

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 1330/Mum/2021 (Assessment Year 2012-13)

ITO, Ward-1(2)(3) Room No.527, 5 th Floor Aaykar Bhawan Churchgate, Mumbai-400 020	Vs.	Neminath Homes Pvt.Ltd. 115, 4 th Floor Development Bank Building Crawford Market Mumbai-400 001 PAN : AABCO2184R
(Appellant)		(Respondent)

Assessee by	Shri Prakash Jhunjhunwala
Department by	Shri A.K.Kardam,CIT-DR
Date of Hearing	10.02.2022
Date of Pronouncement	28 .03.2022

ORDER

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned Commissioner of Income-tax(Appeals)-47 dated 15.04.2021 and pertains to Assessment Year 2012-13.

2. The grounds of appeal are as under:-

1. Whether On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition u/s. 68 of share application money of Rs. 2,35,00,000/-without appreciating the fact that money has been received from bogus parties with no liabilities,
2. Whether On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs. 2,35,00,000/- holding that same is capital receipts without appreciating the fact that same is accommodation entry received from hawala operator and liable to be taxed u/s. 68 of the I.T. Act, 1961.
3. Whether On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs. 5,95,00,000/- received as unsecured loan without appreciating the fact that same is accommodation entry received from hawala operator Sh. Bhanwarlal Jain.

4. Whether On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting the disallowance of interest paid of Rs. 8,88,000/- without appreciating the fact that interest bearing fund has been diverted for non business purpose.

5. Whether On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs. 26,17,60,000/- received as investment from bogus parties under Joint Venture agreement without appreciating the fact that same was received from bogus parties without any commercial expediency.

6. Whether On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs. 26,17,60,000/- received by assessee under Joint Venture agreement without appreciating the fact that same was received from

3. Brief facts of the case are that that the appellant company is engaged in the real estate and construction business. The appellant filed its return of income u/s. 139(1) on 30/09/2012 declaring the total income of Rs.48,380/-. The case was selected for scrutiny and therefore, the AO issued a notice u/s.143(2) on 06/08/2013 and took up the proceedings. During the course of hearing, AO issued the notices u/s 142(1) and directed the appellant to furnish the documents on various issues raised namely share application money, unsecured loans received from entities connected to Jain group of cases as also investments made by joint venture partners. In response, the appellant had filed the written submissions and supporting documents to justify the transactions recorded in audited books of accounts. However, the AO rejected the contentions of the appellant and made various additions u/s 68 of the Act and disallowances in the assessment order dated 30.03.2015, and consequently determining the income at Rs. 35,09,82,040/-.

4. Apropos issue of share application money of Rs. 2.35 crores u/s. 68 of the I.T.Act. During course of assessment proceedings, the Id. AO observed that the appellant had received the share application monies @ 5/- per share (Face value is of Rs.10 per share- as part payment) along with share premium of Rs.10/- per share (total share premium is of Rs.20/- per share) from the 7 parties.

The AO observed that the appellant had forfeited the above mentioned share application money (part paid) of Rs.2,35,00,000/- during the year, on the grounds that these parties failed to pay subsequent payments as per schedule. The AO therefore asked the appellant to furnish the party wise details of share applications and return of allotment in Form 2 filed with Registrar of Companies (ROC). Further the AO had also issued notices u/s 133(6) to all the above share-applicants at their given addresses. However he noted that all the notices were returned unserved by the postal- authorities. The AO therefore directed the appellant to furnish the I.T. returns, Ledger account, PAN card and bank statements of share applicants. In response, the appellant filed the submissions and documents on record. The appellant requested the AO to issue fresh notices u/s 133(6) due to change in name of the company from Orbit Heights P. Ltd to Neminath Homes P Ltd . However, the Id. AO rejected the appellant's request and held that the appellant had not proved the identity and credit-worthiness of the share applicants and genuineness of transactions and there after relying on certain judicial pronouncements, the AO treated this share application as unexplained and made an addition of Rs.2,35,00,000/- u/s 68 of I.T. Act, 1961.

5. Before the Id.CIT(A) assessee submitted that these share application money were received in earlier year. That on the touchstone of several case laws, these can not to be taxed in the present assessment year. The Id.CIT(A) accepted the submissions and held as under:-

“I have considered the facts of the case, submissions and contentions of the assessee as also the order of the AO. I have also perused the material on record as also legal and factual matrix. On perusal of the documents submitted by the assessee, it is seen that the disputed share applications monies of Rs.2,35,00,000/-, in respect of which addition is made u/s 68, had not been received during impugned year (A.Y.2012-13). On the contrary such share applications monies had been received in earlier years viz. A.Y.2010-11. The copies of ledger accounts and bank statements fortify the fact that such share applications monies had been received during A.Y.2010-11. The audited balance sheet of earlier year of the assessee also show such share applications money of Rs.2,35,00,000/- and further the balance sheet of impugned year does not disclose

the receipt of share application during the year. Accordingly, it remain an undisputed fact that such share application monies has not been received during the year, rather had been received in earlier year(A.Y. 2010-11). Therefore, such investments or otherwise could have been considered by the AO only in the year of receipt, which is A.Y. 2010-11. Therefore the addition made by the AO u/s 68 in this regard during the year becomes unsustainable in law and is liable to be deleted.”

6. In this regard, he also referred to following case laws

- i) PCIT v Real value Realtors Pvt.Ltd. 113 Taxmann.com 62 (Bombay High Court)
- ii) Ivan Singh vs. ACIT 116 taxmann.com 499 (Bombay High Court)
- iii) CIT vs Parmeshwar Bohra 301 ITR 404 (Rajashtan High Court)
- iv) CIT vs Usha Stud Agricultural Farms Ltd. 301 ITR 384 (Delhi High Court)
- v) DCIT v Global Mercantiles (P) Ltd. 67 taxmann.com 166 (Kolkatta High Court)
- vi) Tulip Hotels Pvt.Ltd. vs DCIT 132 TTJ 3 (ITATs)
- vii) Vardhman Overseas Ltd. vs ACIT 24 SC 393 (ITAT, Delhi)

7. The Id.CIT(A) also found force in assessee's contention that addition u/s. 68 cannot be made as necessary amendment provisions were not applicable in the assessment year under consideration and the share premium is a capital receipt. In this connection, he referred to following case laws

- i) M/s. Apeak Infotech 397 ITR 148(Bom.HC)
- ii) Orchid Industries Pvt.Ltd. 397 ITR 136 (Bom.HC)
- iii) Gagandeep Infrastructure Pvt.Ltd. in ITA 1613 of 2014 (Bom.HC)
- iv) Green Infra Ltd. (2017) 392 ITR 7 (Bom.HC)
- v) G.S.Homes & Hotesl Pvt.Ltd. 7 tamxann.com 120 (Bombay High Court)
- vi) Vodafone India Service Pvt.Ltd. vs Addl.CIT 368 ITR 1 (Bombay High Court)

8. The order of Id.CIT(A) in this regard as under:-

“There is also force in submission of Ld. AR that addition u/s.68 cannot made of share capital and premium since such is a receipt on capital account and is not of revenue nature. It is observed that the provision of Sec.56(2)(viib) inserted by Finance Act, 2012 had been made applicable from A.Y.2013-14 at does not apply to

the year relevant to A.Y.2012-13. The said view had been adopted in the jurisdictional High Court decisions in the cases of M/s. Apeak Industries (397 ITR 148) Orchid Industries Pvt Ltd (397 ITR 136), Gagandeep Infrastructure Pvt Ltd and M/s., Green Infra Ltd cited supra and by Hon'ble Apex Court in the case of M/s G. S. Homes & Hotels Pvt Ltd (7 Taxmann.com 120) wherein it is held that the share premium is a Capital receipt. Also in the present case, on forfeiture the share application money has been credited to the capital reserve account and not in profit and loss account.

Hon'ble Jurisdictional High Court of Bombay in the case of Vodafone India Service Pvt Ltd vs. Addl. CIT reported in 368 ITR 1 has decided that "the amounts received on issue of share capital including the premium are undoubtedly on capital account". The CBDT vide Circular No.02/2015 dated 29/01/2015 decided not to file the SLP before Hon'ble Supreme Court of India as a result of which such decision of Jurisdictional High Court of Bombay has reached to finality. The judicial decisions relied by Ld. AR also support the case of the appellant wherein it has been decided that forfeiture of shares cannot be brought to tax since it is of capital account. Accordingly, respectfully following the judicial decisions cited supra, I hold that AO is not justified in making the addition u/s.68 of the share applications monies received in earlier years and the same therefore deserves to be deleted. I therefore direct the AO to delete the addition of Rs. 2,35,00,000/- u/s 68 of I.T. Act, 1961."

9. Apropos consequent of Rs. 5.95 crores. On this issue the AO held that the appellant had disclosed the unsecured loans, in the audited balance sheet, of Rs 22.85 crores. As per the break-up of the details of unsecured loans, the appellant had received unsecured loans of Rs.5,95,00,000/- from 6 parties belonging to Bhanwarlal Jain Group of cases, during the year.

The AO further observed that the appellant had claimed the interest on loans of Rs 1.03 crores which includes the interest of Rs.52,85,654/- paid to various parties belonging to Shri Bhanwarlal Jain Group. The AO held that Shri Bhanwarlal Jain, Rajesh Banwanlal Jain and Manish Bhanwarlal Jain manage various entities in name of various persons who are fictitious and are name sake directors and such entities are engaged in providing the accommodation entries of loans, advances, sales, etc for commission. The AO held that during course of search conducted at the premises of Shri Bhanwarlal Jain and his group entities, it had been admitted that various entities

are controlled by Shri Bhanwarlal Jain and the transactions are the accommodation entries only. The AO held that transactions had been entered with such entities wherein cheques are given in exchange of cash for commission and the directors of such entities are name sake persons. In response, the appellant filed the written submissions before AO along with supporting documents to prove the identity and credit-worthiness of the lenders and genuineness of the loans received during year and interest paid thereon. The appellant also submitted that all lenders are assessed to Income Tax and had filed their Income Tax returns and entire loans had been received through banking channel by A/c payee cheques/ RTGS. However, Ld. AO rejected the appellant's contentions and held that the lender entities are run, controlled and operated by Shri Bhanwarlal Jain who is engaged in providing accommodation entries wherein the cheques/RTGS had been given in exchange of cash for commission. Accordingly, AO made the addition u/s.68 of the unsecured loans received from the entities belonging to Shri Bhanwarlal Jain of Rs.5,95,00,000/-. Consequently, AO also made the disallowance of interest paid to the concerns/entities belonging to Shri Bhanwarlal Jain of Rs.52,85,664/-

10. Upon assessee's appeal, Id.CIT(A) noted the assessee's submissions and reliance upon case laws. He noted that, the appellant disputed the addition made by the AO. That the appellant in this regard had furnished the documents such as PAN of lenders, confirmation of account, own bank statement disclosing receipt and repayment of loans through A/c payee cheques/RTGS, IT acknowledgment receipt, Balance sheet and Bank statement of the lenders, TDS certificates of interest paid on such loans to prove the identity and credit worthiness of the lenders and genuineness of loan transactions. That the AO had not pointed any defects in such documentary evidences filed on record. That it is observed that such loans had been received through banking channel by A/c payee cheques/RTGS and thereafter had been subsequently repaid through banking channel by A/c payee cheques/RTGS. That the appellant had paid

the interest on such loans and in support had filed the copies of own bank statements and bank statements of the lenders and also filed the copies of TDS certificates of interest paid on the disputed loans. That it appears that the Id. AO had placed much reliance on the statements of Shri Bhanwarlal Jain recorded by the Investigation wing, during course of their search in his case, however it is observed that such statements had been retracted subsequently by him and therefore its evidentiary value reduces. That further, it is also seen that the appellant was not provided the copies of such statements for rebuttal and an opportunity of cross examination had not been allowed to the appellant. That the appellant had furnished the copies of bank statements of the lenders and it is submitted that there is no immediate cash deposits against the loans provided to the appellant.

That it is also gathered that no independent verification has been made by the AO and he did not issue even the notices u/s 133(6) to the bankers to verify the source of lenders funds and had not brought any contrary material on record to prove that unexplained funds belonging to the appellant had been routed in garb of loans. That there is also force in submission of Ld. AR that appellant is not required to prove the source of lenders funds and that the proviso of Sec 68 would apply w.e.f. A.Y-2013-14 onwards.

11. Thereafter, he referred to following case laws

- i) Hon'ble High Court in the case of Pr.CIT v. Veedhata Tower Pvt. Ltd. (ITA No. 819 of 2015)
- ii) Hon'ble Apex Court in the case of Pr.CIT vs. Vaishnodevi REfoils & Solvex 96 taxmann.com 469(SC)
- iii) Nemichand Kothari v CIT (264 ITR 254-Gauhati)
- iv) Hon'ble Bombay High Court in the case of CIT vs. Haresh D. Mehta 86 taxmann.com 22
- v) CIT v. Nikunj Exim Enterprises (P) Ld. 35 tamxann.com 384

vi) Hon'ble Bombay High Court in the case of CIT vs. Orchid Industries (P) Ltd.

88 taxmann.com 502

12. He also referred to several other case laws and held as under:-

“As discussed above, the appellant had furnished all relevant documents to prove the genuineness of the transactions like; PAN of lenders, Confirmation of account, own bank statement disclosing receipt and repayment of loans through A/c payee cheques/RTGS, I.T acknowledgment receipt, Balance sheet and Bank statements of the lenders, TDS certificates of interest paid on such loans to prove the identity and credit worthiness of lenders and genuineness of loan transactions. Accordingly, the appellant had discharged its onus to prove the identity and credit-worthiness of the lenders and genuineness of the loans, then the addition made by the AO u/s 68 deserves to be deleted.”

13. He further found that assessee's own group concern case and in assessee's own case. Tribunal has decided in favour of assessee, he concluded as under:-

“ From the above discussion, it is crystal clear that this issue has been decided in favour of the assessee, by the Hon'ble ITAT Mumbai in assessee's own case for AY 2013-14 and 2014-15 vide order dated 08.07.2019. Further my Id. Predecessor has also decided this issue in assessee's own case, for AY 2010-11, 2011-12, following above order of the ITAT and the present year is the only year which is pending. Further, it is observed that the facts of the presents year are identical to the appeals decided by the Hon'ble ITAT, Mumbai and my Id. Predecessor in the case of the assessee for A.Y. 2010-11 to 2014-15 and there is no variation in facts. Therefore on adopting the consistent approach, the addition made u/s.68 is liable to be deleted, in the present year as well.

In view of the above discussion, I direct the AO to delete the addition unsecured loans of Rs. 5,95,00,000/- made u/s 68 of I.T Act, 1961.

Consequently, the disallowance of interest paid to the parties belonging to Shri Bhanwarlal Jain also deserves to be deleted. I therefore direct the AO delete the disallowance of interest of Rs.52,85,664/as well.”

14. Apropos issue of disallowance of interest paid of Rs. 8.88 lacs. On this issue, while completing the assessment, the AO perused the audited P & L account and observed that the appellant had paid the interest on loans of Rs.1,03,78,696/- and had

disclosed the interest income of Rs.46,70,002/-. The AO also observed that the appellant had given the interest free loans to its 2 group concerns of Rs.74,00,000/-. The AO held that the appellant is incurring the interest on loans taken and is not recovering the interest on loans given to its associate concerns. Accordingly, AO directed the appellant to justify as, to why interest should not be disallowed in proportionate manner. In response, the appellant furnished its' reply and submitted that the loans and advances had been given to its associate concerns to undertake the project activities and such is in normal course of its business. However, AO rejected the appellant's contention and held that the burden is on to prove that the interest bearing funds had been utilized for and appellant had not justified the commercial expediency for which the interest free loans were given to its associate concerns. Thus, AO held that there is diversion of interest bearing funds for non-business purpose and accordingly, made the disallowance of interest on prorata basis of Rs. 8,88,000/- @ 12% of interest free loans given of Rs. 74,00,000/- u/s. 3(1)(iii) of I.T.Act, 1961.

15. Upon assessee's appeal, the Id.CIT(A) has held in this issue as under:-

“I have considered ' the facts of the case and the submissions' of the assessee. It is undisputed fact that the appellant had given the interest free loans to its associate concerns of Rs 74,00,000/- during the year .and on the other hand, had made the interest payments on borrowings. The appellant had not proved the commercial expediency for which the interest free loans were given to the associate concerns. Also, appellant had not brought any evidence on record to prove that the interest free loans were given to the associate .for business purpose. The onus lies on the appellant to prove that non-interest bearing funds had been utilised for providing the interest free loans which had not been discharged by the appellant. Thus, I hold that AO is justified in making the disallowance of interest @ 12 % of interest free loans given of Rs 8,88,000/-.

However, it is also true that the appellant had not claimed the interest paid on loans as deductible expense, rather the appellant had capitalised the entire finance cost to Capital Work in progress (WIP) account since its project was not completed. Thus, the addition of unclaimed interest made by the AO is not justified. It is true that

the entire finance cost had been transferred by the appellant to Capital Work in progress (WIP), accordingly, I direct the AO to reduce the Capital Work in progress (WTP) by Rs 8,88,000/- on Account of disallowance of such interest. This will result into addition in the hands of the assessee in subsequent years.”

16. Apropos issue of addition us. 68 of the investment in joint ventures. On this issue the AO noticed that the appellant had disclosed the investment in Joint Venture of Rs.26,17,60,000/- under "Current Liabilities", The notes attached along with audited balance sheet also disclosed that the appellant had received the amounts under Joint venture agreement. The AO therefore asked the appellant to furnish the details along with supporting documents" of such investments towards Joint venture. The appellant furnished the names and address of 17 parties from whom the contributions has been received under the Joint Venture agreement. In the assessment proceedings, the AO had issued the notices u/s 133(6) to all 17 Joint Venture investors. The compliances were received from 4 parties and the notices u/s 133(6) issued to 13 parties were not complied, either due to non-service or due to non-furnishing of their replies. Accordingly, the AO directed the appellant to furnish the details such as Income Tax returns, ledger account, PAN card and bank statements of such joint venture investors. In the meantime the appellant had also intimated the AO that the parties had not responded to notice u/s.133(6) since its erstwhile name M/s. Orbit Heights Pvt Ltd had been changed to M/s. Neminath Homes Pvt Ltd, which created some confusion at their end and it requested the AO to re-issue the notice u/s 133(6)/ summons with the amended name'as M/s. Neminath Homes Pvt Ltd. Thereafter, the replies from all parties had been received by the AO along with documentary evidences such as PAN, confirmation of account, I.T return, bank statements, - balance sheet, Joint venture agreement and other documents. The appellant also submitted the documents such as ledger account, own bank statement, Joint venture agreement and evidence of repayment of their investments to justify the identity and credit worthiness of the investors and genuineness of the transactions.

However, the Id. AO did not accept the appellant's contention and replies u/s 133(6) received from Joint Venture investors and held that the appellant had not proved the genuineness of the amounts received as investments towards Joint Venture. The relevant finding of the AO is as under :-

- a) "Out of total 17 parties, around 9 to 10 parties are maintaining their bank account with Bank of Baroda, which appears to be highly improbable.
- b) High value credits in the bank account and subsequent circular transactions between the related accounts and immediate withdrawals.
- c) These transactions do not appear to be in the normal course of business.
- d) The date of amount of deposits received into the bank accounts of the aforesaid party were diverted to the assessee "company towards investment in JV" on the same day.
- e) The replies were filed directly in the Tapal not received through 'post'.
- f) Cross-holdings were observed. One company is holding investments in other-companies in the aforesaid set of 17 companies and the other in other company of the set of 17 companies, and so on.
- g) Most of the companies are newly registered. Some of the companies were found to be registered as latest as in F.Y.2011-12
- h) In some of the companies, it is noticed that there is a 'change in name of the company' from one name to another. Similar feature is also observed in the case of assessee's company as well. It means these entities are in the habit of changing their frequently.
- i) In some cases, there is a mismatch of balance outstanding as on 31/03/2012 as per the assessee's books and as per the ledger a/c furnished by these investors in response to notice u/s.133(6).
- j) In some of the cases, for example, Hunger Real Estate Pvt Ltd, there are no commercial activities or receipts from business.

k) Most of the concerns are not making substantial profits, so as to support their creditworthiness to invest huge amounts.

l) In some of the cases, the Auditors are also observed to be common."

Accordingly, the AO held that the appellant had not proved the genuineness of the amounts received as investment towards Joint Venture, and accordingly made the addition of Rs.26,17,60,000/- u/s.68 of I.T Act, 1961.

17. Upon assessee's, appeal, Id.CIT(A) elaborately referred to the assessee's submissions. He observed that out of 17 parties, 4 parties namely Conart Securities Ltd., Orignet Technologies Ltd., Shantoshima Leasing and Finance Ltd., and Siwana Agri Marketing Ltd and Twinstar Industries Ltd had replied to the AO in response to the notice u/s 133(6) and the AO did not point out any discrepancies in their replies. Therefore it is not clear as to why did the Id. AO doubted their investments totaling to Rs2,97,60,000/- and why did he choose to add the same in the hands of the assessee u/s 68, without really assigning any reasons. That evidently these parties had invested a sum of Rs. 2.97 cr. in terms of joint venture agreement dated 08.04.2011, as per which they will develop the project at vesova, Andheri West, Mumbai jointly with the assessee and their share in profits will be 40% ; 17 parties put together, while that of the assessee would be 60%. As per the terms of "Agreement for Joint Venture" dated 08.04.2011 between Orbit Heights Pvt. Ltd. (now known as Neminath Homes Pvt. Ltd.) and seventeen investors, they will re-develop land bearing CTS no.1374/B/293 in village Versova, Andheri (West), Mumbai, which was owned by Swagat Co-operative Housing Society Ltd. That in this regard, society had entered into a development agreement dated 23.03.2009 and granted development rights in respect of the property to the present assessee. That as per clause (d) of the Joint Venture agreement, the assessee was unable to commence and complete the said project through its own means and was looking for some financial assistance to join the said project to commence and complete the said project on Joint Venture basis. Further, (e) the part of the Second Part have to give financial assistance to commence and

complete the said project on Joint Venture basis. That further, (f) the Part of the First Part had other and Party of Second Part had agreed to jointly develop such property particularly described in the Schedule hereunder wherein on Joint Venture which is in the name and style of Orbit Construction and also they have agreed on certain terms and conditions which they desirous to reduce in writing which is in fact these present. That further the Joint Venture would be carried out in the name and style of Orbit Construction and its address would be 115, 4th floor, Crawford Market, Mumbai. That further, the profit sharing ratios of various Joint Venture partners and the assessee company were mentioned in clause no.9 of Joint Venture agreement. That it was also agreed upon, as per clause no.8 that development shall be completed within eighteen months. That however, it appears that this project went into difficulty and could not be started, because of various problems, despite the fact that the assessee had paid a sum of Rs.28.31 crores to MHADA and Bank Guarantee worth Rs.3 crores to the Housing Society. That it is in these circumstances that the investors lost patience and started demanding refund of their investment. That though the assessee tried to persuade the investors to stay put but he failed to do so and ultimately had to refund the investments.

That it is seen that the investors have also furnished the documents; such as PAN and CIN of investors, Confirmation of account, Joint venture agreement, Own bank statements disclosing receipt and repayment of amounts through A/c payee cheques/RTGS, I.T acknowledgment receipt, Balance sheet and Bank statements of the investors to prove the identity and credit worthiness of the genuineness of the transactions. That these companies are active on the roll of ROC and have been filing tax returns regularly and are showing significant incomes. That it is also seen that they case out of the project because it was not getting started because of a host of problems and was getting delayed and there were fears that their investments may have gone bust. That further the investments were made through cheque and were also received back through cheque. That there appears to be nothing unusual in such

transactions in real estate business which is capital incentive and requires lot of funding initially. Therefore Id.CIT(A) held that he was unable to agree with the findings of Id. AO in respect of these four parties. Accordingly, he held that investments made by them is held to be explained. Hence, he directed deletion of addition in this regard.

Thereafter, Id.CIT(A) observed that coming to remaining 13 parties, which either did not reply or notices sent to them returned as unserved, it is seen that the appellant had intimated the AO vide letter dated 09.03.2015 that as the name of the company had changed from Orbit Heights Pvt Ltd to Neminath Homes Pvt. Ltd, there was some confusion/misunderstanding at the end of the investors because of which they failed to respond to the notices u/s 133(6). That therefore the assessee requested the AO to issue summons u/s 131 in the names of these parties again, by mentioning the name of the assessee company as Neminath Homes Pvt Ltd. That these facts have been clearly mentioned by the AO also in the body of the assessment order in para 7.4. That however the AO chose not to issue any summons to these investors. That simultaneously it appears that these parties had submitted detailed replies to the AO, confirming their investments in joint venture project as also furnishing their IT. Returns, Bank statements, financial accounts and other relevant details and also furnished the documents such as PAN and CIN of investors, Confirmation of account, Joint venture agreement, Own bank statements disclosing receipt and repayment of amounts through A/c payee cheques/RTGS, I.T acknowledgment receipt, Balance sheet and Bank of the investors to prove the identity and credit worthiness of the genuineness of the transactions. That evidently the AO had, not pointed any defect in such documentary evidences filed which are placed on record.

18. Thereafter, Id.CIT(A) referred to the documents submitted by the parties. These included PAN card, CIN master data, confirmation, join-venture

agreement, reply to notice under section 133(6), IT acknowledgment receipts, bank statement, balance sheet of the parties.

19. The Id.CIT(A) gave further finding as under:-

‘Coming to the reply filed by various investors, in response to the notices issued by the AO u/s.133(6) of the Act, it may be mentioned that Anikesh Trading Pvt. Ltd, filed a letter dated 07.03.2015 to the AO, which has been duly received by the AO himself as on 13.03.2015 and his signature and seal is clearly visible. Further, the AO also asked the investor to furnish Balance Sheet and Profit & Loss a/c. It is mentioned that the investor had submitted copy of bank statement, copy of ledger account, copy of Income Tax acknowledgement and confirmation that they had invested a sum of Rs.50 lacs in the Joint Venture. Similarly, Conarts Traders Ltd. had submitted a reply vide letter dated 03.03.2015 which has been duly received by the AO as on 23.03.2015 and his signature are there on the acknowledgement of the reply. In the said reply they had submitted various details to the AO including ITR acknowledgement, confirmation of account, bank statement, Profit & Loss a/c. and Balance Sheet. As per their Income Tax return, they have shown an income of Rs.22,05,106/- for the A.Y.2012-13. However, the company has a net worth of Rs.31.98 crores. Similarly, Hetu Investment & Trading Ltd. have submitted its reply they had furnished all relevant details to the AO. They are also assessed to tax and their income for A.Y.2012-13 is Rs.34,64,500/- and they made an investment of Rs.50 lacs in the Joint Venture. Similarly, Dolex Investment Pvt.Ltd. submitted its reply dated 26.02.2015, which is duly received in the office of the AO as on 10.03.2015. Likewise, Hunger Real Estate Pvt. Ltd. submitted a reply dated 25.02.2015 which is duly received in the office of the AO as on 10.03,2015 and had submitted all relevant details. Likewise, Jagvi Development Pvt. Ltd. submitted a reply dated 26.02.2015 as on 10.03.2015. The Company had a net worth of Rs.21.95 crs. during the relevant period and is being assessed to tax. Similarly, Lunkad Textile Pvt.Ltd. which has made an investment of Rs.50 lacs, had filed its reply dated 02.03.2015 with the AO as on 09.03.2015. As per their ITR they have shown an income of Rs.13,47,435/- during the year. Similarly, Nimbus Industries Ltd. which has made an investment of Rs.25 lacs has filed its reply dated 04.03.2015, which is received in the office of the AO as on 05.03.2015. As per the Income Tax return it has shown an income of Rs.45,64,450/-. Similarly, P. Saji textiles Ltd. had filed its reply with the AO as on 10.03.2015 and as per Income Tax return it has shown an income of Rs.12,64,134/-. Similarly, Santoshimi Lease Financial & Investment Ltd. filed its reply dated nil with the AO as on 10.03.2015. As per their ITR its returned income is Rs.21,19,100/- for A.Y.2012-13. The company has invested a sum of Rs.25 lacs in the Joint Venture project. Similarly, Shipra Fabrics Pvt. Ltd. filed its reply dated 03.03.2015 on 09.03.2015 and it has shown return income of Rs.17,48,038/-. Shivana Agriculture Marketing Pvt.Ltd. filed its reply dated 16.02.2015 and

submitted their ITR which shows returned income at Rs.7,61,81,313/-. Similarly, Synazzy Exports Ltd. which has invested a sum of Rs.30 lacs, filed its reply with the AO as on 05.03.2015 and as per the ITR their returned income is Rs. 40,59,550/-. Similarly, Victory Sales Pvt.Ltd. made an investment of Rs. 25 lacs submitted its reply to the AO vide letter dated 26.02.2015 which is duly received in the office of the AO as on 10.03.2015. Their return of income for the year is Rs. 11,08,393. Further, status of all these companies on ROC website shown as active and they have been filing their return of income regularly.”

20. Thereafter, he mentioned the net worth of the parties as under:

Net worth of the Joint Venture Investors

Sr. No.	Name of Joint Venture Investors	Amount received	Net Worth (in Lakhs)	Returned Income
1	Anikesh Trading Pvt. Ltd.	1,00,00,000	1014.46	2,65,613
2	Conart Securities Ltd.	1,00,00,000	3198.53	22,05,106
			0.00	
3	Dolex Commercial Pvt. Ltd.	1,45,00,000	266.22	12,930
4	Hetu Investment & Trading Ltd.	50,00,000	58.40	34,64,500
5	HPL Multi Trade Pvt. Ltd.	2,25,00,000	1028.17	4,29,027
6	Hunger Real Estate Pvt. Ltd.	8,80,00,000	1706.83	1,20,057
7	Jagvi Developers Pvt. Ltd.	2,75,00,000	2195.45	1,37,479
8	Lunkad Textiles Pvt. Ltd.	50,00,000	208.80	13,47,435
9	Nimbus Industries Ltd,	25,00,000	406.80	45,64,450
10	Orignet Technologies Ltd.	2,17,60,000	352.97	5,98,124
11	P. Saji Textile Pvt. Ltd.	75,00,000	309.68	12,68,134
			0.00	
12	Santoshima Leasing Finance & Inv. (1). Ltd.	25,00,000	2276.02	21,19,100
13	Shipra Fabrics Pvt. Ltd.	1,00,00,000	304.75	17,48,038

14	Siwana Agri Marketing Ltd.	2,45,00,000	807.92	(7,61,81,313)
15			0.00	
	Snazzy Export Ltd.	30,00,000	36.09	40,59,580
			0.00	
16	Twinstar Industries Ltd.	50,00,000	228.91	-
17	Victory Sales Pvt. Ltd.	25,00,000	336.89	11,08,399
	Total	26,17,60,000		

21. Thereafter, Id.CIT(A) gave further following findings:-

“Therefore the contention of the Id. AO that these parties did not respond to the notices u/s 133(6) does not appear to be very convincing. Further it is seen that detailed replies were filed by these parties and the AO had also told them to furnish some more details under his own signatures and they complied to the same. Further though the assessee requested the AO to issue summons to these parties u/s 131, by quoting the correct name of the "appellant as Neminath Homes P Ltd, the AO chose not to act, so it cannot be said that the assessee had failed to discharge its onus in respect of these parties or these loans were unexplained.

It is also observed that such Joint venture investments had been received through banking channel by A/c payee cheques/RTGS and thereafter had been subsequently repaid through banking channel by A/c payee cheques/RTGS. All the Joint venture investors had furnished their replies, in response to notice u/s 133(6), on assessment record along with supporting documents. As per the appellant, the said investors are not related to any accommodation entry providers. The AO had not proved that any unexplained funds of the appellant has been introduced in garb of joint venture investments. The appellant had furnished the copies of balance sheets of the investors and, as per the tabular chart, the net-worth of the investors is much more that the amounts invested by the investors in project of the appellant company.

As regards finding of the AO stated in assessment order, it is observed that the appellant had proved the identity, genuineness and creditworthiness of the investors since had filed the documents such as PAN, CIN master data, own bank statements, Joint venture agreement, I.T acknowledgment receipt, confirmation of account, balance sheet, bank statements of the investors on assessment record. The AO's finding that appellant had not initially responded to notice u/s 133(6) is not of much relevance since the erstwhile name of the appellant M/s. Orbit Heights Pvt Ltd was changed to M/s Neminath Homes Pvt Ltd and, in any case, all investors had

subsequently filed their respective replies in response to notice u/s 133(6) and acknowledged copies of such replies is filed on record. The AO, in assessment order, has also accepted that the replies from these parties had been filed in tapal.

The AO's finding that certain investors were holding bank accounts in same bank account, similarity of auditor, cross share-holding, etc. would not disprove the transaction since the funds are stated to have been received from group/related entities of the investors, which would naturally have same auditor or the bankers and among group entities cross holdings is also not unusual.

Further the slight mismatch in closing balance as per ledger account filed by the appellant and confirmation of account filed by the investors, is due to interest disclosed by the investors, however there is no variation of the amounts received during the year. Therefore the observations of Id. AO in this regard appears to be unjustified.

The Ld. AO's finding that the investors had not disclosed reasonable profits in their I.T returns does not appear to be factually correct. In fact, in most of the cases, as discussed in foregoing paras, these investors had shown substantial incomes as also reserves. Even otherwise, it would not disprove the transaction sincenet-worth of the investors, as per their audited balance sheet, much exceeds the investments made in project of the appellant. The appellant had received the funds through banking channel from bank account of the investors who had confirmed the transactions and there is no cash deposits against the funds provided to the appellant. Further these investors do not relate to any accommodation entry network but are independent parties. It also appears that the AO had also not made due efforts and did not issue the notice to the bankers to verify the source of investor's funds and had not brought any contract material to prove that unexplained funds belonging to the appellant had been routed in garb of joint venture investments. There is also force in submission of Id. AR that the appellant is not required to prove the source of payers funds and that the proviso of sec68 would apply only w.e.f. AY 2013-14 onwards and not for the current year.”

22. Thereafter, he referred to following case laws

- i) Hon'ble Apex Court in the case of Pr.CIT vs. Vaishnodevi Refoils & Solvex 96 Taxmann.com 469(SC)
- ii) Hon'ble Bombay High Court in the case of Pr.CIT v. Veedhata Tower Pvt.Ltd. (ITA No.819 of 2015)
- iii) Hon'ble Mdhya Pradesh High Court in the cae of CIT vs. Mehrotra Brothers reported in 270 ITR 157

- iv) Hon'ble Alahabad High Court in the case of CIT vs. S.Kamaljeet Singh reported in 73 CCH 134.
- v) Hon'ble Apex Court in the case of P.K.Noorjahan reported in 237 ITR 570
- vi) Hon'ble Mumbai ITAT in the case of Pooja Bhatt v. ACIT reported in 73 ITD 205
- vii) Hon'ble Rajasthan High court in the case of CIT vs. Jai kumar Bakliwal reported in 366 ITR 217
- viii) Hon'ble Punjab & Haryana High court in the case of CIT vs VArinder Rawley reported in 366 ITR 232
- ix) Hon'ble Gujarat High Court in the case of CIT vs Patel Ramniklal Hirji reported in 41 taxmann.com 493
- x) Hon'ble Gujarat High Court in the case of DCIT vs. Rohini Builders reported in 256 ITR 360.

23. He concluded as under:-

“The other judicial decisions relied by Ld. AR also support the case / of the appellant. The appellant had furnished the documents such as PAN and CIN of investors, Confirmation of account, own bank statement disclosing receipt and repayment of funds through A/c payee cheques/RTGS, Joint venture agreement, I.T acknowledgment receipt, Balance sheet and Bank statements of the investors and replies furnished by the investors in response to notice u/s 133(6) to prove the identity and credit worthiness of lenders and genuineness of transactions and AO had not found any defect in such documents filed on record and had not brought any contrary material on record to disprove the transaction. The judicial decisions relied by Ld. AR also supports the case of the appellant. The appellant had discharged its onus to prove the identity and credit-worthiness of the investors and genuineness of the transactions, accordingly the addition made by the AO u/s 68 deserves to be deleted. I accordingly direct the AO to delete the addition of Joint venture investments made u/s 68 of I.T Act, 1961. Therefore, the Grounds no. 8 & 9 are Allowed.”

24. Against the above order, revenue is in appeal before us. We have heard the parties and perused the records. Ld. DR relied upon the order of the AO. He did not controvert any of the finding by ld.CIT(A). He submitted that in the case of Bhanwar

lal M.Jain, ITAT has accepted that he is providing accommodation entries only on commission business. Hence, he pleaded that the addition for entries from Bhanwarlal Jain group has to be added in the hands of the assessee. For the rest, he relied upon AO's order

25. Per contra, Id. Counsel of the assessee relied upon the orders of the Id.CIT(A). he gave elaborate submission supporting the case of the assessee He summarized the gist of his submission as under:-

Ground Number	Issue	<u>Reasons for deleting the additions by CIT(A)</u>
1&2	Addition u/s.68 of Share application monies received from 7 parties of Rs. 2,35,00,000/-.	a) The disputed Share application monies had been received during earlier year viz. A.Y.2010-11 and Opening balance cannot be added u/s.68 in impugned year; b) Share capital/premium, being capital receipt, cannot be added u/s.68 since amendment in Sec. 68 applies w.e.f. 01/04/2013; c) The assessee had filed relevant documents to prove the identity, genuineness & credit-worthiness of share applicants;
3	Addition u/s.68 of Unsecured loans received from 6 lenders of Rs.5,95,00,000/- belonging to Bhanwarlal Jain group	a) The Ld. CIT(A) deleted the addition on following Hon'ble ITAT order in assessee's own case for A.Y.2013-14 & 2014-15 since involve identical facts; b) CIT(A) had deleted same addition in case of associate companies M/s Neminath Enterprises, M/s Nemichand Associates and Star One Realcon Pvt Ltd. The Hon'ble ITAT had dismissed the Revenue's appeal. c) Assessee had proved the complete identity, credit-worthiness and genuineness of loan transactions; d) Assessee is not required to prove the source of lender's funds.
4	Disallowance of interest of Rs.8,88,000/- on loan utilised for non-business purpose.	This Ground is infructuous, since CIT(A) had upheld the disallowance of interest (para 7.4)
5&6	Addition u/s.68 of Rs.26,17,60,000/- of monies received under Joint Venture housing project from 17 contributors.	a) Assessee had proved the complete, identity, genuineness and credit-worthiness of all Joint Venture Contributors; b) Replies to notice u/s.133(6) had been responded by all 17 Joint Venture Contributors with supporting documents filed on record; c) Joint Venture Contributors are not related to any

		<p>tainted person/group;</p> <p>d) Assessee had repaid the Joint Venture Contributions to respective contributors in subsequent year;</p> <p>e) Hon'ble ITAT had deleted similar additions u/s 68 in assessee's own case for A.Y-2013-14 & 2014-15;</p> <p>f) CIT(A) had deleted similar addition in case of associate companies M/s Neminath Enterprises, M/s Nemichand Associates and Star One Realcon Pvt Ltd. The Hon'ble ITAT had dismissed the Revenue's appeal.</p>
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27. Upon careful consideration, we note that in the present case, the first issue is addition u/s. 68 of share application money amounting to Rs. 2.35 crores, which was received in the previous year. The fact that the amount involved was received in the previous year has not been disputed by the revenue. The Ld.CIT(A) has given a finding that the said amount was received in AY 2010-11. He has found that the copies of ledger account and bank statement have been examined and the same duly fortified the fact that these share application money were received in the earlier period. Once, it is clear that share application money has not been received in the current assessment year and the same have been received in preceding assessment year, the addition of the same u/s. 68 in the current assessment year is not permissible. The Hon'ble Bombay High court in the case of *PCIT vs Real Value Realtors Pvt.Ltd.* in 113 taxman.com 62 has held that when the share application was money received in earlier assessment year, it could not be added in the impugned assessment year. Similarly, Hon'ble Bombay High Court in the case of *Ivan Singh vs. ACIT 16 taxmann.com 499* has held that provision of section 68 cannot be invoked for outstanding sundry credit balance found in account books of the assessee for FY 2006-07 to income of assessee for AY 2009-10. Similar proposition have been laid down in the decisions of other High courts and Tribunal referred in as under:-

- iii) *CIT vs Parmeshwar Bohra* 301 ITR 404 (Rajasthan High Court)
- iv) *CIT vs Usha Stud Agricultural Farms Ltd.* 301 ITR 384 (Delhi High Court)
- v) *DCIT v Global Mercantiles (P) Ltd.* 67 taxmann.com 166 (Kolkata High Court)

vi) Tulip Hotels Pvt.Ltd. vs DCIT 132 TTJ 3 (ITATs)

vii) Vardhman Overseas Ltd. vs ACIT 24 SC 393 (ITAT, Delhi)

Once, it is clear that the amount involved has not been received during the year, the same cannot be added u/s. 68.

28. Once, the issue of addition u/s. 68 falls outside the scope of addition during the present assessment year, the adjudication on merits is only an academic interest. Id.CIT(A) has adjudicated the same also and found that the same is also covered in favour of the assessee by various decisions of Hon'ble Bombay High court and that the amendment made in the Act u/s.68 providing for examination of the source of source is not applicable in the current assessment. He has also find that, these aspects are duly approved by Hon'ble Bombay High court in the case of M/s.Apek Infotech(supra) and M/s.Orchid Industries(supra) Ggandeeep Infrastructure Pvt.Ltd. (Supra) and Green Infra Ltd.(supra). Accordingly, we do not find any infirmity in the order of Id.CIT(A) directing for deletion of addition of Rs. 2.35 crores, which was not received during the year.

29. Apropos, issue of unsecured loan. On this issue, the AO noted that assessee has disclosed unsecured loan in the balance sheet of Rs. 22.85 crores. He noted that Rs. 5.95 crores were received from six parties belonging to Shri Bhanwarlal Jain group of cases. The AO observed that in the case of Bhanwarlal Jain group investigation wing of income tax department had made search and survey, wherein it has found that companies controlled by Bhanwarlal Jain group were engaged in providing accommodation entry. On AO's enquiry, assessee provided all the necessary details including the income tax returns of the parties and it was submitted that the amounts were received through account pay cheque etc. However, AO was not satisfied, he did

not even issue notices to the said parties and solely relying upon the examination done in the case of Bhanwralal Jain group made the disallowances.

30. Upon assessee's appeal, Id.CIT(A) has examined the issue thoroughly. He has noted that all the necessary documentary evidences, such as PAN, confirmation of account, own bank statement disclosing receipt and repayment of loans through account pay cheques/RTGS, IT Return, balance sheet, bank statement of lenders, TDS certificates of interest paid of such loans are in order. Hence, he found that these documents prove the identity and credit worthiness of the lenders and genuineness of the loan transaction. He has also given a finding that loans have been received though by account payee cheques/RTGS and thereafter they have also subsequently repaid through banking channel. The assessee has also paid interest and filed the copies of TDS certificates. Ld.CIT(A) has observed that AO has only placed reliance on the statement of Shri Bhanwarlal Jain, which has been subsequently retracted by Shri Bhanwarlal Jain. Hence, the Id.CIT(A) has found that it is devoid of evidentiary value. Noting that AO has also not issued any notice u/s. 133(6). Ld.CIT(A) has placed reliance upon several case laws on the impugned subject referred above. He also noted that ITAT in assessee's own case for AY 2013-14 and 2014-15 vide order dated 08.07.2019 has decided the same issue in favour of the assessee. Hence, the Id.CIT(A) has deleted the addition and the interest also

31. We have heard both the parties and perused the records. We note that Id. Counsel of the assessee has claimed that this issue is squarely covered in favour of the assessee by the decision of ITAT in assessee's own group case for AY 2013-14 and 2014-15 where issue involved was similar. It is not at all the case that Hon'ble Jurisdictional High Court has reversed the said decision.

32. Furthermore, the assessee has submitted all the necessary documents for the identity, genuineness and creditworthiness of the parties. It is not the case that any of the documents had any short comings. Ld.CIT(A) has been given a finding that assessee in such circumstances has duly discharged its onus. Apart from the above, it is noted that ld.DR has not controverted the finding of ld.CIT(A). He has only submitted that Shri Bhawarlal Jain case has come to the Tribunal and Tribunal has accepted and made addition of income in hands of Shri Bhanwarlal Jain as commission income for providing bogus accommodation entries. We note that the decision of ITAT in the case of Bhanwarlal Jain is on the facts of the specific case. In the present case, we are also having a decision of ITAT in assessee own group case, in which similar issue was decided in favour of the assessee. The decision in the said case cannot mandate us not follow decision of the ITAT in assessee's own case. It is also noted that the facts of the case clearly indicate that AO has not made any investigation of his own. He solely relied upon the examination by the investigation wing in the Bhanwarlal Jain case. Further, ld.CIT(A) has correctly observed that by not giving assessee the statements for rebuttal and an opportunity to cross examine coupled with the retraction by the party, the evidentiary value of the said statement is diminished. The AO has not even issued notice u/s. 133(6) to the parties. Once, it is undisputed that no independent verification was done by the AO and the assessee has provided all the basic documents, the onus upon the assessee stands discharged. Hence, we do not find any infirmity in the order of ld.CIT(A). Hence, we uphold the same. On the same reasoning, the disallowance of interest on these loans have been deleted by ld.CIT(A). We also uphold the said order.

33. Apropos issue of disallowance of interest for diversion for non-business purpose. On this issue the AO has found diversion of interest to the tune of Rs. 8.88 lacs. He has made the disallowance by addition to income. This disallowance of Rs. 8,88,000/- being interest diverted for non-business purpose has been in principle agreed by the

ld.CIT(A). But, the issue has been addressed by the ld.CIT(A) by observing that assessee has actually not debited the amount in profit and loss account. Rather the entire interest has been debited to work in progress. Hence, ld.CIT(A) has agreed with the AO that there is diversion of interest, but he has directed that since the interest has been debited to work in progress, the said amount be reduced from work in progress. Hence, ld.CIT(A) has correctly appreciated the issue. We do not find any infirmity in the same. Thus, the revenue's appeal being misplaced is dismissed on this account.

34. Apropos, the issue of addition u/s. 68 for investment in joint venture. Assessee has shown investment from several parties in joint venture under current liabilities. The AO has issued notice u/s. 133(6) to the joint venture parties. The compliances were received from '4' parties and the notices u/s 133(6) issued to '13' parties were not complied. Hence, AO directed the assessee to furnish the details such as income tax returns, ledger account, bank statement of such joint venture investors. In the meanwhile, the assessee intimated the AO that some of the parties have not responded to these notices as erstwhile name of the assessee's company was M/s. Orbit Heights Pvt.Ltd, which has been changed to M/s. Neminath Homes Pvt.Ltd. and hence, AO asked to assessee to issue notice afresh in the amended name of the assessee i.e Neminath Homes Pvt.Ltd. Thereafter, replies of these parties were received along with the documentary evidences, which included PAN confirmation of the account, IT returns, bank statement, balance sheet, joint venture agreement. However, the AO has not accepted the same. His observation is that a number of parties are maintaining account in the same bank, which in AO's opinion is highly improbable. How, the same is not probable has not been mentioned by the AO. Further AO without any specific reference has in general observed about high value credits in the bank account and subsequent circular transactions between the related accounts and immediate withdrawals. These observations by the AO are dehors any actual figures

or finding therein. Further, AO observed that these transactions are not normal. He further made general statement that there are cross holdings in the company that most of the companies were newly registered that most of the companies are not maintain substantial profit. This was again without reference to specific facts and findings. The Ld.CIT(A) has given a finding that there is a proper joint venture agreement that assessee is not engaged into bogus activity, it is engaged into re-development project in the heart of Mumbai city. That AO has issued notice in the earlier name of the company. That after assessee's request fresh notice in the new name of the company was not given by the AO. AO himself desired the documents to be submitted and the same may duly submitted to the AO. The Ld.CIT(A) has duly examined the documents and found that all the necessary details of the parties i.e PAN card, CIN master data, confirmation, joint venture agreement reply to notice u/s. 133(6), IT acknowledgment receipt, bank statement, balance sheet of the parties were all produced. Ld.CIT(A) has also given sequence of the events and examined and verified the financial worth of the parties by analyzing the net worth of the parties elaborately and has found that there is no doubt about the creditworthiness of these parties. Nothing has been brought by the revenue to controvert these findings. The case laws relied upon by the Ld.CIT(A) are also germane and support the case of the assessee. Assessee has duly discharged the onus and given all the necessary documents for the identity, genuineness and creditworthiness of the parties. Ld.CIT(A) has duly examined the same and found the same to be correct. The AO's order is only based upon surmise and conjecture. He has not dislodge any of the documents filed by the assessee. The assessment year before us is AY 2012-13. The source of source provision has been inserted by amendment u/s.68 of the Act w.e.f. 01.04.2013 effective from AY 2013-14 onwards. That is also for share capital, even in that case Hon'ble Bombay High court has held that it is the pre-amendment provision of section 68 in respect of which the assessee has to discharge its onus. Though in the present case, the issue is not all share capital, even then we note that

there is no provision of examination of source of source in section 68 for the impugned assessment year. Still as noted above, the assessee has discharged its onus. The adverse inference drawn by the AO regarding some of the parties not appearing before him or that the summons could not be served at the address or that before the issuance of cheque amounts were deposited are all without specific detail and are also in the realm of surmise and conjecture. Such issue has been duly adjudicated by Hon'ble Bombay High court in the case of CIT vs. Orchid Industries ITA No. 1433/2014. We may gainfully refer the order of Hon'ble Bombay High Court decision in this case is as under:-

“3] The learned counsel for the Assessee supports the order and submits that the Assessee had discharged its onus. The Assessee had produced the PAN of all the creditors along with the confirmation, Bank Statement showing payment of share application money and relevant record is produced with regard to the allotment of shares to those parties. The share application form, allotment letter, share certificate are also produced. Even the balancesheet, profit and loss account, the books of account of these creditors were produced on record showing that they had sufficient funds for investing in the shares of the Assessee. The learned counsel relies on the judgment of the Division Bench of this Court in case of Commissioner of Income Tax vs. Gagandeep Infrastructure (P.) Ltd., reported in [2017] 80 Taxmann 272 (Bombay) and the order of the Apex Court in case of Commissioner of Income Tax vs. Lovely Exports (P.) Ltd., reported in [2008] 216 CTR 195 (SC).

4] We have considered the submissions.

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.”

35. In our considered opinion, the above exposition applies on all fours to the facts of the present case. In the background of aforesaid discussion and precedents, we do not find any infirmity in the order of Id.CIT(A) and we uphold the same.

36. In the result, this appeal by the revenue stands dismissed.

Pronounced in the open court on 28 .03.2022.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 28 .03.2022
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai