us.

3. The Id. Counsel for the assessee submitted that share application money was received along with the share premium, from five share applicant companies and in support of the identity and creditworthiness of the transactions they have furnished the following documents: a) copy of share application forms, b) copy of bank statement showing the transactions as evidence of transfer through banking channel, c) details of the sources of fund, d) copy of acknowledgement of filing of the return, e) copy of audited accounts etc. of the share capital subscriber companies. He further submitted that the assessee company had furnished it's a) copy of bank statement, b) copy of company's bank book with narration, c) copy of Form No.-2 return of allotment filed with ROC, d) copy of Form No.-5 evidencing increasing authorized share capital filed with ROC, e) confirmation from each of the subscriber companies confirming subscribing of share capital, f) copy of the certificate of valuation of shares to justify share premium and g) photo identity proof and address proof of all the necessary parties. Thus, he submits that the assessee has furnished all necessary documents to prove the identity as well as the creditworthiness of the transaction. As regards the genuineness of the transaction, he submits that a certificate from the Registered Valuer is furnished to justify the share premium. He further submitted that the assessments of share applicant companies were done u/s 143(3) of the Act by the Income Tax Department. He furnished copies of the same and submitted that the issue in question is covered in favour of the assessee by a number of decisions of the Tribunal where it was held that, when the assessment of the share applicant company is completed u/s 143(3) of the Act by the Income Tax Department, the identity and creditworthiness of the share applicant companies and genuineness of the transaction cannot be doubted. We would discuss the case law as and when needed. He submitted that the Id. CIT(A) has wrongly stated that the assessment in this case was completed in pursuance to the order passed by the Pr. CIT u/s 263 of the Act which was factually incorrect. He argued that as the very presumption made by the Id. CIT(A) while adjudicating the case was factually incorrect, the order of the Id. CIT(A) is bad in law. He submitted that a general cut and paste order was framed by the Id. CIT(A) without application of mind. He prayed for relief.

4. The ld. D/R on the other hand supported the order of the ld. CIT(A) and submitted that mere filing of documents mentioned by the assessee before the AO would not be sufficient to prove their identity and creditworthiness of the share applicant companies and to prove the genuineness of the transaction. He pointed out that the AO had issued notices u/s 131 of the Act to the directors of the share applicant companies and in spite of several opportunities, the assessee could not produce the principal officers/and directors of all investor companies to prove the genuineness of the transaction. He agreed that there was violation of principles of natural justice at the stage of the AO as sufficient time was not granted to the assessee to comply with the summons issued u/s 131 of the Act and hence the ld. D/R suggested that the appeal may be restored to the file of the AO for fresh adjudication in accordance with law, with the direction that the assessee should appear before the AO and also produce the directors and principal officers of all the share applicant companies for examination of the AO.

5. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.

6. The ld. CIT(A) at page 6 of his order was wrong in presuming that the AO had passed his order u/s 143(3) of the Act as a consequence to the order passed u/s 263 of the Act by the Pr. CIT. This is not a case where the Pr. CIT has passed any order u/s 263 of the Act. This wrong presumption in our view influenced the decision of the ld. CIT(A).

6.1. Be it as it may there are five shareholders in this case. The documents and evidences that were filed by the assessee in support of the transaction are given at page 2 of the AO's order. Copies of the same are fled before us by way of a paper book. The identity of the investor companies stand proved.

6.2. The creditworthiness of these share applicant companies is evident from the following table:

Name of the Shareholder	Investible Funds available as per Financials (Rs)	Amount Invested in the appellant company (Rs)	Percentage(%) of investment in the assessee company
Aakansha Commercials Pvt Ltd	5,19,37,788	15,00,000	2.88
Pingle Commotrade Pvt Ltd	5,76,16,596	25,00,000	4.34
Sunview Tradelinks Pvt Ltd	5,27,73,053	45,00,000	8.53
Trimudra Credit Ltd	57,21,16,395	10,00,000	0.17
Walden Barter Pvt Ltd	5,99,51,394	30,00,000	5.00

A perusal of the same proves the creditworthiness of the transaction.

6.3. As far as the justification for the question of share premium is concerned, the assessee has furnished a share valuation certificate. The AO has not pointed out any infirmities or errors in this share valuation certificate. He has not rejected any of the documents filed by the assessee. Thus the share premium charged is justified in this case.

6.4. Moreover, we find that the assessments of the share subscriber companies have been completed by the Income Tax Department u/s 143(3) of the Act, copies of which are placed at pages 107, 137, 164, 201 and 232 of the paper book. When the assessments of the share applicant companies are completed u/s 143(3) of the Act, the identity of the shareholder companies cannot be doubted. When the share applicant companies who have invested in the share capital of the assessee company, and when their respective assessments are completed u/s 143(3) of the Act, no addition can be made in the hands of the assessee company u/s 68 of the Act.

6.5. This Bench of the Tribunal under similar circumstances, in the case of *DCIT vs. M/s. Maa Amba Towers Ltd.* in *ITA No.1381/Kol/2015*; Assessment Year 2012-13, order dated 12th October, 2018 had held as follows:

*“3. Mr. Choudhury vehemently contends during the course of hearing that the Assessing Officer had rightly made the impugned addition since the taxpayer had failed to prove identity, genuineness and creditworthiness of the share premium money. He terms the impugned share subscription premium ₹690/- per share having face value of ₹10/- each as highly exorbitant. Case laws Sumati Dayal vs. CIT(1995) 214 ITR 801 (SC) and CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC) is further quoted during the course of hearing that the relevant evidence submitted during the course of assessment has to be considered as per the human probabilities by removing all blinkers. Our attention is thereafter invited to the relevant nuances of such share subscription routing involving multiple layers to plough back unaccounted monies back to the books. We find no merit in the Revenue's instant grievance in the light of relevant facts on record. There is no dispute about the assessee's having declared its share subscription premium from M/s Agrani Credit & Finvest Pvt. Ltd., Crown Mansion Pvt. Ltd., Liberal Infrastructure Pvt. Ltd., Darshan Enclave Pvt. Ltd., Snow Fall Impex Pvt. Ltd. involving corresponding sums of ₹27,60,000/-, ₹55,20,000/-, ₹82,80,000/- in case of third and fourth and ₹48,30,000/- in last entity's case; respectively totalling to ₹3,01,00,000/-. Case file suggests that the assessee has placed on record their income tax acknowledgement of the impugned assessment year 2012-13, directors' report along with audited financial statements, explanation regarding source of investments, bank statements, share application forms and board's resolution(s) followed by their respective regular assessment orders pertaining to very assessment year u/s. 143(3) of the Act. Their Assessing Officer(s) made u/s 68 unexplained cash credits additions of share premium amounting to ₹67,03,00,000, ₹44,85,00,000/-, ₹24,42,00,000/- & ₹21,70,00,000/- in case of first four entities and accepted similar credits of ₹20,45,00,000/- to be genuine satisfying all parameters of identity, genuineness and creditworthiness. It can therefore be safely assumed that all these additions sums forming subject-matter of the impugned additions to be accepted as genuine in respective investors entities' end as the source of the amount(s) in issue totalling to ₹3,01,00,000/-. Learned Departmental Representative fails to dispute that the same very amount cannot be added twice in payees and recipients' hands u/s 68 of the Act. We therefore see no reason to accept Revenue's instant former substantive ground. We affirm CIT(A)'s findings under challenge qua the instant former issue.”*

6.6. This Bench of the Tribunal under similar circumstances, in the case of *M/s C.P. Re-Rollers Ltd. vs. DCIT* in *ITA No.1811/Kol/2017*, Assessment Year 2013-14, order dated 03.04.2019, had held as follows:

*"46. We find that the Hon'ble Supreme Court in the case of M/s Earth Metal Electricals P Ltd vs CIT & Anr. reported in 2010 (7) TMI 1137 in Civil Appeal No. 21073 / 2009 dated 30.7.2010 arising from the order of Hon'ble Bombay High Court had held as under:-*

*ORDER*

*Delay condoned.*

*Leave granted.*

*Heard learned counsel on both sides.*

*We have examined the position. We find that the shareholders are genuine parties. They are not bogus and fictitious. Therefore, the impugned order is set aside.*

*The appeal is allowed accordingly. No order as to costs.*

*47. In the instant case before us, we also note that the share subscribing companies are duly assessed to income tax. The Ld AR had placed on record the copies of the assessment orders framed in the cases of the share subscribing companies, as noted above. It therefore cannot be disputed that the share subscribing companies are not in existence. From the assessment orders, it is noted that the share subscribing companies are duly assessed to income tax and their income tax particulars together with the copies of respective income tax returns with their balance sheets are already on record. We also find that the Ld. CIT(A) had categorically stated that the scrutiny assessments were framed on the share subscribing companies for the Asst Year 2010-11 which shows their existence is genuine and transactions carried out by them were the subject matter of examination by the income tax department in scrutiny proceedings. This fact has not been controverted by the Revenue before us.*

*48. We may gainfully refer to the judgment in the case of Pr. CIT Vs Paradise Inland Shipping (P) Ltd (84 taxmann.com 58) wherein the Bombay High Court had deleted similar addition on similar set of facts made on account of unexplained cash credits and the SLP filed by the Revenue against the judgment has been dismissed by the Hon'ble Supreme Court. The relevant extracts of the judgment is as follows:*

*"5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the judgment of the CIT Appeals which reads thus :*

*"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :*

*1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-*

*Date of Registration 09/05/1995*

*6. On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies.*

7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot reappraise the evidence to come to any contrary evidence. Considering that the authorities have rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial question of law which arises in the present Appeal for consideration.

49. We also find that the Hon'ble Apex Court recently in the case of Principal CIT vs Vaishnodevi Refoils & Solvex reported in (2018) 96 taxmann.com 469 (SC) wherein the SLP of the Revenue has been dismissed by the Hon'ble Apex Court. The brief facts of that case were that the addition u/s 68 of the Act was made by the Assessing Officer in respect of capital contributed by the partner of the firm. The Hon'ble Gujarat High Court noted that when the concerned partner had confirmed before the Assessing Officer about his fact of making capital contribution in the firm and that the said investment is also reflected in his individual books of accounts, then no addition could be made u/s 68 of the Act. The decision of Hon'ble Gujarat High Court is reported in (2018) 89 taxmann.com 80 (Guj HC) . The SLP of the revenue against this judgment was dismissed by the Hon'ble Supreme Court.

50. We may gainfully refer to the following decisions of the Hon'ble High Court in the cases as under:

(a) In the case of Pr. CIT Vs Chain House International (P) Ltd [2018] (98 taxmann.com 47) the AO had added the share application by way of unexplained cash credits was that the assessee was unable to give any justifiable reason for issuing shares at a premium. The Hon'ble Madhya Pradesh High Court did not agree with this reasoning given by the AO for making addition u/s 68, holding as under:

*"Issuing the share at a premium was a commercial decision. It is the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe the shares at such a premium or not. This was a mutual decision between both the companies. In day to day market, unless and until, the rates is fixed by any Govt. Authority or unless there is any restriction on the amount of share premium under any law, the price of the shares is decided on the mutual understanding of the parties concerned. [Para 52]*

*Once the genuineness, creditworthiness and identity of investors are established, the revenue should not justifiably claim to put itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of ascertaining how much is a reasonable premium having regard to the circumstances of the case. [Para 53]*

*There is no dispute about the receipt of funds through banking channel nor there is any dispute about the identity, creditworthiness and genuineness of the investors and, therefore, the same has been established beyond any doubt and there should not have been any question or dispute about premium paid by the investors; therefore, unless there is a limitation put by the law on the amount of premium, the transaction should not be questioned merely because the assessing authority thinks that the investor could have managed by paying a lesser amount as Share Premium as a prudent businessman. The test of prudence by substituting its own view in place of the businessman's has not been approved by the Supreme Court. [Para 54]"*

(b) In the case of CIT v. Gagandeep Infrastructure (P.) Ltd. [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 the Revenue contended that the fact that the shares were issued at high premium raised suspicion on the genuineness of the

transactions. While dismissing this plea raised by the Revenue, the Hon'ble Bombay High Court held as under:

*(e) We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P.) Ltd.(supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.*

*(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.*

*(c) In CIT Vs Anshika Consultants Pvt Ltd (62 taxmann.com 192), the AO had added the share application monies treating it to be their unaccounted monies routed through accommodation entries since the shares were issued at a high premium. The Hon'ble Delhi High Court did not agree with this contention put forth by the Revenue, by observing as under:*

*"Whether the assessee-company charged a higher premium or not, should not have been the subject matter of the enquiry in the first instance. Instead, the issue was whether the amount invested by the share applicants were from legitimate sources. The objective of section 68 is to avoid inclusion of amount which are suspect. Therefore, the emphasis on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is disquieting in the present case is when the assessment was completed, the investigation report which was specifically called from the concerned department was available but not discussed by the Assessing Officer. Had he cared to do so, the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants would have been apparent. Even otherwise, the share applicants' particulars were available with the Assessing Officer in the form of balance sheets income-tax returns, PAN details etc. While arriving at the conclusion that he did, the Assessing Officer did not consider it worthwhile to make any further enquiry but based his order on the high nature of the premium and certain features which appeared to be suspect, to determine that the amount had been routed from the assessee's account to the share applicants' account. As held concurrently by the Commissioner (Appeals) and the Tribunal, these conclusions were clearly baseless and false. This Court is constrained to observe that the Assessing Officer utterly failed to comply with his duty considers all the materials on record, ignoring specifically the most crucial documents."*

51. We also rely on the following judgments of the Coordinate Bench of ITAT Kolkata, where based on same facts, and identical and common grounds and coordinate Bench deleted the addition:

(1) M/s Jagannath Banwarilal Texofabs Pvt Ltd, in ITA No. 1762/Kol/2016, For A.Y. 2012- 13, order dated 26.10.2018.

(2) M/s Wiz-Tech Solutions Pvt Ltd, in ITA No.1162/kol/2015,for A.Y. 2012-13, order dated 14.06.2018.

52. To conclude, 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. We note that the share application money and share premium money which were received by the assessee company from the two share applicant companies viz: M/s. Prism Vintrade Private Limited, and M/s. Gannet-Vintrade Private Limited, during the period December, 2012 to March, 2013 had already been suffered disallowance under section 68 of the Act. As these two share applicant companies invested the same money in the assessee company, therefore, no further disallowance is warranted in the hands of the assessee company. Once taxed income cannot be taxed again.

In the case of third company, M/s Haven Vincom Pvt. Ltd, the assessment, pertaining to the AY. 2010-11 was not revised by the Department. That is, M/s Haven Vincom Pvt. Ltd has raised share capital and share premium which has not been treated by the Department as cash credit under section 68 of the Act and has not been disallowed by the assessing officer in the assessment of M/s Haven Vincom Pvt. Ltd ( vide assessment order-paper book pg.173) . We note that M/s Haven Vincom Pvt. Ltd has utilized the same money (which it received by raising share capital/premium and not disallowed by AO, u/s 68) to purchase the share capital and share premium in the assessee company (M/s C.P. RE Rollers Ltd) therefore it should not be disallowed under section 68 of the Act, in the hands of the assessee company, as the Department itself accepted genuine money in the hands of M/s Haven Vincom Pvt. Ltd. Hence, in the case of M/s Haven Vincom Pvt. Ltd, the identity, creditworthiness and genuineness have been proved beyond doubt. In case of Sushma Chawala for share application of Rs.4,22,500/- and share premium of Rs. Rs.4,22,500/-, the Id Counsel explained the identity, creditworthiness and genuineness therefore no disallowance can be made. Besides, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of these three share applicants by submitting the following documents and evidences:

- 1) Return of ROC, that is, form No. 2 submitted before R.O.C.
- 2) PAN Number copies of each share subscriber.
- 3) Copy of Balance Sheet, Profit and loss account of all share applicant companies.
- 4) Details of investments sold by all share applicant companies.
- 5).Transaction with the assessee was duly highlighted in the bank statement
- 6). Explanation along with evidence of source of source of the funds of the share applicant Companies.
- 7). Audited Accounts of the share holders.
- 8) Relevant address proofs / Form filed by the share applicants with ROC.
- 9). Income Tax Return of share applicant companies.
- 10) Copy of the Bank Statement of Share applicant companies where from the amount was debited. 11) Copies of Bank statement of the assessee company where the share application money and premium were credited.
- 12). Cheque Number, the amounts subscribed by shareholders along with the name of bank its branch address and the number of shares allotted to them with face value on the date of allotment.
- 13) Common Director of the share applicant companies (who is director in assessee company as well as share applicant companies) appeared before the assessing officer

in response to notice u/s 131 of the Income Tax Act and submitted documents and evidences before the AO.

Thus, all above documents that is, the PAN details, bank account statements, audited financial statements, balance sheet, profit and loss account, Income Tax acknowledgments, and ROC statements etc were placed on AO's record. One of the directors of share applicant companies appeared before the AO in response to summon u/s131 of the Act and explained the genuineness of three share applicants. Therefore, considering this factual position and precedents relied on the subject, as noted above, we delete the addition made by the assessing officer U/s 68 of the Act to the tune of Rs.17,49,95,000/-

53. In the result, the appeal of the assessee is allowed.”

7. In view of the above discussion, and respectfully following the propositions of law laid down in the above referred case law, we hold that the assessee in this case has proved the identity and creditworthiness of the share applicant companies and the genuineness of the transaction. The Revenue has not brought out any contrary evidence on record. Under these circumstances, we delete the addition made u/s 68 of the Act and allow the appeal of the assessee.

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

***Kolkata, the 3<sup>rd</sup> February, 2021.***

Sd/-  
 [Aby T. Varkey]  
 Judicial Member

Dated: 03.02.2021

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

1. ***Ninestar Merchants Pvt. Ltd., 48, Park Street, 2<sup>nd</sup> Floor, Kolkata-700 017.***
2. ***ITO, Ward-3(3), Kolkata.***
3. CIT(A)-17, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

Sd/-  
 [J. Sudhakar Reddy]  
 Accountant Member

By order

Assistant Registrar  
 ITAT, Kolkata Benches