

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND  
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA Nos.299 & 314/M/2020  
Assessment Years: 2012-13 & 2013-14**

M/s. Rubberwala Hospitality Pvt. Ltd., Ground Floor, Rubberwala House, Dr. A. Nair Road, Agripada, Mumbai – 400 011 <b>PAN: AADCR2994L</b>	Vs.	Income Tax Officer- 5(3)(1), Room No.526, 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Mani Jain, A.R.  
Revenue by : Shri Raghuveer Madana, D.R.

Date of Hearing : 17.11.2021  
Date of Pronouncement : 23.11.2021

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The above appeals have been preferred by the assessee against the two separate orders even dated 08.11.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2012-13 & 2013-14.

**ITA No.299/M/2020**

2. The issue raised in ground No.1 is general in nature and needs no adjudication.

3. The issue raised in ground No.2 is against the confirmation of addition of Rs.55,00,000/- by Ld. CIT(A) as made by the AO under section 68 of the Act on account of unexplained cash credits in respect of loan taken from M/s. Marine Gems Pvt. Ltd.

4. The facts in brief are that the assessee filed the return of income at nil on 30.09.2012 through e-filing which was processed under section 143(1) of the Act. Subsequently, the case of the assessee was taken up for consideration under CASS and statutory notices were duly issued and served upon the assessee. The assessee is engaged in the business of construction and development of properties. During the course of assessment proceedings the AO noticed that the assessee has taken unsecured loan of Rs.6,81,28,712/- during the year and accordingly called upon the assessee to file necessary evidences to prove the identity, creditworthiness of the lenders and genuineness of the transactions. The AO also issued notices under section 133(6) to various parties the replies whereof were duly received and filed in the assessment folder. In one case namely M/s. Marine Gems Pvt. Ltd., the AO received information from DGIT (Inv.) Mumbai vide letter dated 13.03.2014 that during the course of search and seizure action on Surat based group known as Gautam Jain and others it was found that they were involved in providing the non genuine bills and accommodation entries and assessee has taken unsecured loan of Rs.55,05,548/- from the said party. Accordingly, a show cause notice was issued. During the course of assessment proceedings the assessee filed various evidences comprising name, address, ITR confirmation, payment through banking channel etc. before the AO. The AO, however, not finding any merit in the contention of the assessee treated the entire amount as non genuine on the basis of information received from DGIT (Inv.) Mumbai that M/s. Marine Gems Pvt. Ltd. is engaged in providing accommodation entry and accordingly added

Rs.50,05,548/- to the income of the assessee in the assessment framed under section 143 of the Act dated 27.02.2015.

5. In the appellate proceedings the Ld. CIT(A) dismissed the appeal of the assessee by holding that M/s. Marine Gems Pvt. Ltd. is a company belonging to Shri Gautam Jain and others group which were found to be advancing accommodation entries during the course of search action and therefore the loan taken by the assessee is rightly added by the AO and thus dismissed the appeal.

6. After hearing both the parties and perusing the material on record, we find that the assessee has borrowed a sum of Rs.55,00,000/- from M/s. Marine Gems Pvt. Ltd. during the year an entity which is related to Shri Gautam Jain & others on which a search action under section 132 of the Act was conducted and it was found that the group was engaged in providing accommodation entries. We find that assessee has filed all the evidences to prove all the three ingredients of section 68, however, the AO has not pointed out any defect in those evidences and merely relied upon the report of the investigation wing that the lender is engaged in providing accommodation entries. We also note that the assessee has relied on the decision of the co-ordinate Bench of the Tribunal in ITO vs. Smt. Leena Harsh Harde in ITA No.6429/M/2017 A.Y. 2013-14 order dated 20.02.2020 wherein the identical issue of unsecured loan from M/s. Marine Gems Pvt. Ltd. has been held to be genuine. The operative part whereof is reproduced as under:

“17. We have heard the rival submissions, perused the orders of the authorities below. On perusing the assessment order we find that the addition u/s. 68 of the Act was solely made based on the statement said to have been recorded in the case

of Shri Gautam Jain in the course of search proceedings against him, where he has said to have deposed that he is providing accommodation entries. The assessment was reopened solely on the basis of the statements recorded from the third party. The evidences furnished before the Assessing Officer, First Appellate Authority and also before us suggests that the assessee has complied with the requirement of filing all the evidences to prove the genuineness, creditworthiness and identity of the creditors. The assessee has furnished confirmations of the creditors, copy of acknowledgement of returns of the creditors, copies of financials of the creditors, copies of bank statements of the creditors showing that the transactions were routed through banking channels. Nothing adverse comments were made by the Assessing Officer in respect of all these evidences furnished by the assessee except stating that the creditors have not responded to the notices issued u/s. 133(6) of the Act or the notices issued u/s. 133(6) of the Act returned unserved. Except for these statements the Assessing Officer chose not to give any details in respect of which of the creditors he has issued notices, which of the creditors he has not able to serve the notices and from which of the creditors there is no responses. The evidences furnished before us shows that in fact out of three creditors two creditors have been responded to the notices issued u/s. 133(6) of the Act and furnished the information as required by the Assessing Officer. M/s. Marine Gems Pvt. Ltd., and M/s. Parshwanath Gems Pvt. Ltd., have furnished copy of ledger account, copy of acknowledgement of return, Copy of PAN, copy of Profit and Loss Account and balance sheet and copy of bank statement highlighting the transactions. Even though the Assessing Officer stated that statement of Shri Gautam Jain recorded u/s. 131 of the Act was provided to the assessee it is the contention of the assessee that no such copy of statement was provided.

18. On a perusal of the Assessment Order we find that the Assessing Officer has not made any sort of enquiries with respect to the evidences furnished by the assessee with the creditors. The Assessing Officer neither gave a finding in the Assessment Order which creditor has not responded nor he has made any independent enquiry with the creditors except relying on the statement of third party and whose statement was also not provided to the assessee in spite of request for cross examination. The Assessing Officer not provided an opportunity to the assessee for cross examination and this fact was also recorded by the Ld.CIT(A). Ld.CIT(A) on examining the facts and the submissions recorded his findings as under:

“7.1 During the appellate proceedings, the appellant has stated that the appellant has submitted the confirmation, bank statement, Acknowledgement, ITR and financial statements of the lender and affidavits during the scrutiny proceeding before the A.O. Further, stated that the AO has not brought any material on records to prove the loan taken by the appellant as the accommodation entry. On the contrary, the appellant has proved the transaction of loan as genuine loan with evidence on records. The AO has made the disallowance u/s 68 inspite of all the conditions satisfied by the appellant.

7.2 The expression "nature and source" has to be understood together as a requirement of identification of the source and the nature of the source, so that the genuineness or otherwise could be inferred. The Hon'ble Supreme

Court, in Kale Khan Mohd.Hanif vs. CIT, pointed out that the onus on the assessee has to be understood with reference to the facts of each case and proper inference drawn from the facts. If the prima facie inference on the fact is that the assessee's explanation is probable, the onus will shift to the Revenue. As far as the creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. Once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents, to prove the matter further.

7.3 Element of credit worthiness and satisfaction of AO thereafter is subjective and requires more efforts/inquiry on the part of the AO to give a finding in the order that lender is not credit worthy. The AO must make proper enquiry before making any addition. In Khandelwal Constructions v. CIT 227 ITR 900 (Gau.), it has been held that empowers the Assessing officer to make enquiry. If he is satisfied that these entries are not genuine he has every right to add these as income from other sources. But before rejecting the assessee's explanation, A.O. must make proper enquiries and in the absence of proper enquiries, addition cannot be sustained.

7.4. It is clear from the submission of appellant that the transactions were through account payee cheques and appellant has submitted sufficient details before the AO during the assessment proceedings. The source of receipt through banking channel clearly establish the genuineness of the credit which is reflected in the books of accounts. The decision of the Hon'ble Gujarat High Court in the case of Dy. CIT vs Rohini Builders - [256 ITR 360] is held that all the loans were received by the assessee by account payee cheques and the repayment of loans have also been made by account payee cheques along with interest in relation to those loans and that the Assessing Officer having allowed the interest claimed/paid by the assessee in relation to the cash credits cannot treat the cash credits as not genuine. It held that the administrative expenses had discharged the initial onus which lay on it in terms of Section 68 by proving the identity of the creditors by giving their complete addresses, GIR nos. PAN Nos. and copies of Assessment Orders wherever readily available and that it has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from the bank accounts of the creditors. It held that the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of accounts but not the source of the source.

7.5 Further, in the case of Namichand Kothari vs CIT - [264 ITR 254] [Gau], the Hon'ble High Court had held that:

"A 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 assessment 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-creditor 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 is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transaction, which took place between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, since, these aspects may not be within the special knowledge of the assessee.

7.6. The assessee must satisfy three important conditions, namely, (i) the identity of the creditor; (ii) the genuineness of the transaction; and (iii) the financial capacity of the person, i.e. the credit worthiness of the creditor. However, the onus of the assessee is limited to the extent of proving the source from which he received the cash credit. The credit worthiness of the creditor has to be judged vis-a-vis the transaction which had taken place between the assessee and the creditor, and it is not the burden of the assessee to find out the source of creditworthiness of the lender to prove the genuineness of the transaction. This issue is dealt by the Gauhati High Court in the case of CIT v. Smt. Sanghamitra Bharali (2014) 361 ITR 481 (Gau). The aforesaid points were also affirmed in the past by the Apex Court in the case of CIT v. Orissa Corporation P. Ltd reported in (1986) 159 ITR 78 (SC). In the case of CIT v. Varinder Rawley (2014) 366 ITR 232 (P & H) the court held that "where the assessee shows that the entries regarding credit in a third party's account were in fact received from the third party and are genuine, he discharges the onus. In that case, the sum cannot be charged as the assessee's income in the absence of any material to indicate that it belongs to assessee", particularly in a case where no summons u/s 131 is issued against the third party.

7.7 From the assessment order, it transpires that the AO has solely relied upon the statement of Shri Gautam Jain and did not carry out any worthwhile independent inquiry in the matter. He has totally ignored the documentary evidences submitted by the appellant. The AO, in the assessment order, has admitted existence of these details. The AO has not pointed out any defect in the above mentioned documentary evidences submitted during assessment proceedings. Without pointing out any lacuna in the evidences submitted by the

appellant, the sources and the genuineness of transaction cannot be doubted. Once evidences related to a transaction is submitted before the A.O., the onus shifts on him to prove these as non-genuine. The A.O. has not discharged the onus cast on him. In my opinion, merely based on the statement of a third person without any corroborative evidence will not make the loan transactions, in question, as accommodation entries. As such, in the absence of any contrary evidence placed on record, the transactions cannot be treated as accommodation entries. Identical issues decided by the Hon'ble ITAT, Mumbai in the case of Reliance Corporation vs. ITO 32(3)(2), Mumbai dated on 12-04-2017 ITA No.1069 to 1071. The relevant part of decision are as under:-

Held (i) that the assessee had established the identity of the creditors. The assessee 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 which was not in dispute. Once the assessee had established these, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter, the burden had shifted ITA No. 1069/M/2017 and other three appeals to the Assessing Office to prove the contrary. The failure on the part of the creditors to show that their Subcreditors had creditworthiness to advance the said loan amounts to the assessee, could not, under the law be treated as the income by the appellant from undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness from 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. The Assessing Officer 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. Therefore, the Assessing Officer could not have treated the said amounts as income derived by the assessee from undisclosed sources."

(ii) that no assessment could be made contrary to the provisions of law. In the instant case, the very basis for making the assessment was under challenge. If the assessment was based on a completely erroneous view of law, such findings could not be regarded as mere findings of facts, but must be treated as substantial questions of law. Therefore, the question raised in the appeal was a substantial question of law because it went to the very root of the assessment made.

The aforesaid view has been also considered and fortified and favourably referred to by the Allahabad High Court in the case of C.I.T. v. Shalimar Buildwell Pvt. Ltd. (2014) 220 Taxman 138 (All.) In the case of Lalpuria Construction P. Ltd (supra) the Hon. Rajasthan High Court has held that "that in the case of Accommodation entry – without giving an opportunity of cross examination merely on the basis of oral statement additions cannot be made u/s. 68. It is further held that:

“The oral statement of a third party recorded by Search authorities which was never placed to be confronted by assessee and no documentary evidence was supplied to assessee, could not be considered in making addition u/s. 68 on account of alleged accommodation entries. " Besides, it is further submitted that the Hon'ble Bombay High Court in the case of Ms. Rushabh Enterprise v. ACIT had occasion to go through the IT A No.1069/M/2017 and other three appeals identical issue and two of the Creditors in that case, i.e. Mis. Laxmi Trading Co. and Ms. Rose Impex were also parties in the case of the assessee. In the case of Andaman Timber Industries (supra), the Hon'ble Supreme - Held as under:.

"Not allowing the assessee to cross examine the witnesses by the Adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullify in as much as it amounted to violation of principles of Natural Justice because of which the assessee was adversely affected." The order was vacated.

The aforesaid view was earlier considered by the Jurisdictional High Court in the case of CIT v. Ashish International

In our considered view the facts of the assessee case are squarely covered by the ratio laid down in the decisions referred to above. We therefore, in view of our observations and the ratio laid down by the various decisions are inclined to set aside the order of CIT(A) and direct he AO to delete the additions of Rs.1,29,04,231/-. Since we have decided the issue of addition u/s 68 in favour of the assessee, the addition as sustained by the Ld. CIT(A) u/s 69C of the Act of Rs.3,45,000/- is also ordered to be deleted. In result the appeal of the assessee is allowed.

The appellant has requested the assessing officer to provide for the cross examination with Gautam Jain. But it was denied to him. The Hon'ble Apex

Court in the case of Andaman Timber Industries in CIVIL APPEAL No. 4228 OF 2006 held as under :-

"According to us, not allowing the assessee to cross examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted -to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. That apart, the Adjudicating authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the sold dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-03-2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.

7.8 The Hon'ble High Court of Mumbai in the case of H.R.Mehta vs. ACIT ITA No.5 8 of 2001 in the judgement delivered on 30-06- 2016 held as under:-

"In M/s. Andaman Timber industries, the Supreme Court found that the adjudication authorities has not granted an opportunity to the assessee to cross examine the witness and the tribunal merely observed that the cross examination of the dealers in that case, could not have brought out any material which would not otherwise be in possession of the appellant assessee. The Supreme Court set aside the impugned order and observed that it was not for the adjudicating authority to presuppose as to what could be subject matter of the cross examination and make the remarks such as was done in that case. In the instant case, although the appellant has called upon us to draw an inference that the burden shifted to the revenue in the present case, be need not hasten and adopt that view after giving out though to various issue raised and the decisions cited by Mr. Traishawalla and finding that on a very fundamental aspect, the revenue was not justified in making an addition at the time of re-assessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT. Quite apart from denial of Mn opportunity of cross examination, the revenue did not even prove the material on the basis of which he department sought to conclude that the loan was a bogus transaction.

7.9 As far as the question of validity of the transaction done through are concerned, even if some of the transactions entered into by Gautam Jain are found to be not genuine, it does not lead to the conclusion that all the transactions were non-genuine including the transactions related to the appellant. There is no evidence brought in the assessment order to prove the above conclusion, by the AO. The outcome of investigation carried out in the case of Shri. Gautam Jain and the conclusions drawn therein cannot be applied ipso facto to all other cases. Simply relying on the report and statement, the AO cannot conclude that all transactions are accommodation entries.

7.10 The case of the appellant is covered by the decision of ITAT, "I" Bench, Mumbai in the case of Satish N. Doshi, HUF vs. ITO , Ward 21(2)(4), Mumbai in ITA.No. 2329/Mum/2009 and the decision of ITAT, "E" Bench, Mumbai in the case of Shaf Broadcast Pvt. Ltd Vs. ACIT, Cir-9(3), Mumbai in ITA No.1819/Mum/2012. -Both the cases relate to re-opening of assessment on the basis of statements of Mr. Mukesh Choksi and Mr. I.C. Choksi and associated brokerage companies. The Hon'ble ITAT on the analysis of the findings made in the assessment orders has reached to the conclusion that the reopening itself is bad in law and quashed the orders accordingly. The ratio of these judgments is applicable to the facts of the instant case. This is confirmed by the Delhi Bench of the Income Tax Appellate Tribunal in the case of DCIT v. Nipun Builders & Developers P. Ltd. (ITA No. 557/DEL/2010) wherein the Tribunal dismissed the Revenue appeal by holding that the Assessing Officer has primarily relied upon the Report of the Investigation wing which cannot conclusively prove that assessee's own money was invested in the form of share application money. Further, it may be pointed out that 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"

7.11 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 incometax 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.

7.12 The Hon'ble ITAT Mumbai in the case of ITO vs Anand Shelters Pvt. Ltd. (2012) 20 Taxmann.com 153 has enumerated certain principles which would be extremely

useful in understanding the issue in hand. It has been stated in the said judgment that over the years, law regarding cash credits have evolved and has taken a definite shape. A few aspects of law u/s.68 can be enumerated.

1. Sec. 68 can be invoked when there is a credit of amounts in the books maintained by the assessee, such credit is a sum of money during the previous year and either the assessee offers no explanation about the nature and source of such credits or the explanation by the assessee in the opinion of the Assessing Officer is not satisfactory.

2. The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be formed objectively with reference to the material on record.

3. Courts are of the firm view that the evidence produced by the assessee cannot be brushed aside in a casual manner.

4. The onus of proof is not static. The initial burden lies on the assessee to establish the identity and the credit worthiness of the creditor as well as the genuineness of transaction.

5. The identity of creditors can be established by either furnishing their PANs or assessment orders. The genuineness of the transaction can be proved if it was shown that the money was received by A/c payee cheque. Creditworthiness of the lender can be established by attending circumstances.

7.13. During the assessment proceedings, the appellant has submitted Loan Confirmations, Copy of Acknowledgement and Copies of the Bank Statements of concerned parties. If the above referred principles are applied to the facts of the case under consideration, it can be seen that the identity of the creditors has been established as they are having PAN and they are regularly filing return of income. The genuineness of the transaction is established from the fact that both the acceptance and repayment of loan has been through banking channels. The creditworthiness of the lenders can be established from the statements. In the assessment order, the A.O. did not at all discuss the merit of submission made by the appellant and casually brushed aside the details filed by the appellant. Further, the appellant has stated that he had furnished all the relevant details during the course of the assessment proceedings and duly discharged its onus by furnishing the identity and address of the parties.

7.14 In view of the facts and circumstances mentioned above, in my opinion, that appellant has submitted sufficient documents to prove the genuineness of the loan transaction during the year under consideration. After considering the totality of facts, rival submissions, the applicable law and on the basis of discussion mentioned above, I have come to the conclusion that nature and source of loan transactions of Rs. 3,67,00,000/-stands explained. Consequently, addition made by A.O. cannot be sustained. Therefore, A.O. is directed to delete the addition of Rs.3,67,00,000/- This ground of appeal is allowed.”

19. None of these findings have been rebutted with evidences by the revenue though Ld. DR vehemently supported the order of the Assessing Officer.

20. In the case of PCIT v. Ami Industries (India) P. Ltd., (supra) the Hon'ble Jurisdictional High Court held as under:

“17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under Section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under Section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that nonresponding to notice would not ipso facto mean that the creditors had no credit worthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and creditworthiness of the creditors were available, without any infirmity in such evidence and the explanation required under Section 68 of the Act having been discharged, Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

19. In appeal, Tribunal noted that before the Assessing Officer, assessee had submitted the following documents of the three creditors: -

a) PAN number of the companies;

- b) Copies of Income Tax return filed by these three companies for assessment year 2010-11;
- c) Confirmation Letter in respect of share application money paid by them; and
- d) Copy of Bank Statement through which cheques were issued.

20. Tribunal noted that Assessing Officer had referred the matter to the investigation wing of the department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the investigation wing was received, Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the investigation wing, it was mentioned that the companies were in existence and had filed income tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted credit worthiness of the three creditors. Finally, Tribunal held as under: -

"5.7 As per the provisions of Section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following-

- (a) Identity of the creditor
- (b) Genuineness of the transaction
- (c) Credit-worthiness of the party

(i) In this case, the assessee has already proved the identity of the share applicant by furnishing their PAN, copy of IT return filed for asst. year 2010-11.

(ii) Regarding the genuineness of the transaction, assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii) Regarding credit-worthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their Board of Directors.

(iv) Regarding source of the source, Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, assessee need not to prove the source of the source.

(v) Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent company's own income from undisclosed sources. Accordingly, no addition can be made u/s.68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In NRA Iron & Steel (P) Ltd (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

21. Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and creditworthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. Appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

22. Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost."

21. The ratio of the above decision applies to the facts of the assessee's case. Assessee has discharged its onus by providing adequate evidences to prove that the transaction is genuine. Assessee has proved the genuineness, creditworthiness and identity by furnishing loan confirmations, financials, bank statements, copies of ITR of all the three creditors. Assessee has discharged her onus by furnishing all this information, however, the Assessing Officer except relying on the statement of

third party and whose statements were also not provided to the assessee treated the creditors as non-genuine without making any sort of enquiries. Therefore, in the facts and circumstances we do not find any infirmity in the order passed by the Ld.CIT(A) in deleting the addition and holding that the assessee has proved the genuineness of the transactions, identity and creditworthiness of the creditors and in deleting the addition made u/s. 68 of the Act. Thus, the order of the Ld.CIT(A) is sustained. Grounds raised by the revenue are rejected.”

7. We also note that the AO has issued notice under section 133(6) of the Act in order to verify the transaction and the lender has duly responded to the said notice by filing the necessary evidences as sought by the AO. Besides the assessee has paid interest on the said loan after deduction of TDS at source. Under these circumstances and considering the identical case being decided by the co-ordinate Bench as discussed hereinabove we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition as the assessee has proved all the three ingredients of section 68 of the Act

8. The issue raised in ground No.3 is against the confirmation of disallowance on account of interest of unsecured loan which is consequential to ground No.2 as decided above. Accordingly, we set aside the order of Ld. CIT(A) and direct the AO to delete the disallowance and accordingly the appeal of the assessee is allowed.

**ITA No.314/M/2020**

9. The issue involved in the present appeal is similar to one as decided by us in ITA No.299/M/2020 A.Y. 2012-13 with the only difference that instead of M/s. Marine Gems Pvt. Ltd. the assessee has taken unsecured loans from M/S Marine Gems Pvt. Ltd., M/s. Karishma Diamond Pvt. Ltd. and M/s. Maniratnam Exim Pvt. Ltd. which has been added by the AO

under section 68 of the Act. All these entities are belonging to Shri Gautam Jain and others group and the facts are quite similar. Accordingly, our decision in ITA No.299/M/2020, would mutatis mutandis apply to this appeal as well. Accordingly, the order of Ld. CIT(A) is set aside and AO is directed to delete the addition on account of unsecured loan of Rs.1,04,00,000/- and Rs.21,15,330/- on account of interest thereon. Accordingly, the appeal of the assessee is allowed.

10. In the result, both the appeals of the assessee are allowed.

**Order pronounced in the open court on 23.11.2021.**

**Sd/-**  
**(Amarjit Singh)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Rajesh Kumar)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated: 23.11.2021.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.