

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT**

**BEFORE SHRIPAWAN SINGH, JM & DR. A.L.SAINI, AM**

आयकरअपीलसं./ITA No.435/AHD/2017

(निर्धारणवर्ष / Assessment Year: (2012-13)

(Virtual Court Hearing)

Sejal Jewellers Pvt. Ltd, UG-4/5 Rangila Park, Ghod Dod Road, Surat-395007	V s.	Income Tax Officer, Ward-2(1)(2), Surat, Aaykar Bhavan, Majura Gate, Surat
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: <b>AAQCS 8686 P</b>		
<b>(Appellant )</b>		<b>(Respondent)</b>

Assessee by :Shri Rasesh Shah, CA

Respondent by :Shri H.P. Meena– CIT-DR

सुनवाईकीतारीख/ **Date of Hearing** : 21/01/2022

घोषणाकीतारीख/**Date of Pronouncement**: 28/02/2022

**आदेश / ORDER**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the assessee pertaining to the assessment year 2012-13, is directed against the order passed by the Ld. Commissioner of Income Tax (Appeals)-2, Surat [in short "CIT(A)"] dated 15.12.2016, which in turn arises out of an assessment order passed by Assessing Officer under section 143(3) of the Income Tax, 1961 (hereinafter referred to as 'the Act') dated 31.03.2015.

2. Grounds of appeal raised by the assessee are as follows:

*"1. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming the action of the Assessing Officer in making addition of Rs.5,00,00,000/- on account of bogus shares capital and share premium u/s 68 of the I.T. Act.*

*2. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming the action of the Assessing Officer in making addition of Rs.1,50,000/- on account of unexplained expenditure.*

*3. It is therefore prayed that the above addition made by the Assessing Officer and confirmed by learned Commissioner of Income-tax (Appeals) may please be deleted."*

3. Succinct facts are that during the course of assessment proceedings, assessing officer observed that assessee had received a sum of Rs.50,00,000/- towards share capital and Rs.4,50,00,00/- towards share premium totaling to Rs.5,00,00,000/- towards share capital from nine companies during the year under consideration. In order to verify the creditworthiness and genuineness of the transaction, the assessing officer issued notice u/s133(6) of the Act to these nine investor companies but only partial compliance was made. The assessing officer also visited Kolkata/Mumbai and found that the at the given addresses of the office premises, no such companies were running. The assessing officer noted that the addresses, as per the Canara Bank records the seven investor companies were of Kolkata. The DDIT, Investigation Wing, Kolkata u/s 131(1)(d) of the Act also conducted inquiries and reported that no compliance was made to the summons issued u/s131 of the Act, as the parties were not found at the given addresses. The local inquiries conducted that no such concerns was running from the address for the past 4 to 5 years from the given addresses and the report of the assessing officer was confronted to the assessee. The assessee company's authorized representative was asked to produce the investors alongwith the books of accounts as they were not traceable at the given addresses. The inquiries also revealed that companies namely Momentum Real Estate Pvt. Ltd., Pawanputra Metal Pvt. Ltd., Goriputra Metal Pvt. Ltd., Seva Infrastructure Pvt Ltd., and Founder Properties Pvt Ltd., have the address 2B, Grant Lane, 2<sup>nd</sup> Floor, Kolkata-700012, were having common address which is the address of Pravin Agarwal the entry operator. Therefore, the assessing officer on the analysis of the bank account found that these investor companies were not carrying out any actual business activity. The assessing officer held that the amount of investment of Rs.5,00,00,000/- in form of share capital/share premium was in form of cash credit and therefore assessing officer made an addition u/s 68 of the Act.

4. On appeal, Learned CIT(A) has confirmed the action of the assessing officer. Aggrieved, the assessee is in appeal before us.

5. Shri Rasesh Shah, Learned Counsel for the assessee, begins by pointing out that assessee furnished before the assessing officer the copy of Balance Sheet, profit and loss account, final accounts, Copy of Income Tax return acknowledgement and bank statement for the relevant period evidencing the amount received from share applicants on account of Share capital and share premium through banking channel. The Id Counsel contends that in the course of assessment proceedings, assessee filed the necessary documents such as share application form, minutes of the board meeting, share certificate, bank statement, acknowledgement of return of income, audited accounts, MCA master details, contra confirmation of each party from whom assessee received the share application money. Further, assessee filed own board resolution, Form no 2, being return of allotment filed with ROC and assessee's bank statement. All these details were filed, vide assessee's letters dated 09.03.2015, which were placed at 55 to 58 of paper book. The assessee has even filed shareholder's register alongwith said letter. In the course of appellate proceedings, the Id. CIT(A) issued the query letter dated 08.11.2016. In response to this letter, assessee filed detailed reply, vide letter dated 12.12.2016. The assessee clarified that he has already filed the shareholders' register, bank statement of investors, board resolution and other details and assessee explained the modus operandi of offering the shares to the investor companies. The assessee also filed the copy of the share certificates that were delivered to the investor companies. The assessee explained that the share capital including share premium was utilized for the purpose of working capital. It was further explained that the share premium was not used for the purpose of payment of dividend, and it was not written off. The assessee further explained the justification for collecting share premium of Rs. 4.5 crores from nine investor companies. The Ld Counsel relied on several case laws in support of his contention regarding the genuineness of the share capital. The assessee submitted during the appellate proceedings, that the copy of the statement on oath of Shri Pravin Agarwal was not provided to him by the assessing officer and neither the opportunity to cross examine of Shri Pravin Agarwal was provided to the assessee. All the investors companies have fully

complied with the notices issued u/s 133(6) of the Act, therefore, addition made by the assessing officer may be deleted.

6. Apart from verbal arguments, Id Counsel also submitted written submissions before the Bench, which is reproduced below:

*“The appeal is directed against the order of CIT(A) passed on 15.12.2016 confirming the addition of Rs. 5,00,00,000/- on account of share capital and share premium u/s 68 and Rs.1,50,000/- for commission on account of unexplained expenditure. The assessee company has filed its return of income on 13.09.2012 declaring therein total income of Rs. 31,940/-. The return of income was processed u/s143(1) of Income Tax Act, 1961. The case was selected for scrutiny through CASS. Accordingly, a notice u/s 143(2) of the Act was issued on 12.08.2013 and duly served upon assessee on 17.08.2013. Further, a notice u/s 142(1) of the Act, dated 02.12.2014 along with detailed questionnaire calling for various details was issued and served upon the assessee. During the year under consideration, the assessee company is engaged in the business of manufacturing & trading of gold and jewellery. During the year under, assessee has received the amount of 4,50,00,000/- (Rs. 90 per share) towards share premium and Rs. 50,00,000/- (Rs. 10 per share) towards share capital totaling to Rs.5 crores from nine parties. All the share application money were received in the month of March, 2012. Assessee didn't commence business before issue of the share capital. During the year under consideration, assessee received only Rs.76,929/-. This receipts are on accounts of labour charges which were received after receipt of share application money. In the course of assessment proceedings, assessee filed the necessary documents such as share application form, minutes of the board meeting, share certificate, bank statement, acknowledgement of return of income, audited accounts, MCA master details, contra confirmation of each party from whom assessee received the share application money. Further, assessee filed own board resolution, Form no 2 being return of allotment filed with ROC and assessee's bank statement. All these details were filed vide letters dated 09.03.2015 which were placed at 55 – 58 of paper book. The assessee has even filed shareholder's register alongwith said letter. All the nine companies have their registered office at Mumbai. Out of these nine companies, seven companies' bank statements show address of Kolkata other than 2 investors companies- Season Multitrade and Vigro Mercantile. In the course of assessment proceedings, assessing officer issued the notice u/s. 133(6) to all the parties and they have filed replies as mentioned in show cause notice placed at Page no. 51 of the paper book. The assessing officer himself mentioned in the show cause notice that this fact has been brought to the notice of assessee's authorized representatives vide order sheet dated 27.02.2015. However, assessing officer contradicted this fact at para no. 7.3 of the Assessment order that the department has tried to reach these companies, by way of issuing the 133(6), but except few, none has replied about their source in hand. The learned CIT(A) also in his finding at page no. 11 of the appellate order has mentioned that assessing officer issued notice u/s 133(6) of the Act to the nine investors companies but only partial compliance was made. In the course of assessment proceedings, assessing officer required assessee to furnish explanation as per*

order sheet entry dated 27.02.2015 on issue of share application money received by the assessee company. In response to the same, assessee filed detailed submission vide letter dated 09.03.2015. The assessing officer issued show cause notice on 16.03.2015 which is placed at page no. 47 to 54 of the Paper book. In the show cause notice at page no. 49 & 50 of paper book and at page no. 20 of the assessment order, it was mentioned by the assessing officer that five companies namely Momentum Real Estate Pvt. Ltd., Pawanputra Metal Pvt. Ltd., Goriputra Metal Pvt. Ltd., Seva Infrastructure Pvt. Ltd., Founder Properties Pvt. Ltd. are managed and controlled by Shri Praveen Agarwal, one of the entry provider of Kolkata as they are having the same address of Kolkata as given by Praveen Agrawal. In the show cause notice at para no. 4 (page no. 51 of the paper book), assessing officer mentioned that Shri Manoj Sinha visited Kolkata and Mumbai and he observed that no company found operational (page no. 51 of the paper book). The assessing officer has only reproduced the report specifically in case of two companies namely Season Multitrade Pvt. Ltd. and Virgo Mercantile Pvt. Ltd. wherein it was narrated that the place was always closed and various notices of department were pasted there. The assessing officer also mentioned in the show cause notice that investigation was carried out by DDIT (Inv.) Wing of Kolkata to verify the existence of the above-mentioned investors. It has been reported that none of the companies was found at the said addresses (page no. 50 of paper book). The assessing officer in the show cause notice at page no. 49 of paper book has further observed that CA Chinmoy Ghatak was the auditor of Momentum Real Estate Pvt. Ltd. who admitted in his statement that he did not verify the registers required to be maintained by various companies as required by the Companies Act, 1956 while conducting audit. The assessing officer further observed in the show cause notice (page no. 50 of the paper book) that CA Swapn Saha proprietor of S.K. Saha & Co. is the auditor of four applicant companies viz. Seva Infrastructure Pvt. Ltd., Founder Properties Pvt. Ltd., Substantial Consultancy Pvt. Ltd. and Raachi Consultancy Pvt. Ltd.. In the show cause notice, assessing officer observed that out of the four companies, the two companies viz Seva Infrastructure Pvt. Ltd. and Founder Properties Pvt. Ltd. are controlled by Praveen Agarwal and therefore it is accommodation entry companies. The assessing officer in the show cause notice inferred that as Seva Infrastructure Pvt. Ltd. and Founder Properties Pvt. Ltd. are associated with Praveen Agarwal, the other two companies viz Raachi Consultancy Pvt. Ltd. and Substantial Consultancy Pvt. Ltd. also belongs to Praveen Agarwal. The assessing officer at page no. 25 of the assessment order has observed that the investing companies have given audit fees ranging from Rs. 1500/- to about Rs. 10000/- as audit fees. At para no. 5 of the show cause notice (page no. 51 of the paper book), the assessing officer observed that the investor companies were not carrying out any proper activity as there is almost no revenue generation and no significant income. At para no. 6 of the show cause notice (page no. 52 of the paper book), the assessing officer observed that bank accounts show the immediate credit entries and thereafter the debit entries have been there in form of investments in the shares of the assessee company. Further, assessing officer mentioned that there was no proper movement of genuine funds but the accounts are used only for channelizing unaccounted money. It is to be noted that assessing officer has not brought any evidence on record in this regard. In response to show cause notice, assessee filed detailed reply vide letter dated 20.03.2015 which is placed at page no. 24 to 46 of the paper book. Thereafter,

*the summons u/s 131 were issued to directors of assessee company. The adjournment was sought by them as mentioned by assessing officer in para 7.3 of the Assessment order. In the assessment order, assessing officer has observed that assessee has not complied with the provisions of section 78(2) of Companies Act and therefore the share premium received by the assessee company was required to be added. Against the various observations made by the assessing officer, assessee filed the detailed written submission on 29.06.2016 which can be found at page no. 8 to 23 of paper book. The Ld. CIT(A) made further inquiry by issuing the notice u/s. 250(4) on 8.11.2016 at page no. 4-7 of paper book. Assessee filed the detailed submission in response to notice u/s. 250(4) on 12.12.2016 which can be found at page no 1-3.*

**Arguments:**

*In the course of assessment proceedings, assessee filed the necessary documents such as share application form, minutes of the board meeting, share certificate, bank statement, acknowledgement of return of income, audited accounts, MCA master details, contra confirmation of each party from whom assessee received the share application money. Further, assessee filed own board resolution, Form no 2 being return of allotment filed with ROC and assessee's bank statement. All these details were filed vide letters dated 09.03.2015 which were placed at 55 – 58 of paper book. The assessee has even filed shareholder's register alongwith said letter. In the course of appellate proceedings before CIT(A), the ld. CIT(A) issued the query letter dated 08.11.2016. In response to this letter assessee filed detailed reply vide letter dated 12.12.2016. Assessee clarified that he has already filed the shareholders' register, bank statement of investors, board resolution and other details and assessee explained the modus operandi of offering the shares to the investor companies. Assessee also filed the copy of the share certificates that were delivered to the investor companies. Assessee explained that the share capital including share premium was utilized for the purpose of working capital. It was further explained that the share premium was not used for the purpose of payment of dividend and it was not written off. Assessee further explained the justification for collecting share premium of Rs. 4.5 cr from nine investor companies. As explained at para no. 5, all the investors companies have fully complied with the notice issued u/s 133(6) and it was wrongly observed by assessing officer in assessment order and ld. CIT(A) in the appellate order that notices issued u/s 133(6) were partly complied.*

**Comments on statement of Praveen Agarwal:**

*Regarding the statement of Praveen Agarwal, it is submitted that Shri Praveen Agarwal didn't provide the full address of alleged five companies. The address mentioned in the bank statements of above mentioned 5 companies is 2B, Grant Lane, 2nd Floor, Kolkata – 700012, however, the floor was not mentioned in the address given Shri Praveen Agarwal. Assessee was provided with the statement of Shri Praveen Agarwal and he has given the name of companies controlled by him in reply to Q no 8, 9, 12 & 14. Shri Praveen Agarwal didn't mention any investor company of the assessee and therefore there is no link between the entry provider Praveen Agarwal and nine investor companies of the assessee. Moreover, the statement of Shri Praveen Agarwal had been taken to unearth the hawala entries of one Kushal Group. The assessee does not have any*

connection with Kushal Group. The assessee doesn't know any such person. A list has been prepared in Q. No. 16 of the said statement of Shri Praveen Agarwal in which names of various companies who have invested in the Kushal Group companies have been mentioned. Even in the said list also there were no mentions about the investor companies of the assessee. Moreover, if we look at the close scrutiny of various companies and their corporate identification number provided by the ROC, West Bengal, even any of these numbers do not match with the investor companies of the assessee. All the above five mentioned companies were incorporated in Maharashtra. Accordingly, the reference of the statement of Shri Praveen Agarwal made by assessing officer is totally baseless and had no connection with the investor companies of the assessee. Assessee do not find any logic, relation or link of the said statement of one so called entry operator with that of the assessee. It seems that assessing officer had tried to fit the assessee in the trap of entry operator with whom the assessee had no connection. The assessee requested to produce Shri Praveen Agarwal for cross verification in reply to show cause notice vide letter dated 20.03.2015. The assessing officer didn't produce Praveen Agarwal for cross examination.

**Comments on the report of Manoj Sinha:**

In the show cause notice issued by assessing officer it was mentioned (page no. 51 of the paper book) that Shri Manoj Sinha visited Kolkata and Mumbai and no company was found operational. The assessing officer only reproduced the report of two companies namely Season Multitrade Pvt. Ltd. and Virgo Mercantile Pvt. Ltd. The report reproduced by the assessing officer referred only two companies and in respect of the other seven companies, the report is silent. Further, no photo was enclosed although it was mentioned in the show cause notice. The assessing officer has not given any evidence of issuing commission to Manoj Sinha. Assessee demanded the Investigation report of ACIT, Shri Manoj Sinha and statement of neighbouring unit holders in reply to show cause notice (page no. 28 of paper book). It is to be noted that both these companies viz. Season Multitrade and Virgo Mercantile were assessed to tax by way of scrutiny assessment for the same assessment year 2012-13.

**Comments on the report of DDIT, Investigation Wing:**

The assessing officer has only made the bald statement in the show cause notice that DDIT Inv. Wing didn't find the company but the report of the Investigation Wing was not reproduced either in the show cause notice or assessment order.

**Comments on statement of CA Chinmoy Ghatak:**

The statement of CA Chinmoy Ghatak was recorded in case of Sterling Merchants Pvt. Ltd. who is not the investor company in case of assessee company. In the statement he has nowhere stated the name of Momentum Real Estate Private Ltd. as a shell company which he has audited. Assessee has demanded cross examination of CA Chinmoy Ghatak in reply to show cause notice page no. 26 of paper book (para no. 3). He has never stated that the companies have not maintained any of the statutory registers as prescribed under the Companies Act. It is to be noted that turnover of Momentum Real Estate Pvt. Ltd. was Rs. 7,32,25,318/-.

**Comments on CA Swapn Saha:**

1. *The assessing officer has drawn the conclusion only on the basis that auditors of Seva Infrastructure Pvt. Ltd. and Founder Properties Pvt. Ltd. allegedly to be belonging to Shri Praveen Agarwal are also auditors of other two companies. However, as stated above Seva Infrastructure Pvt. Ltd. and Founder Properties Pvt. Ltd. could not be linked with Praveen Agarwal. Further, the fact that Shri Swapn Saha is also the auditor of other two companies cannot establish that these two companies are entry provider companies.*

**Comments on the observation of Assessing Officer that the investor companies are paper companies:**

2. *In this regard, we hereby give the full analysis of the financial data of all the investor companies which establish the creditworthiness of all the companies without leaving any doubt.*

**Pawanputra Metal Private Limited :**

- a. *The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. *The company has been allotted the Corporate Identification Number CIN U27100MH2010PLC203861 which was converted into a Limited company in 2013 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. *The company has been allotted PAN AAFCP6072M and filed its Income tax returns regularly with the Income tax ward 9(2)(4) Mumbai.*
- d. *The audit report and audited financial statements clearly of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 4,84,64,258/-. Thus, contention of the assessing officer that the company has not generated any revenue is totally out of the place. It is not possible that every time business generates income. It may be possible that the income may be very low. Since the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**Substantial Consultancy Private Limited**

- a. *The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. *The company has been allotted the Corporate Identification Number CIN U51109MH2009PTC197378 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. *The company has been allotted PAN AAQCS2039A and filed its Income tax returns regularly with the Income tax ward 3(3)(3) Mumbai.*

- d. *The audit report and audited financial statements of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 4,07,00,100 /-. Thus, contention of the assessing officer that the company has not generated any revenue is totally out of the place. It is not every time possible that every time business generate income. It may be possible that the income may be very low. Since the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**Founder Properties Private Limited**

- a. *The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. *The company has been allotted the Corporate Identification Number CIN U70102MH2010PTC201397 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. *The company has been allotted PAN AABCF7861L and filed its Income tax returns regularly with the Income tax ward 3(1)-4 Mumbai.*
- d. *The audit report and audited financial statements of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 7,34,69,858/-. Thus, contention of the assessing officer that the company has not generated any revenue is totally out of the place. It is not every time possible that every time business generate income. It may be possible that the income may be very low. Since the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**Seva Infrastructure Private Limited :**

- a. *The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. *The company has been allotted the Corporate Identification Number CIN U70102MH2010PTC201453 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. *The company has been allotted PAN AAQCS2038B and filed its Income tax returns regularly with the Income tax ward 3(3)-4 Mumbai.*
- d. *The audit report and audited financial statements of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 4,07,37,200/-. Thus, contention of the assessing officer that*

*the company has not generated any revenue is totally out of the place. It is not every time possible that every time business generate income. It may be possible that the income may be very low. Since the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**Raachi Consultancy Private Limited :**

- a. *The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. *The company has been allotted the Corporate Identification Number CIN U51109MH2009PTC197376 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. *The company has been allotted PAN AAFCR4224H and filed its Income tax returns regularly with the Income tax ward 3(3) Mumbai.*
- d. *The audit report and audited financial statements of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 4,07,00,399/-. Thus, contention of the assessing officer that the company has not generated any revenue is totally out of the place. It is not every time possible that every time business generate income. It may be possible that the income may be very low. Since the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**Virgo Mercantile Private Limited**

- a. *The assessing officer has not verified the profit & loss account of the company wherein expenses have been debited under the head "Other Administrative expenses" which inter alia include salary expenses, staff welfare expenses, Bank charges, Auditor's remuneration, travelling expenses, printing & stationery expenses etc.*
- b. *Moreover, the company has engaged in the speculation business, share trading and F&O business also. It is an accepted fact that all these business activities are legal and are being carried out with registered broker and on the stock exchange. If all these activities have been carried out by the company, how can there be a doubt on creditworthiness and genuineness?*
- c. *The assessing officer has casually mentioned in generalized terms that the company does not have its own funds and whatever funds were raised by the company through share capital and premium, have been completely invested in the shares of unlisted private companies with*

*no apparent benefits. This is totally a wrong fact. Out of the total funds raised by the company, it has invested in the quoted shares to the tune of Rs.2,82,96,630/- which are the shares traded in the stock exchange.*

- d. The assessing officer has totally ignored the fact that the company had given loans and advances to various persons and from them the company has earned interest income also.*
- e. The company is incorporated under the Companies Act, 1956 with its Corporate Identity number U93090MH2007PTC170465 which has been allotted by ROC, Maharashtra, Mumbai. The company has been allotted the PAN AACCV6426E and being assessed by ITO Ward 443(3) Mumbai. Thus, the identity has been proved.*
- f. On our verification of the audit report and audited financial statements of the investor company, it is found that the company is actually carrying out the business of share trading and F&O. The company has carried out speculation business also in the stock market. Moreover, the company has advanced money to various persons from whom it has earned income also. The total income earned by the investing company before Provision of tax comes to Rs. 9,22,367/-. Thus, your general contention that the investing company has very little or meagre income is totally ruled out.*
- g. The company is allowed to carry out the business of investing and trading in shares and securities by its MOA and AOA and even the company is empowered to advance loans to other persons.*
- h. Further, it to be noted that scrutiny assessment was also completed in the case of the Virgo Mercantile Private Limited by way of assessment order passed u/s. 143(3) on 23.03.2015.*

**Season Multitrade Private Limited**

- a. The assessing officer has not verified the profit & loss account of the company wherein expenses have been debited under the head "Other Administrative expenses" which inter alia include salary expenses, staff welfare expenses, Bank charges, Auditor's remuneration, travelling expenses, printing & stationery expenses etc.*
- b. Moreover, the company has engaged in the speculation business, share trading and F&O business also. It is an accepted fact that all these business activities are legal and are being carried out with registered broker and on the stock exchange. If all these activities have been carried out by the company, how can there be a doubt on creditworthiness and genuineness?*
- c. The assessing officer has casually mentioned in generalized terms that the company does not have its own funds and whatever funds were raised by the company through share capital and premium, have been completely invested in the shares of unlisted private companies with*

*no apparent benefits. This is totally a wrong fact. Out of the total funds raised by the company, it has invested in the quoted shares to the tune of Rs. 2,99,87,865/- which are the shares traded in the stock exchange.*

- d. The assessing officer has totally ignored the fact that the company had given loans and advances to various persons and from them the company has earned interest income also.*
- e. The company is incorporated under the Companies Act, 1956 with its Corporate Identity number U51900MH2007PTC170394 which has been allotted by ROC, Maharashtra, Mumbai. The company has been allotted the PAN AALCS5917J and being assessed by ITO Ward 443(4) Mumbai. Thus, the identity has been proved.*
- f. On our verification of the audit report and audited financial statements of the investor company, it is found that the company is actually carrying out the business of share trading and F&O. The company has carried out speculation business also in the stock market. Moreover, the company has advanced money to various persons from whom it has earned income also. The total income earned by the investing company before Provision of tax comes to Rs. 8,09,673/-. Thus, your general contention that the investing company has very little or meager income is totally ruled out.*
- g. The company is allowed to carry out the business of investing and trading in shares and securities by its MOA and AOA and even the company is empowered to advance loans to other persons.*
- h. Further, it to be noted that scrutiny assessment was also completed in the case of the Season Multitrade Private Limited by way of assessment order passed u/s 143(3) on 20.03.2015.*

**Momentum Real Estate Private Limited**

- a. The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. The company has been allotted the Corporate Identification Number CIN U70102MH2010PTC199808 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. The company has been allotted PAN AAHCM3688A and filed its Income tax returns regularly with the Income tax ward 3(2)-4 Mumbai.*
- d. The audit report and audited financial statements of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 7,32,25,318 /-. Thus, contention of the assessing officer that the company has not generated any revenue is totally out of the place. It is not every time possible that every time business generate income. It may be possible that the income may be very low. Since*

*the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**Goriputra Metal Private Limited**

- a. *The company was incorporated in Maharashtra and having its registered office at Mumbai.*
- b. *The company has been allotted the Corporate Identification Number CIN U27200MH2010PTC203864 and the incorporation certificate has been issued by the ROC, Mumbai. Thus, the company is in existence.*
- c. *The company has been allotted PAN AADCG9106F and filed its Income tax returns regularly with the Income tax ward 9(1)-4 Mumbai.*
- d. *The audit report and audited financial statements of the investor company clearly mentioned that the company has carried out the business activities during the year and the total turnover achieved by the company was 6,28,01,450/-. Thus, contention of the assessing officer that the company has not generated any revenue is totally out of the place. It is not every time possible that everytime business generate income. It may be possible that the income may be very low. Since the company was in operation for the year under consideration, it had incurred various expenses also viz. Salary, audit fees, conveyance expenses, general expenses, printing & stationery, Accounting charges, ROC filing fees also.*

**General Comments for the investor companies :**

- a. *In para 5.2 of your show cause notice you have stated in the general terms that the investor company being accommodation entry provider, has received cash against the investment made by it in the share capital of the assessee company but there was no cash deposited in the bank account of the investor company. Nowhere it is found or substantiated by you that the assessee company has given or introduced cash directly or indirectly to this investing company.*
- b. *Nowhere in Section 68, (as it stood on the date of transaction during the year under consideration i.e. A.Y. 2012-2013,) it was stated that the assessee has to prove the source of the source of the credits. The assessee's onus is discharged when the source is proved to be genuine. Here in the case, the source of the investment in share capital of the assessee company by investor company is proved beyond doubt substantiated by the evidences. In fact, assessee proved source of the source by placing voluminous evidence on record. Even otherwise, amendment to prove source of source brought in section 68 of the Act was brought w.e.f. A.Y. 2013-14 and is not retrospective as held by Bombay High Court in case of CIT vs. M/s. Gagandeep Infrastructure Pvt. Ltd. [Tax Appeal No. 1613 of 2014] (Mum HC) and PCIT vs. Apeak Infotech – [2017] 397 ITR 148 (Bombay)*

- c. *The company is allowed to make investments in the shares and securities of any company established under the Companies Act, 1956 as per the objects of the company.*

**Comments on the entries in the bank accounts of investor companies:**

*In this regard it is submitted that all the amounts invested by the investor companies are through normal banking channel. The amounts credited in the bank accounts of the investor companies have also been received through the normal banking channels only. Thus, there was no scope left to doubt the transactions. Moreover, your honours would appreciate the fact that all the bank accounts were the "CURRENT ACCOUNTS" and no bank would give any interest on the current account. Any businessman would not keep his funds idle in the Current bank account. Thus, contention of assessing officer that there was very meager or small balance in the bank accounts cannot hold good. It has nothing to do with the genuineness of the transactions. Had it been so, the transactions entered into by any person enjoying the CC facilities of the bank would always be ingenuine because, in such cases the bank balance is always negative. So assessing officer's argument that since the bank balance is very small, the transactions are totally ingenuine is not at all correct. Further, all the investor companies have clearly showed their source of credits in the bank accounts. Thus, here the source of the source is also proved which was not supposed to be the duty of the assessee as per the provisions of Sec. 68 as it stood in the statute before its amendment w.e.f A.Y. 2013-2014. If there is sufficient bank balance before issuing the amount to the assessee company for investing in the shares, then there is hardly any scope left to doubt the genuineness of the funds. Moreover, it is to be appreciated that the companies have reasonably good amount of balances in their bank accounts at the year-end also. This fact is evident from the audit reports of the investor companies. It is to be noted that assessing officer has not brought on records any evidence that there was actually unaccounted money which was channelized. The source of the funds of the investor companies are clear. The funds which have been credited in the bank accounts of the investor companies has come from other companies who are also assessed to tax and are the actual business doing companies. How can there be an allegation that these funds are the unaccounted money? All the funds are from the genuine bank accounts and are reflected on the books of the respective companies. Hon'ble Delhi High Court in case of PCIT vs. M/s. Goodview Trading Pvt. Ltd. – Appeal No. ITA 377/2016 (HC) (Del.), confirmed the order of CIT(A) and Tribunal deleting the addition for share capital and securities premium. The hon'ble court reproduced the finding of CIT(A) at para 3 of the order which reads as under:*

*"I have considered the assessment order and submissions of the assessee. It is settled law that the onus of proving a claim is initially on the assessee but this is a shifting burden and once an assessee discharge its primary onus, the burden shifts on the revenue. In the present case the assessee had duly discharged its onus by submitting necessary evidence available to establish the bona fide of the transactions. Thereafter, the onus shifted on the revenue to prove that the claim of the assessee was factually incorrect. Simply by pointing out that the applicant companies did not have sufficient income or that the bank accounts*

*indicated credits and debits in rapid succession leaving little balance does not discharge the burden cast upon the revenue to take an adverse view in the matter. Further, if there was statement of a person or any other material indicating tax evasion by the assessee, or persons in control of its management, the material relied upon should have been made available to the assessee in its entirety. From the records, it appears that this was not done. It has been held by the Hon'ble Apex Court that taxing authorities exercise quasi-judicial powers and in doing so they must act in a fair and not a partisan manner. Although it is part of their duty to ensure that no tax which is legitimately due from the assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighted against the assessee. It is impossible to subscribe to the view that unless those authorities exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee, they should be deemed to have exercised it in a proper and judicious manner (CIT v. Simon Carves Ltd. [1976] 105 ITR 212 (SC)). In my considered opinion, this is not the case where addition should have been made u/s 153C, but w/s 147/143(3) after making proper enquires. In the present facts of the case, the addition is not legally sustainable and is deleted. Appellant gets relief of Rs.25,00,96,500/-."*

*The Hon'ble Court thereafter has given the finding at para 8 as under:*

*"It is quite evident from the CIT (A)'s reasoning in paragraph 4.3, that the materials clearly pointed to the share applicants possessing substantial means to invest in the assessee's company. The assessing officer seized certain material to say that minimal or insubstantial amounts was paid as tax by such share applicants and did not carry out a deeper analysis or rather chose to ignore it. In these circumstances, the inferences drawn by the CIT(A) are not only factual but facially accurate."*

*From the above discussion, it is clear that the investor companies are not paper companies although their income may be meagre but they have revenue from operations and capital reflected in their audited accounts. Assessee has projected the following chart to prove the credit worthiness of the investor companies :*

<i>Name of the Investor</i>	<i>Revenue from operations of investors</i>	<i>Amount of Trading Liabilities</i>	<i>Net worth of investor</i>	<i>Amount of investment in assessee company</i>	<i>Investment as % of Net worth</i>
<i>Pawan Putra Metal Private Limited</i>	<i>4,84,64,258</i>	<i>66,250</i>	<i>27,78,67,477</i>	<i>70,00,000</i>	<i>2.52 %</i>
<i>Substantial Consultancy Private Limited</i>	<i>4,07,00,100</i>	<i>3,45,009</i>	<i>33,34,19,162</i>	<i>50,00,000</i>	<i>1.50 %</i>

<i>Founder Properties Pvt. Ltd.</i>	7,34,69,858	71,020	30,22,62,508	75,00,000	2.48 %
<i>Seva Infrastructure Private Limited</i>	4,07,37,200	3,73,986	42,02,75,928	45,00,000	1.07 %
<i>Virgo Mercantile Private Limited</i>	35,60,379	23,34,727	18,83,13,147	45,00,000	2.39 %
<i>Season Multitrade Private Limited</i>	24,19,147	-	20,93,94,686	45,00,000	2.15 %
<i>Momentum Real Estate Private Limited</i>	7,32,25,318	3,59,028	40,94,39,510	70,00,000	1.71 %
<i>Goriputra Metal Private Limited</i>	6,28,01,450	56,500	28,92,02,375	10,00,000	0.35 %
<i>Raachi Consultancy Private Limited</i>	4,07,00,399	3,72,157	32,20,82,821	90,00,000	2.79 %

**Opportunity of Cross Examination and furnishing of evidence**

*The assessing officer has not provided the investigation report of Kolkata Investigation Wing, the photographs and statements of the neighbouring persons in case of two companies viz. Season Multitrade Pvt. Ltd. and Virgo Mercantile Pvt. Ltd as referred in the report of Shri Manoj Sinha, ACIT. The assessing officer has also not allowed the cross examination of Praveen Agarwal and auditor CA Chinmoy Ghatak. Accordingly, the assessment order passed by assessing officer is not valid in view of the following decisions of courts:*

- *Andaman Timber Industries vs. Commissioner of Central Excise (2015) 281 CTR 0241 (SC)*
- *DCIT vs Mahendra Ambalal Patel [Tax Appeal No. 462 of 1999] (Guj. HC)*
- *Commissioner of Income Tax, Central, Jaipur vs. Supertech Diamond Tools (P). Ltd (2014) 44 taxmann.com 460 (Rajasthan)*
- *Pr. Commissioner of Income Tax vs Chartered Speed Pvt. Ltd. [Tax Appeal No. 126 of 2015 with 127 of 2015] (Guj. HC)*
- *Kishanchand Chellaram v/s CIT [125 ITR 713] [SC]*
- *H.R. Mehta vs. ACIT – Income Tax Appeal No. 58 of 2001 (HC) (Bom.)*
- *Laxmanbhai S. Patel vs CIT [327 ITR 0290] (Guj HC)*

**Comment on issue of Securities Premium**

The company has not violated the provision of section 78(2) of the Companies Act, 2013 as alleged by the assessing officer. The object of section 78(2) of the Companies Act, 2013 is to ensure that dividend is not distributed out of Securities Premium account. Assessee has not declared dividend and not utilized Securities Premium account in contravention of 78(2) of Companies Act, 2013. The decision of Supreme Court in case of *Bharat Fire and General Insurance Ltd. vs. CIT* (1964) 53 ITR 108 which is relied by the assessing officer is not applicable to facts of the assessee company. The decision was regarding the taxability of income as dividend when declared from share premium in the hands of the recipient company as per the law as stood at the relevant time. Even in the said decision also Hon'ble Supreme Court has explained the same thing that sub section impliedly provides that it cannot be used for the purpose of paying dividends. Here in the case of the assessee company no dividend has been declared and distributed. Thus, there was no restriction on the use of the share premium account for the business purpose. Reliance is placed on the decision of *DCIT Vs. Finproject India (P.) Ltd.* (2018) 171 ITD 82 (Mum). The reliance is placed on the decision of Mumbai Bench in case of *ACIT vs. M/s. Gagandeep Infrastructure Pvt. Ltd.* (ITA No. 5784/M/2011) where it was held that premium was a capital receipt which was to be dealt with section 78 of the Companies Act, 2013 and the assessee company was not required to prove genuineness, purpose and justification for charging premium on shares. Further it was held that amendment brought by inserting clause (viib) to section 56 of the Act for proposing to tax excess securities premium is applicable from 01.04.2013 i.e. from and on 01.04.2013 and not retrospectively. Reliance is also placed on the following decisions:

- *CIT v/s. Anshika Consultants Pvt. Ltd.* [62 taxmann.com 192] (Del.) (HC)
- *Green Infra Ltd. v/s. ITO* [78 taxmann.com 340] (Bom.) (HC)

**Non – Applicability of judgment of NRA Iron & Steel [412 ITR 0161]**

The decision of the Supreme Court in case of *NRA Iron & Steel* [supra] is not applicable on the case of the assessee on account of following reasons:

- a. The assessing officer has not provided the investigation report of Kolkata Investigation Wing, the photographs and statements of the neighbouring persons in case of two companies viz. *Season Multitrade Pvt. Ltd.* and *Virgo Mercantile Pvt. Ltd.* as referred in the report of *Shri Manoj Sinha, ACIT*. The statement of the alleged entry provider *Praveen Agarwal* didn't implicate the name of the assessee. Assessing officer failed to establish any link of the assessee company with *Praveen Agarwal*.
- b. The report of *Manoj Sinha, ACIT* referred non-finding of two companies but in their cases assessment was made under scrutiny for same assessment year.
- c. In the case of the assessee, the notice u/s. 133(6) was served on all the investors and they have duly responded.
- d. In case before the Supreme Court, in many cases the bank statement of the investors were not filed. Here in all cases the bank statements were filed.

The judgment of Supreme court in case of *NRA Iron & Steel* [supra] was distinguished in the decision of *PCIT vs. Ami Industries (India) Ltd* [424 ITR 0219] (Bom) as under :

“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.”

However, as stated above in case of assessee, the field reports of investigation wing and ACIT were not furnished to the assessee with evidence.

### **Discharge of onus by the assessee**

It is clear that assessee has established identity of the investors, genuineness of transactions and credit worthiness of the investors beyond the shadow of doubt. Without prejudice, it is submitted that the Department is free to proceed to reopen the individual assessments, however, under no circumstances, can the amount of share capital be regarded as the undisclosed income of the assessee as held by Gujarat High Court in case of *Hindustan Inks and Resins Ltd. vs. DCIT – (2011) 60 DTR 0018* relying on the decision of *CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195* and *CIT vs. Steller Investment Ltd. (1991) 99 CTR (Del) 40*.

### **Further reliance is placed on the reliance is placed on following decision of courts:**

- *Earthmetal Electrical Pvt. Ltd. vs CIT [Civil Appeal No. 6181 of 2010 arising out of SLP No. 21073/2009 SC) wherein the decision of Tribunal and High court was reversed]*
- *Earthmetal Electrical Pvt. Ltd. vs ITO [ITA 590 of 2005] (Bom. HC)*
- *Earthmetal Electrical Pvt. Ltd. vs ITO (ITA 239/MUM/2005)*
- *CIT v/s Ujala Dyeing and Printing Mills (P) Ltd. (SC) SLP dismissed by SC reported in [317 ITR (ST.)(1)]*
- *CIT v/s Ujala Dyeing and Printing Mills (P) Ltd. [328 ITR 437] [Guj]*
- *CIT v/s M/s Pankaj Enka Pvt. Ltd. [Tax Appeal no. 967 of 2015] (Guj.)(HC)*
- *Pankaj Enka Pvt. Ltd. vs. DCIT [ITA No. 816/Ahd/2013]*
- *CIT vs. HimatsuBimet Ltd. [2011] 12 taxmann.com 87 (Guj.) (HC)*
- *Principal CIT vs. D & H Enterprises (2016) 241 Taxmann 0157 (Guj. HC)*
- *PCIT v/s. Hi- Tech Residency (P.) Ltd. [2018] 96 taxmann.com 403 (Delhi) (SC)*
- *PCIT v/s. Hi- Tech Residency (P.) Ltd. [2018] 96 taxmann.com 402 (Delhi)*
- *CIT v/s. Jalan Hard Coke Ltd. [2018] 95 taxmann.com 331 (SC)*
- *CIT v/s. Jalan Hard Coke Ltd. [2018] 95 taxmann.com 330 (Rajasthan) (HC)*
- *PCIT vs. Chain House International Pvt. Ltd. [104 CCH 0182 (SC) ]*
- *PCIT vs. Chain House International Pvt. Ltd. [(2018)408 ITR 0561 (MP) ]*
- *PCIT v/s. Paradise Inland Shipping Pvt. Ltd. [SLP no. 12644/2018] (SC)*

- *PCIT v/s. Paradise Inland Shipping Pvt. Ltd. [84 taxmann.com 58] (Bom.) (HC)*
- *CIT v/s. Ranchhod Jivanbhai Nakhava [21 taxmann.com 159] (Guj.) (HC)*
- *CIT vs. Gangeshwari Metal (P.) Ltd. (2013) 30 taxmann.com 328 (Delhi)*
- *CIT v/s. Vrindavan Farms Pvt. Ltd. – Tax Appeal No. 71 of 2015 (Del.) (HC)*
- *CIT v/s Oasis Hospitalities (P) Ltd. [333 ITR 119] [Del]*
- *CIT v/s KC Fibres Ltd. [332 ITR 461] [Del]*
- *CIT v/s Value Capital Services (P) Ltd. [307 ITR 334] [Del]*
- *CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 361 ITR 220 (Delhi)*
- *CIT v/s. Dolphin Canpack Ltd. (2006) 283 ITR 190 (Delhi)*
- *CIT vs. Divine Leasing & Finance Ltd. (2006) 74 CCH 0936 (HC.) (Delhi)*
- *Commissioner of Income Tax v/s Fair Finvest Ltd. (2013) 357 ITR 146 (Delhi)*
- *Pr. CIT v/s Rakam Money Matters Pvt. Ltd. [ITA No. 778/2015] (Delhi)*
- *Pr. CIT – 5 v/s Laxman Industrial Resources Ltd. [ITA 169/2017] (Delhi)*
- *CIT vs. Dwarkadish Investment (P) Ltd. [330 ITR 0298] [Del.]*
- *CIT vs. Winstral Petrochemicals (P) Ltd. [78 CCH 0445] [Del.]*
- ***PCIT vs. Oriental International Co Pvt Ltd. [ITA No. 9 of 2018 (Del)]***
- ***CIT-3 vs. Five Vision Promoters Pvt Ltd. [ITA 234/2015] (Del)***
- ***CIT vs. M/s Russian Technology Centre Pvt. Ltd. [ITA no. 547,549 and 555 of 2013 (Del)]***
- *PCIT v/s. Laxman Industrial Resources Ltd. [88 taxmann.com 648] (Del.) (HC)*
- *CIT v/s. Orchid Industries Pvt. Ltd. [88 taxmann.com 502] (Bom.) (HC)*
- *CIT vs. M/s Creative World Telefilms Ltd. [ITA (L) No. 2182 of 2009] (Bomb. HC)*
- *Barkha Synthetics Ltd. Vs ACIT [283 ITR 0377] (Raj. HC)*
- *CIT v/s. Pranav Foundation Ltd. – 51 taxmann.com 198 (Mad.)*
- *CIT v/s. Vacmet Packaging (India) Pvt. Ltd. – 367 ITR 217 (All.)*
- *CIT v/s. Navbharat Duplex Ltd. – Tax Appeal No. 279 of 2010 (All.)*
- *CIT vs STL Extrusion (P) Ltd [ 333 ITR 269] (MP)*
- *CIT v/s Arunananda Textiles (P) Ltd. [333 ITR 116] [KAR]*
- *CIT vs. Peoples General Hospital Ltd. [85 CCH 0223] [MP.]*
- *Deem Roll Tech Ltd. v/s. Dy. CIT [92 taxmann.com 72] (Ahd.)*
- *ACIT vs. El Dorado Biotech (P.) Ltd. [2021] 123 taxmann.com 265 (Ahd.)*

**Receipt of share capital and securities premium before commencement of business:**

*Assessee has not started the business before the receipt of the share application money. Even assessing officer has confirmed this fact at page no. 33 of the assessment order by observing that assessee-company has not started the business after receiving premium even after two years. This observation made by assessing officer is partially true in as much as assessee started the business in the next year and during the year assessee received only labour charges of Rs. 76,926/- after receipt of Share Application money. When the business is not started at the time of subscription of the share capital, the addition cannot be made as held by the Gujarat High Court in case of ACIT vs. Geera Finance Ltd. [Tax Appeal No. 67/2001]. This case law is followed by Ahmedabad Bench in case of Sonal Jewellery Pvt. Ltd. vs. DCIT – [ITA No. 331/AHD/2017].”*

7. On the other hand, Ld DR for the Revenue submitted before us that it is well settled principal of law as declared by the Hon'ble Supreme Court in the case of Sumati Dayal Vs CIT, (214 ITR 801) that the true nature of transactions have to be ascertained in the light of the Surroundings circumstances. Undisputedly, the onus of proving of credits in its books of accounts lies with the assessee and the settled position of law is that the assessee is required to prove all the three criteria, that is identity, genuineness and creditworthiness. But in the instant case, the assessee company failed to discharge this onus. Therefore, the Assessing Officer was justified in adding share subscription money to assessee's taxable income as unexplained cash credit.

8. Learned DR also submitted that statement of Shri Praveen Agarwal, which had been taken by the Income Tax Authorities, to unearth the hawala entries, are important. Shri Praveen Agarwal, was engaged in the business of entry provider(accommodation entry provider) therefore, these share applicant Companies are bogus, as Shri Praveen Agarwal, used these companies for providing accommodation entry.The Ld. CIT-DR pointed out that net income shown by the share applicants are negligible. Therefore, the assessee has failed to prove the creditworthiness of the share applicants. He further stated that assessee has also failed to prove the identity and genuineness of the said transactions as all the share applicants are the paper companies. The Ld. DR further submitted that the assessee had miserably failed to explain the nature and source of the sums in question, so the AO has rightly added the sums u/s 68 of

the Act. Hence, Id DR prays the Bench that addition made by the assessing officer may be upheld.

9. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. An assessee receiving a credit has to testify its case through the 'triple marker test' of Identity, Creditworthiness and Genuineness of Transactions which are the ingredients of Section 68 of the Act to prove the genuineness of cash credits received by the assessee. Before us the assessee-company has submitted in respect of each share applicants, the following details and documents to prove the Identity, Creditworthiness and Genuineness of Transactions, which are given below:

(1) In respect of M/s Momentum Real Estate Pvt Ltd, the assessee has furnished the following evidences:

- (a) share application form (paper book pages 112-114)
- (b) Minutes of Board meeting (pb 15)
- (c) Share certificate (pb 116)
- (d) Relevant bank statement (pb 117-118)
- (e) Acknowledgement of return of income (pb 119)
- (f) Audit report alongwith financial statement for the A.Y. 12-13 (pb 120-131)
- (g) MCA master details alongwith signatories details (pb 132)

(2) In respect of M/s Seasons Multitrade Pvt Ltd, the assessee has furnished the following evidences:

- (a) Share application form ( pb 133)
- (b) Minutes of board meeting ( pb 134)
- (c) Share certificate ( pb 135)
- (d) Contra confirmation (pb 136)
- (e) Relevant bank statement alongwith bank book (pb 137-138)

(f) Acknowledgement of return of income alongwith computation of income for AY 12-13 ( pb 139-140)

(g) Audit report alongwith financial statements for the AY 12-13 (pb 141-151)

(h) MCA master details alongwith signatories details (pb 152)

(3) In respect of M/s Virgo Mercantile Pvt Ltd, the assessee has furnished the following evidences:

(a) Share application form (pb 153)

(b) Minutes of board meeting (pb 154)

(c) Share certificate ( pb 155)

(d) Contra confirmation (pb 156)

(e) Relevant bank statement alongwith bank book (pb 157-158)

(f) Acknowledgement of return of income along with computation of income for A.Y 12-13 (pb 159-160)

(g) Audit report alongwith financial statements for the A.Y. 12-13 (pb 161-172)

(h) MCA master details alongwith signatories details (pb 173)

(4) In respect of M/s Raachi Consultancy Pvt Ltd, the assessee has furnished the following evidences:

(a) Share application form (pb 174-176)

(b) Minutes of board meeting (pb 177)

(c) Share certificate ( pb 178)

(d) Relevant bank statement (pb 179-180)

(e) Acknowledgement of return of income (pb 181)

(f) Audit report alongwith financial statement for the AY 12-13 (pb 182-194)

(g) MCA master details alongwith signatories details (pb 195)

(5) In respect of M/s Seva Infrastructure Pvt Ltd, the assessee has furnished the following evidences:

- (a) Share application form (pb 196-97)
- (b) Minutes of board meeting (pb 198)
- (c) Share certificate ( pb 199)
- (d) Relevant bank statement (pb 200-201)
- (e) Acknowledgement of return of income (pb 202)
- (f) Audit report alongwith financial statement for the AY 12-13 (pb 203-215)
- (g) MCA master details alongwith signatories details (pb 216)

(6) In respect of M/s Founder Properties Pvt Ltd, the assessee has furnished the following evidences:

- (a) Share application form( pb 217-219)
- (b) Minutes of board meeting (pb 220)
- (c) Share certificate ( pb 221)
- (d) Relevant bank statement (pb 222)
- (e) Acknowledgement of return of income (pb 223)
- (f) Audit report alongwith financial statement for the AY 12-13 (pb 224-235)

(7)In respect of M/s. Substantial Consultancy Pvt Ltd, the assessee has furnished the following evidences:

- (a) Share application form (pb 237)
- (b) Minutes of Board meeting (pb 238)
- (c) Share certificate ( pb 239)
- (d) Relevant bank statement ( pb 240)
- (e) Acknowledgement of return of income (pb 241)
- (f) Audit report alongwith financial statement for the AY 12-13 (pb 242-255)
- (g) MCA master details alongwith signatories details (pb 256)

(8) In respect of M/s Pawanputa Metal Pvt. Ltd, the assessee has furnished the following evidences:

- (a) Share application form ( pb 257)
- (b) Minutes of board meeting ( pb 258)
- (c) Share certificate ( pb 259)
- (d) Relevant bank statement (pb 260)
- (e) Acknowledgement of return of income( pb 261)
- (f) Audit report alongwith financial statement for the AY 12-13 (pb 262-274)
- (g) MCA master details alongwith signatories details (pb 275)

(9) In respect of M/s Goriputa Metal Pvt. Ltd,the assessee has furnished the following evidences:

- (a) Share application form ( pb 276)
- (b) Minutes of board meeting (pb 277)
- (c) Share certificate ( pb 278)
- (d) Relevant bank statement (pb 279)
- (e) Acknowledgement of return of income (pb 280)
- (f) Audit report alongwith financial statement for the AY 12-13 ( pb 281-293)
- (g) MCA master details alongwith signatories details (pb 294)

10. It is a well-accepted law that Section 68 provides for fulfillment of three basic conditions viz. (i) **Identity** (ii) **Genuineness** of the transaction; and (iii) **Creditworthiness** of the share applicants. Further, the primary onus to prove of these three conditions lies on the assessee. In the present case, it is an undisputed fact that during the course of assessment proceedings, and appellate proceedings, the assessee has furnished the complete details and evidences in respect of each share applicant, as noted above. Therefore, Id Counsel claimed that by

submitting these above noted documents and evidences, the assessee-company has proved three ingredients of section 68 (i) **Identity** (ii) **Genuineness** of the transaction; and (iii) **Creditworthiness** of the share applicants. At this juncture, Id Counsel also has argued that Assessing Officer ought to have verified with the respective AOs of the share applicants as per law and procedure laid down by Hon`ble Gujarat High Court in the case of CIT v. Ranchod Jivabhainakhava (ITA 50 of 2011 (Guj.)). The Id Counsel also placed reliance on the judgment of Hon'ble Supreme Court in the case of ORRISSA CORPORATION LTD. 159 ITR 78 and of Hon'ble ITAT, Ahmedabad in the Case of ROHINI BUILDERS - 76 TTJ 521 (Ahd).

11. Learned DR for the Revenue heavily relied on the statement of Shri Praveen Agarwal. He stated that Shri Praveen Agarwal, was entry provider and these share applicant Companies were used by Shri Praveen Agarwal, for providing accommodation entry. Per Contra, Ld Counsel submits that Assessing officer has used the statement of Shri Praveen Agarwal, without providing opportunity of cross examine the same.

We note that not allowing the assessee to cross examine the witness 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. We note that same view expressed by the Hon`ble Calcutta High Court in the case of Eastern Commercial Enterprises 210 ITR 103 (Cal), wherein it was held that it is a trite law that cross examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against the party unless the party is put on notice of the case made out against him. Therefore, the addition made by the assessing officer based on the statement of an alleged entry operator Shri Praveen Agarwal is not sustainable in law, as the assessing officer did not provide an opportunity to the assessee to cross examine the statement of Shri Praveen Agarwal, therefore addition made by the assessing officer needs to be deleted.

Apart from this, we note that Shri Praveen Agarwal didn't mention any investor company of the assessee and therefore there is no link between the entry provider (Praveen Agarwal) and nine investor companies of the assessee. That is, in the statement of Shri Praveen Agarwal, name of share applicants are not there. Moreover, the statement of Shri Praveen Agarwal had been taken to unearth the hawala entries of one Kushal Group. The assessee-company, under consideration, does not have any connection with Kushal Group. The assessee doesn't know any such person. A list has been prepared in Q. No. 16 of the said statement of Shri Praveen Agarwal in which names of various companies who have invested in the Kushal Group companies have been mentioned. Even in the said list also there were no mentions about the investor companies of the assessee. The Id Counsel also contends that various companies and their corporate identification number provided by the ROC, West Bengal, even any of these numbers do not match with the investor companies of the assessee. All the above five mentioned companies were incorporated in Maharashtra. Accordingly, the reference of the statement of Shri Praveen Agarwal made by assessing officer is totally baseless and had no connection with the investor companies of the assessee-company. There is no relation or link of the said statement with share applicants of assessee-company. Therefore, such statement (Shri Praveen Agarwal) should not be used against assessee.

12. We note that with effect from assessment year 2013-14 section 68 of the Act has been amended to provide that if a closely held company fails to explain the source of share capital, share premium or share application money received by it to the satisfaction of the A.O., the same shall be deemed to be the income of the company u/s 68 of the Act. The said amendment has been held to be prospective and not retrospective by Hon`ble Bombay High Court in **Gagandeep Infrastructure Private Limited TS-132-HC-2017(Bom)**. We note that assessee`s case relates to assessment year 2012-13, hence amended provisions of section 68 does not apply to the assessee-company under consideration, therefore, assessee-company need not to prove source of the source. However, after going through the assessee`s paper book and facts

relating to share applicants, we note that assessee has proved source of the source also. Further, Hon`ble Bombay High Court in case of **Gagandeep Infrastructure Private Limited (supra)** has held that where revenue urged that assessee company received share application money from bogus shareholders, it was for revenue to proceed by reopening assessment of such shareholders and assessing them to tax and not to add same to assessee's income as unexplained cash credit.

13. Before we adjudicate as to whether the Ld. CIT(A)'s action is right or erroneous, let us look at section 68 of the Act and the judicial precedents on the issue at hand. Section 68 under which, the addition has been made by the AO 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 also held by the Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570.

The main plank on which the AO made the addition was because all the directors of the share subscribers did not turn up before him. In our view, this approach of the AO is not correct. It is noted that the all the documents were furnished before the AO which substantiated the transaction between the assessee

company and the share applicants. It is therefore not a case where the documents sought from the applicants to examine the transaction were not available before the AO. As regards the issue of non-appearance of the share applicants, we note that 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.*

14. In the case of CIT Vs. Jalan Hard Coke Ltd (95 taxmann.com 330), the Hon'ble Rajasthan High Court noted that the assessee had furnished the details of the share applicants but expressed its inability to produce the share applicants before the AO for examination. The Hon'ble High Court held that mere non-

appearance of share applicants could not be reason enough to assess the share application monies received by way of unexplained cash credit. The SLP filed by the Revenue against this judgment has been dismissed by the Hon'ble Supreme Court. The relevant extracts of the judgment are as follows:

*"6.2 Taking into consideration the aforesaid decision we are of the considered opinion that company cannot be assessed for the income tax to find out the person who has applied as share holder. The view of taken by the Tribunal is just and proper, therefore, the issue is answered in favour of the assessee and against the department."*

15. Further, in the case of CIT v. Orchid Industries (P.) Ltd. [2017] 88 taxmann.com 502/397 ITR 136, the Hon'ble Bombay High Court on the issue of non-appearance of share applicants had held as under:

*"[5] The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.*

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

16. 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.”*

17. Further the Hon'ble Calcutta High Court in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata (347 ITR 347)also 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.”*

18. Further, the Hon'ble High Court at Calcutta in the case of Crystal Networks (P.) Ltd. v. Commissioner of Income-tax (353 ITR 171), on the issue of unexplained cash credits, 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).*

9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of *Udhavdas Kewalram v. CIT* [1967] 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.

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.

19. 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 CIT Vs Dataware Pvt Ltd (ITAT No. 263 of 2011) dated 21.09.2011 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."*

20. 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.*

21. The Hon'ble' High Court of Delhi in the case of CIT v/s. Steller Investment Ltd 192ITR 287 has held that:

*"...if it be assumed that the subscribers to the increased share capital were not genuine even then under no circumstances could the amount of share capital **be regarded as undisclosed income of the assessee. It may be there were some bogus shareholders and the money may have been provided by some other persons.** It would have been more sensible to re - open the assessments of the person alleged to have advanced the money. How this amount of increased share capital could be assessed in the hands of the company itself was beyond understanding.*

The Hon'ble Supreme Court has agreed with this view, and dismissed the SLP of Revenue in CIT v/s Stellar Investment Ltd in 251 ITR 263 (SC).

22. The Hon'ble jurisdictional ITAT in the case of Pankaj Enka v/s DCIT in ITA No.816/Ahd/2013 has held that:

*" the assessee has discharged the primary onus to prove as genuine share application money. On perusal of bank statement, no cash has been deposited by them before issue of cheque to the assessee towards share application money. If the assessing officer doubts the source of source, he was free to conduct inquiry in the case of person from whom assessee has received funds" .*

The Hon'ble' jurisdictional High Court has concurred with this view of Hon'ble ITAT in ITA No. 967/2015 dated 05.01.2016.

23. On the identical facts, in Tax appeal no.442 of 2011 of Hon'ble' Gujarat High Court in the case of CIT v/s Belgium Glass & Ceramics P Ltd (date of pronouncement 13.06.2012), held as follows:

*"4. On consideration of facts and the order of the Tribunal, it is seen that while reversing the order of the Commissioner (Appeals) the Tribunal took view that once the applicants admit to have made the payment of share application money, no further inquiry was necessary into the creditworthiness and genuineness of the transactions in the case of assessee - company. It took such view on the basis of various judicial pronouncements of the High Courts in which, the issue of share application money was considered and mainly relied on the decision of the Apex Court in CIT v/s Lovely Exports P Ltd (2010 ) 14 SSC 761)*

*4.1 In the facts of the case, it is not disputed that the assessee had furnished the assessing officer the names of 15 persons from whom the share application money was receive. The assessee had also produced in respect of each of them the copies of revenue records in form no. 7/12 extracts showing that they were holders of agricultural land. In Lovely Exports (supra), the Supreme Court*

*considered the issue of share application money regarded as undisclosed income u/s 68 of the Act and observed that if share application money was received by assessee - company, from the alleged bogus share holders, whose names were given to assessing officer then the Department was free to proceed to reopen the individual assessments in accordance with Law."*

24. In CIT v/s Ujala Dyeing & Ptg Mills Pvt. Ltd, the Hon'ble High Court of Gujarat has held that "the assessee discharged its onus of proving the identity or parties, genuineness of transactions and creditworthiness of share applications in as much as evidently their returns of income, assessment orders, balance sheets, showing investment, explanation regarding how they raised funds have been submitted before lower authorities".

The Hon'ble Gujarat High Court in many decisions, such as in case of Hindustan Inks & Resins Ltd v/s DCIT, reported in Tax appeal no. 523 of 2004 dated 17. 06. 2011 (2011) 60 DTR 0018 and in the case of CIT v/s Himatsu Blmet Ltd (High Court of Gujarat no. 546 of 2009, Order dt 04.05.2010 in Tax Appeal), also held that once the basic documents such as, confirmation, copy of bank account, copy of share application and copy of income tax returns of the creditors, or share applicants have been furnished by the assessee, the onus of proving the above three elements required for section 68 is discharged. It is also held that it is not for the assessee to prove or to explain the source of the share applicant or loan creditor. It is also held that if there is any doubt regarding source of the said creditors / share applicants, the matter can be examined by the concerned assessing officer in the assessment of the creditor / share applicant.

25. **Conclusion:** We note 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 reserves.

We note that 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 and 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 acknowledgments were placed on AO's 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. We note that collective and cumulative view of the facts and circumstances discussed above leads to conclusion that three ingredients of the Section 68 are satisfied to a reasonable extent, by the assessee. This coupled with fact that no adverse finding has been made by the assessing officer based on coordinated investigation. The cogent evidences and sound reasoning, makes the adverse conclusion drawn by the assessing officer, regarding three elements of section 68, untenable. In the facts and circumstances of the case as discussed above, no addition is warranted under Section 68 of the Act. Therefore, we delete the addition of Rs.5,00,00,000/-.

26. Before parting, we would like to state that ground no.2 raised by the assessee pertains to addition of Rs.1,50,000/-, as unexplained expenditure u/s 69C of the Act. This amount relates to issue of share capital/premium wherein it has been held by the assessing officer that assessee had obtained accommodation entries of Rs.1,50,000/- in form of share capital/premium from the various entry providers for which certain expenses would have incurred by way of commission payment. Since, we have deleted the addition relating to share capital/premium, therefore, this addition of Rs.1,50,000/- is consequential in nature and hence the same is hereby deleted.

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

Order pronounced on 28/02/2022 by placing the result on the notice board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

Surat/दिनांक/ Date: 28/02/2022

**Dkp Outsourcing Sr.P.S.**

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

Assistant Registrar/Sr. PS/PS  
ITAT, Surat