

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

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
MS KAVITHA RAJAGOPAL, HON'BLE JUDICIAL MEMBER**

ITA No. 1597/MUM/2021 (A.Y. 2012-13)

M/s. JDS Ventures India Limited Office No. 4, Bharat Photo House 547, Kalbadevi Road Mumbai - 400002 PAN: AAECA1485E	v.	Income Tax Officer – 10(2)(1) 5 th Floor, Aayakar Bhavan M.K. Road, Mumbai - 400020
Appellant		Respondent

Assessee Represented by	:	Shri N.R. Aggarwal
Revenue Represented by	:	Ms. Vranda U. Matkari
Date of Hearing	:	12.08.2022
Date of pronouncement	:	17.10.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-17, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 18.03.2019 for the A.Y. 2012-13.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2012-13 on 29.09.2012 declaring total income of ₹.25,40,740/-. The case was processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act") by CPC, Bangalore. Subsequently the case was selected for scrutiny u/s. 143(3) of the Act under CASS and notice u/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In response, AR of the assessee attended and submitted the relevant information as called for.

3. During the assessment proceedings, Assessing Officer observed from the record that assessee has not carried out any business as projected, as the project has not taken off. However, the assessee has taken over chemical manufacturing unit in Sarigam, Gujarat. Further, Assessing Officer observed that assessee has issued 26000 equity shares of face value of ₹.10 each on a premium of ₹.990/- per share. In order to verify the genuineness of the transaction, Assessing Officer issued notices u/s. 133(6) of the Act to all the shareholders who had been allotted shares during the year, calling for necessary details. The details of shareholders with their financial position as extracted by the Assessing Officer are given below: -

Sl.NO.	Name and address of the company	Profit before tax	No of shares applied for	Share capital	Share premium	Total amount paid	Return of income for Financial Year 2011-12
	1.	2.	3.	4.	5.	6. (4+5)	7.
1.	Idor Systems and solution P. Ltd.,	226792	4500	45000	4455000	4500000	67809
2.	Algorithmic software system Pvt LTD	51353	4500	45000	4455000	4500000	67809
3.	Divya Infotech. Pvt Ltd	364295	4500	45000	4455000	4500000	376488
4	Netforrnax Information systems Pvt Ltd	(-) 58522	4500	45000	4455000	4500000	(-) 46957
5	TFC Engg, Pvt. Ltd.	121,390	4000	40000	39600000	4000000	121,390
6	Key integrated solutions Pvt ltd	126699	4500	45000	4455000	4500000	126699
	Total		26000	260000	25740000	26000000	

4. The Assessing Officer observed from the above table that, majority of the investors are earning only meagre profits. When the assessee was asked to substantiate how the shares were issued with such huge premium, in response assessee submitted as under: -

"..... it is submitted that premium received is a capital receipts and accounted for under the head reserve and surplus under share premium account. The assessee also put reliance on the judgement passed by Hon'ble ITAT, Mumbai G Bench dated 23.08.2013 in the case of Green Infra Ltd vs ITO. In the said judgment ITAT Mumbai G Bench has clearly spelled out that Section 68 cannot be invoked and there is no bar under the companies act so far as amount of premium is charged.....No director or their relatives are in any way related to the directors/shareholders of the company to whom shares were allotted.

Explanation regarding interest income: The assessee company raised the fund during the year for the purpose of takeover of the running units. However, the deal could not be finalized during the year and therefor surplus fund lying with the company is converted into fixed deposit through auto sweep facility to meet the

routine expenses incurred by the assessee company during the year. Therefore, the company has treated the said income as business income to appropriate the expenses incurred during the year. The assessee after appropriating all the expenses had paid tax on the net interest income which is Rs.8,35,430/- by way of TDS of Rs.3,29,476/ and Rs.5,05,950/- by way of S.A.Tax. The assessee also put reliance on the judgment passed by Hon'ble ITAT Mumbai G Bench dated 23.08.2013 in the case of Green Infra Ltd vs ITO, whereas it was concluded that fund raised for business purposes temporarily held in fixed deposit, in that case interest earned from fixed deposit treated as business income.

Therefore, it is submitted that, on the facts above, the income is correctly treated as business income in the case of assessee company and should be assessed as income from business instead of income from other sources relying the judgement hereinabove....."

5. After considering the submissions of the assessee, Assessing Officer rejected the same and proceeded to make the additions with the following observations: -

"1. During the last two year the Assessee Company has not earned anything from operational income. Assessee has earned only income from Bank Interest. In this background, the EPS of the company goes into very bad situation. Before an investor buys shares of any company, this is the first figure that the investors need to check. An increase in earnings every year is a sign that the company is prima facie a good candidate for further analysis. Increasing earnings generally leads to a higher stock price. Analyzing Earnings is the first most important step for investors because they give an indication of the company's expected future dividends and its potential for growth and capital appreciation. But it is evident the EPS of the assessee cannot attract any investor as the EPS in bad shape. A wise investor will not invest in a company of which EPS is not good.

2. *Even none of the investors has any operational income. They too have only income from interest only.*

3. *The assessee company has never declared dividend. If company has never declared dividends, why will any investor buy shares of that company?*

4. *The earnings of investor companies are too low as compared to the investment made in assessee company.*

5. *An equity shareholder is primarily interested in the capital appreciation of his investment and dividend per share. Because both of these factors are influenced mainly by the earnings of the company. Therefore, the analysis made to find out the attractiveness of investment in equity share capital takes into consideration the income of the company. Any investor would, first of all, for the sake of finding out attractiveness of investment in equity share capital of any company, take into consideration the income of the company.*

6. *Therefore, by knowing more facts it appears that these companies have been created only for the sole purpose for giving the funds to the company which do not have a substantial assets or credentials to justify the same.*

7. *Most of the companies that have advanced share application money do not have financial strength. They apparently do not have fund generated from the operation of business. Such entry represents unaccounted money of the person in whose books of account the money has been credited as share application money and the investor company is only a conduit for routing the money back to the books of account of the assessee."*

6. Based on the above observations, Assessing Officer proceeded to make the addition by relying on case laws and held that assessee received the share capital as bogus and through accommodation entry. Accordingly, he analysed

the applicability of section 68 of the Act and proceeded to make the addition u/s.68 of the Act.

7. Aggrieved, assessee preferred an appeal before the Ld.CIT(A) and before the Ld.CIT(A) assessee submitted as under: -

"1. *The justification of the share issued at premium:*

The said company is contemplating to start a chemical business by setting up either a new plant or by taking over fixed assets and liabilities of the existing plant and talks are in progress. This will require infusion of further capital over and above the capital presently available with the company. As per one audit balance sheet of 31-03-2011, the net worth of the company is Rs. 1,50,61,917/- and thus the share value is Rs. 628/- per shares. The company has investment in flat at Borivali West, Mumbai-400092 which is of Rs. 16,90,654 (al cost), which is purchased on 04-02-2004. The market value of the said flat as on 31-03-2011 is Rs. 50,00,000/- (Approx) and therefore considering the net worth of the company as follows:

Particulars	Amount (₹.)
<i>Net Worth as per Audited Balance Sheet as on 31 03.2011</i>	<i>1,50,61,917/-</i>
<i>Market Value of the flat situated at Borivali West, Mumbai – 400002 is ₹.50,00,000/- (Minus ₹. 16,90,654/-) net appreciation</i>	<i>33,09,346/-</i>
<i>Total</i>	<i>1,83,71,263/-</i>
<i>No of shares</i>	<i>24,000</i>
<i>Book Value per shares</i>	<i>₹. 765/-</i>
<i>However, considering the future earning of the chemical plant, the lumpsum appreciation in the book value is considered including goodwill of the company</i>	<i>₹.250/-</i>
<i>Issue price of preferential shares</i>	<i>1015/- say ₹.1000/-</i>

Therefore, the shares are issued at a premium of Rs. 990/- per shares.

2. Reconciliation of AIR details along with the copy of 26AS; TDS. certificates and copy of bank statement of current account and CD Plus duly highlighted the relevant entries are enclosed herewith.

3. The advance of Rs. 30,00,000/- was received from Mr. Nirmal Keida on 22-01-2009 for entering into a joint venture proposal. Subsequently, Mr. Nirmal Keida has suggested to the company that to enter into a joint venture agreement with Gati.com Pvt Ltd and therefore the company has paid Rs. 30,00,000/- by cheque on in two equal installments on 03.12.2010 & 06.12.2010 of Rs. 15,00,000/- therefore we have not paid money received from Mr. Keida till the settlement of money receivable from Gati.com Pvt Ltd. Therefore, it is submitted that this is standing in debit and credit side of the balance sheet but effect is nullified pending final settlement."

8. After considering submissions of the assessee, Ld.CIT(A) analysed the financial position of each of the investors and held that these companies no doubt has huge trade payable and trade receivable. However, there is no profit making apparatus only receipt from other income like interest and also there is no opening or closing stock, it shows that these investors are not in actual business. Therefore, he came to the conclusion that these companies are only shell companies which are setup to make accommodation entries. He held that assessee has received these monies through these entities as accommodation entry by relying on case laws and finally he sustained the

additions made by the Assessing Officer. He also distinguished the case laws relied by the assessee in his order.

9. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. The Learned CIT(Appeals) erred in confirming the order by Income Tax Officer passed u/s. 143(2) of the Act where by erred in confirming the addition of ₹.2,60,00,000/-."

10. The present appeal is filed by the assessee with a delay of 835 days and assessee also filed an affidavit in this regard and prayed for condonation of delay. In the affidavit assessee has submitted as under: -

"1. That the Appellant had filed an appeal before the Commissioner of Income Tax (Appeal)- 17, now known as CIT(Appeal) -16 on 21.04.2015 for A.Y. 2012-13 against the order u/s.143(3) of the Income Tax Act, 1961 passed by the Income Tax Officer - 10(2)(1), Mumbai.

2. That the Office of the Commissioner of Income Tax (Appeal) - 17 issued fixing the date for hearing on 29.12.2017, 27.02.2019 & 11.03.2019 appellant authorized Representative Shri N R Agarwal, CA attended before Hon'ble Commissioner of Income Tax (A) 17 and submitted the submission as per respective hearing dates.

3. That thereafter the Office of the Commissioner of Income Tax (Appeal) - 17 issued notice the date for hearing on 11.03.2019. However, the aforesaid notice was never received by the Appellant and therefore appellant was unaware of the date of hearing before Commissioner of Income Tax (Appeal) 17.

4. That during the period from 16.01.2016 to 16.04.2018 and 26.04.2018 to 03.05.2019 deponent was in the custody of EOW & ED hence office of the company was closed.

5. That the deponent thereafter met the Office of the Commissioner of Income Tax (Appeal)- 16 on several occasions for the status of appeal. However, the deponent was given to understand that the file was not traceable and in absence of the file they are unable to give status of appeal.

6. That the deponent met the Office of the Commissioner of Income Tax (Appeal) -17 again in July 2021, when the deponent received notice u/s 271(1) (c) and then came to know that the appeal had been disposed and the order had been passed on 18.03.2019. However appellate order was never served on assessee.

7. That thereafter the appellant filed a letter dated 26.08.2021 for copy of the order passed by the Commissioner of Income Tax (Appeal)-17.

8. That thereafter the appellant received the Appellate order, passed by the Commissioner of Income Tax (Appeal) - 17 on 01.09.2021.

9. That the deponent thereafter immediately filed appeal before Hon'ble Tribunal on 13.09.2021.

11. Ld. DR objected for the condonation of delay and however, he has not filed any submissions against the affidavit and the facts described in the above affidavit.

12. Considered the submissions of both parties, on the enquiry by the bench, the Ld.DR verified the status of the order passed by the Ld.CIT(A) and Accordingly, he submitted that the relevant appellate order was delivered to the assessee through ITBA portal on 23.03.2019 and as per the report it was delivered as well. Further, we observe that assessee has not received any

physical copy of the order and since the order was delivered through ITBA portal, assessee could not or failed to notice that such order was passed through ITBA portal. Considering the overall facts on record and for the sake of overall justice we condone the delay with such delay.

13. Coming to the merits of the case, at the time of hearing Ld. AR brought to our notice the details of shareholders and their financial position which is placed in Page No. 1 of the Paper Book. Further, he brought to our notice the submissions made by the assessee before the Ld.CIT(A) that the book value of the shares is stood on the date of issue share was ₹.765 per share and the issue price was determined at ₹.1000 per share considering the fact that assessee was about to start chemical plant and considering the future development the price of the shares was increased by ₹.250/-. Therefore, he submitted that the assessee has a proper reason and explanation to issue the shares at premium. Further, he brought to our notice Page No. 355 of the Paper Book in which assessee has justified the issue of shares at premium before the Ld.CIT(A) the relevant submissions made by the assessee are reproduced below: -

"3). Assessee had issued shares at Rs. 990/- AO had objections for issuing shares at a premium Hence addition is made by him.

AO failed to consider following value of assessee's share as on 31/3/2011 which is as under.

<i>Share Capital</i>	<i>2,40,000/-</i>
<i>Reserve and Surplus</i>	<i>1,48,21,917/-</i>
<i>Property Investment Market Value 50 lacs (Cost 16,90,654) (Property sold on 22/8/2014 for Rs. 57,35,000/-)</i>	<i>33,09,346/-</i>
<i>Appreciation in Value of Investment</i>	
<i>Market/Book Value 6,59,85,135/- less cost 23,89,650/-</i>	<i>6,35,95,485/-</i>
<i>Total in build value of shares of assessee</i>	<i>8,19,66,748/-</i>
<i>Number of shares as on 31.03.2011</i>	<i>24000</i>
<i>Book value of each share of the assessee as on 31.03.2011</i>	<i>3415/-</i>

.....

4. Apart from above book Valuation of shares, Assessee had plans from 2012 to enter into manufacturing Industry, Particularly in Chemicals at GIDC Sarigam Tal. Umbergaon Dist Valsad, Gujrat for which finally agreement dated 26/11/2014 was entered in to.

Offer letter dated 31/5/2011 to prospective shareholder is enclosed. Page No. 212 to 250
Kindly see page no. 226 for investment in chemical business.

Basis of issue of shares at a premium is on Page no. 227 to 228

Value of shares by Net asset method is Rs. 766/

Value of shares as profit Earning method is Rs. 1080/

Value of shares by Discounted Cash Flow method is Rs. 1275/

Value of shares by Discounted Cash Flow Explicit method is Rs. 1710/

Valuation certificate of share of the company is enclosed on 241 to 249

Agreement with Newtech Polymers India Pvt Ltd. for transfer of assets & Liabilities of chemical Business is enclosed Page No. 251 TO 258

Conveyance deed for transfer of Land is enclosed. Page No. 259 to 316

Shareholders, for purpose of Share Premium will consider book Value & future prospects of the assessee company"

14. He also brought to our notice relevant agreement and conveyance deed to support the above submissions which is placed in Page No. 251 to 254 of the Paper Book. Further, he submitted that the investors in the company no

doubt has very small income. However, he submitted that there is substantial funds available at their disposal to make the investment in the assessee company.

15. Further, he submitted that Assessing Officer observed in his order that assessee has not discharged the onus, in this regard he submitted that assessee has submitted various documents before the Assessing Officer to substantiate its claim. Therefore, assessee has already discharged the onus and further, he submitted that Assessing Officer has not investigated further and Assessing Officer has given his opinion on the basis of the informations submitted by the assessee. There is no separate finding by the assessee by making proper investigations. In this regard, he relied on the Coordinate Bench decisions in the case of ITO *v.* M/s. Sweta Synthetics Pvt. Ltd., in ITA.No. 3000/Mum/2017 dated 12.07.2019 and ITO *v.* VHM Apparels P. Ltd., in ITA.No. 3078/Mum/2017 dated 09.09.2019. Ld. AR submitted that the issue involved in these appeals are exactly similar to the facts of the assessee's case.

16. Ld. DR vehemently supported the orders of the authorities below.

17. Considered the rival submissions and material placed on record, we observe that the Assessing Officer has made addition based on the informations available on record and simply by observing that assessee has issued the shares with share premium and he has not made any further enquiry. The facts in this appeal are exactly similar to the facts in the decision of the M/s. Sweta Synthetics Pvt. Ltd., (supra). The Coordinate Bench in the case of M/s. Sweta Synthetics Pvt. Ltd., (supra) held as under: –

"9.2. We find that all the investor companies are having sufficient creditworthiness to make investment in the assessee company which would be evident from the table hereinbelow:-

Details & capacity of share Holders						
Name of Applicant	Share Capital	Reserve	Secured Loans	Total	Income	Invested
1) Hema Trading Company Pvt Ltd	17,600,000.00	159891.00	0	17759891.00	2,52,451.00	25,20,000.00
2) Javda India Impex Ltd	36,790,000.00	776703.00	9966942.00	47533645.00	904728.00	25,20,000.00
3) Kush Hindusthan Entertainment Lt	25,290,000.00	186178.00	0.00	25476178.00	293230.00	6420000.00
4) Real Gold Trading Co. Pvt Ltd	17,592,000.00	119971.00		17711971.00	189356.00	25,20,000.00
5) Lexus Infotech Ltd.	20,132,000.00	127509.00		20259509.00	102211.00	25,20,000.00
Share Application Money						
6). Reynolds Petro chem. Ltd	8,000,000.00	4424932.00	5725000.00	18149932.00	72201.00	5100000.00
7) Utkantha Trading Pvt Ltd	100,000.00	190438.00	50765315.00	51055753.00	301438.00	2520000.00
Total						<u>2,41,20,000/-</u>

9.3. Now it would be relevant to address the case laws relied upon by the Id DR before us.

PCIT vs Bikram Singh reported in 85 taxmann.com 104 (Del HC)

In this case, the loans were received from 8 persons whose identities were not established. There was a clear finding that the lenders did

not have sufficient financial strength to advance the loans to the assessee therein, that too without any collateral security, without any interest and without a loan agreement. The relevant observations of the assessing officer in that case on facts were as under:-

9. *A brief summary of each of the eight transactions and creditors thereof, as per the AO's order is as under:*

(i)	<i>Shri Amar Singh - Only a letter of confirmation was filed. Name of the father and address was not given. PAN number was not given. The information requested from Gurgaon Gramin Bank, from where the cheque was issued with respect to the compensation from land acquisition, was also not received. The person was not produced. Thus, the identity, creditworthiness and genuineness of Shri Amar Singh were not proved.</i>
(ii)	<i>Shri Chandan Singh - A confirmation letter of Shri Chandan Singh was filed along with the bank statement. The AO noticed that the bank account was opened with a cash deposit of Rs.500/- and huge amounts of cash was deposited in this account before the cheques of Rs.60, 00,000/- and Rs.50, 00,000/- were issued. The AO concluded that since the source of cash was unverified and Shri Chandan Singh was also not produced, the identity, creditworthiness and genuineness of Shri Chandan Singh was not proved.</i>
(iii)	<i>Shri Harpreet Singh - No documents were filed by the Assessee to establish the identity, address etc. Even the PAN number or ID proof was not filed and he was also not even produced.</i>
(iv)	<i>Shri Om Prakash - No documents to establish the address, PAN number, source of deposit and ID proof, were filed. Neither was a confirmation letter filed nor was he produced.</i>
(v)	<i>Shri Shiv Tej - No documents to establish the address, PAN number, source of deposit and ID proof, were filed. Neither was a confirmation letter filed nor was he produced.</i>
(vi)	<i>Shri Ram Chander - Only a confirmation letter was filed. However, the AO observed that the same was not supported by any evidence of identification, cheque numbers, sources of income or sources of loan. The person was not produced.</i>

(vii)	Smt. Sunita - Only a confirmation letter was filed. However, the AO observed that the same was not supported by any evidence of identification, cheque numbers, sources of income or sources of loan and even she was not produced.
(viii)	Shri Virender Yadav - A confirmation letter was produced but no PAN number was mentioned. The AO observed that the bank statements reveal the deposit of cash of Rs.13,00,000/- and Rs.7,00,000/- immediately before the issuance of the cheque in favour of the Assessee. He was also not produced.

15. The ITAT by order dated 19th July, 2016 partly allowed the Assessee's appeal and deleted the additions in respect of four of the creditors. The summary of the conclusions of the ITAT in respect of the eight creditors and the transactions is set out below:

(i)	In respect of Smt. Sunita, the ITAT held that additional evidence was submitted by the Assessee and the same was taken on record. The ITAT observed that Smt. Sunita, being the wife of the Assessee and her financial affairs having been handled by the Assessee himself, the identity and creditworthiness of Smt. Sunita was established. Her PAN Card has been filed. By assessing the bank accounts of Smt. Sunita, the ITAT concluded that the genuineness and creditworthiness was also established.
(ii)	In respect of Shri Virender Yadav, the ITAT observed that since his PAN card had been submitted by the Assessee, the matter deserved to be remanded to the AO to pass a speaking order.
(iii)	In respect of Shri Shiv Tej, the ITAT after relying upon the documents, produced by the Assessee, restored the matter to the file of the AO as he had not been produced before the AO.
(iv)	In respect of Shri Om Prakash, the Assessee relied upon the letter of confirmation, the PAN card and Voter Identity Card to establish the identity and also submitted that the AO did not record the statement of Shri Om Prakash despite his appearance before the AO. Thus, the ITAT concluded that the matter deserved to be restored to the file of the AO.
(v)	In respect of Shri Ram Chander, the ITAT referred to the confirmation letter issued by him, Voter ID Card, the copy of bank statement and the cheque of Rs. 18.48 Lakhs, which was explained by him as having been received from his sister Vidya. Thus, the ITAT

	<i>concluded that the identity, creditworthiness and genuineness was established and the addition of Rs.10 lakhs in respect of Shri Ram Chander was deleted.</i>
<i>(vi)</i>	<i>In respect of Shri Chandan Singh, the ITAT referred to the copy of PAN Card, Voter ID Card and the bank statement, which was submitted by the Assessee. The ITAT held that the identity, genuineness and creditworthiness was established and the addition made to the tune of Rs.1.10 Crores was deleted.</i>
<i>(vii)</i>	<i>In respect of Shri Amar Singh, the ITAT referred to the letter of confirmation and Voter ID Card to establish the identity of this creditor. He further referred to the bank statement, which showed a deposit of Rs.84,44,762/- in his bank account, just before the issuance of cheque of Rs.50 lakhs to the Assessee. According to the Assessee, this amount was received from the Land Acquisition Officer, Gurgaon in favour of Shri Amar Singh. The ITAT thus deleted the addition of rupees Rs.50 lakhs in respect of Shri Amar Singh.</i>
<i>(viii)</i>	<i>In respect of Shri Harpreet Singh, the ITAT referred to the letter issued by him explaining that the loan was given by his son Mr. Dakshdeep Singh vide cheque no. 58913 dated 18th June, 2010 drawn on HDFC Bank. He also referred to the confirmation letter given by Mr. Dakshdeep Singh. The ITAT noted that the creditworthiness of Mr. Dakshdeep Singh was not established and hence the matter was restored to the file of the AO to examine the identity, genuineness and creditworthiness. However, for statistical purpose, addition of Rs.3,50,000/- in respect of Shri Harpreet Singh was allowed.</i>

16. Thus, the ITAT

•	<i>deleted the following additions qua Shri. Amar Singh, Shri. Chandan Singh, Shri. Ram Chander, and Smt. Sunita.</i>
•	<i>restored the additions with respect to Shri. Virender Yadav, Shri. Om Prakash, Shri. Shiv Tej Singh, and Shri. Harpreet Singh, to the AO for reconsideration.</i>

It was held by Hon'ble Delhi High Court as under:-

41. An analysis of the above facts shows that none of these four individuals have the financial strength to lend such huge sums of money to the Assessee, that too without any collateral security, without interest and without a loan agreement. The mere establishing of their identity and the fact that the amounts have been transferred through cheque payments, does not by itself

mean that the transactions are genuine. The AO and the CIT (A) have rightly held that the identity, creditworthiness and the genuineness are all in doubt. Moreover, the Court notes that that these amounts have been advanced to the Assessee without any explanation as to their relationship with the Assessee, the reason for the payment of such huge amounts, as also whether any repayments have, in fact, been made. There are contradictions in the explanation given by the Assessee and the statements recorded by these four individuals, which are irreconcilable. For example, in the case of Shri Ram Chander/Ram Charan, he had initially stated that he had given Rs.10,00,000/- out of the proceeds of sale of the land but thereafter it was claimed by him that the money had come from her sister Vidya. Such contradictions clearly render all these transactions dubious. The ITAT could not have, merely because the payments were through cheques, held that the transactions were genuine. The ITAT erred in simply accepting the explanation of the Assessee qua the four transactions. The ITAT, clearly, did not follow the binding precedent in Divine Leasing & Finance Ltd. (supra), which in no uncertain terms requires that the authorities are duty bound to investigate the creditworthiness of the creditors, subscribers and the genuineness of the transactions. Thus the ITAT did not merely give findings of fact but misapplied the law. Hence the authorities CIT v. S. Nelliappan [1967] 66 ITR 722 (SC), Orissa Corpn. Pvt. Ltd. (supra), Gun Nidhi Dalmia (supra) do not support the Assessee's case. The Assessee has failed to discharge his initial burden as the explanation given by the Assessee and the four individuals does not appear to be credible.

Hence it could be seen that the aforesaid narration of facts are totally distinguishable with facts of the instant case before us, which are not reiterated for the sake of brevity.

9.4. *Finally the Id DR placed reliance on the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs NRA Iron & Steel (P) Ltd reported in 412 ITR 161 (SC) wherein the decision on addition made towards cash credit was rendered in favour of the revenue. We have gone through the said judgement and we find in that case, the Id AO had made extensive enquiries and from that he had found that some of the investor companies were non-existent which is not the case before us. Certain investor companies did not produce their*

bank statements proving the source for making investments in assessee company, which is not the case before us. Source of funds were never established by the investor companies in the case before the Hon'ble Apex Court, whereas in the instant case, the entire details of source of source were duly furnished by all the respective share subscribing companies before the Id AO in response to summons u/s 131 of the Act by complying with the personal appearance of directors. In the instant case before us, after the relevant details were furnished by the assessee before the Id AO, no enquiries were further made by the Id AO with the share subscribers. The Id AO merely relied on the statement of Shri Praveen Kumar Jain and proceeded to make the addition. Hence the decision relied upon by the Id DR is factually distinguishable and does not advance the case of the revenue.

9.5. We find that as per the mandate of section 68 of the Act, the nature and source of credit in the books of the assessee company has been duly explained by the assessee. The credit is in the form of receipt of share capital and share premium from share applicants. The nature of receipt towards share capital is well established from the entries passed in the respective balance sheets of the companies as share capital and investments, as the case may be. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. The identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and income tax returns. With regard to the creditworthiness of share applicants, these companies are having capital and reserves in several crores of rupees and the investment made in the assessee company is a small part of their capital as could be evident from the aforesaid table. These transactions are also duly reflected in the balance sheets of the share applicants. By this, the creditworthiness of share applicants is also proved beyond doubt. With regard to genuineness of transactions, the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their respective bank accounts. The share applicants have confirmed the fact of

investment in share capital and share premium by filing a confirmation together with an affidavit from their directors and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques. No verification was carried out by the Id AO in the instant case either by issuing notices u/s 133(6) of the Act or by issuing summons u/s 131 of the Act with the share applicants.

9.6. Undisputedly the Share Applicants in this case are the bank account holders in their respective banks in their own name and are sole owner of the credits appearing in their bank account from where they issued cheques to the assessee. For the proposition that a Bank Account holder himself is the 'owner' of 'credits' appearing in his account (with the result that he himself is accountable to explain the source of such credits in whatever way and form, the same have emerged) support can be derived from section 4 of Bankers Book Evidence Act 1891 which reads as under:-

"4. Mode of proof of entries in bankers' books: Subject to the provisions of this Act, a certified copy of any entry in a bankers' book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every cases where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

9.6.1. Following the said provisions, the co-ordinate bench of Allahabad Tribunal in the case of Anand Prakash Agarwal reported in 6 DTR (All-Trib) 191 held as under:-

"The question that remains to be decided now is whether the subject matter of transfer was the asset belonging to the transferor/donors themselves. There is enough material on record which goes to show that there were various credits in the bank accounts of the donors, prior to the transaction of gifts, which undisputedly belonging to the respective donors themselves, in their own rights. No part of the credits in the said bank' accounts was generated from the appellant and/or from its associates, in any manner. The certificates issued by the banks are construable as evidence about the ownership of the transferors or their respective

bank accounts, as per s.4 of the Bankers' Books evidence Act 1891, which read as under:

"4. Where an extract of account was duly signed by the agent of the bank and implicit in its was a certificate that it was a true copy of an entry contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book was in the custody of the bank, it was held admissible in evidence. Radheshyam v. Safiyabai Ibrahim AIR 1988 Bom. 361 : 1987 Mah. 725: 1987 Bank J 552."

In view of the position of law as discussed above, it is always open for a borrower to contend, that even the "creditworthiness" of the lender stands proved to the extent of credits appearing in his Bank Account and he should be held to be successful in this contention."

9.7. We find that the Hon'ble Calcutta High Court in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata reported in 347 ITR 347(Cal) had 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."

9.8. We find that the Hon'ble Supreme Court in the case of M/s Earthmetal Electricals P Ltd vs CIT & Anr. reported in 2010 (7) TMI

1137 in Civil Appeal No. 21073 / 2009 dated 30.7.2010 arising from the order of Hon'ble Bombay High Court had held as under:-

ORDER

Delay condoned.

Leave granted.

Heard learned counsel on both sides.

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

The appeal is allowed accordingly.

No order as to costs.

In the instant case before us, the share subscribing companies are duly assessed to income tax. It is not in dispute that the share subscribing companies are in existence. It is not in dispute that the share subscribing companies are duly assessed to income tax and their income tax particulars together with the copies of respective income tax returns with their balance sheets are already on record. Hence it could be safely concluded that they are genuine shareholders and not bogus and fictitious. Accordingly, the ratio laid down by the Hon'ble Apex Court in the case of M/s Earthmetal Electricals P Ltd supra would be squarely applicable to the facts of the instant case.

9.9. We would like to add that receipt of share capital for a company is not a prohibited transaction, as that is one of the main source of raising funds for a company to run its intended activities. Once all the relevant details of the investor companies were filed by the assessee before the Id AO, it is incumbent on the part of the Id AO to trigger the further verification on the investor companies by either issuing notice u/s 133(6) or summons u/s 131 of the Act to examine the veracity of the documents furnished before him. In the instant case, admittedly no such verification was carried out by the Id AO. The only premise on which addition was made was by placing reliance on the statement recorded from Shri Praveen Kumar Jain during the course of his search action. In these facts and

circumstances, there is absolutely no reason to draw any adverse inference on the impugned transactions and the documents submitted by the assessee.

9.10. We find that the same investor companies were subject matter of adjudication by the co-ordinate bench of this tribunal in the case of Ambee Investment & Finance Pvt Ltd vs ITO in ITA Nos. 3899 and 3948/Mum/2017 dated 8.2.2019 wherein the transactions with the investor companies Olive Overseas Pvt Ltd (Real Gold Trading Pvt Ltd) ; Nakshatra Business Pvt Ltd (Hema Trading Co. Pvt Ltd) ; Javda India Impex Ltd ; Lexus Infotech Ltd and Kush Hindusthan Entertainment Ltd were considered and issue decided in favour of the assessee. The relevant operative portion of the order passed by this tribunal in ITA Nos. 3899 & 3948/Mum/2017 dated 8.2.2019 supra are as under:-

"8. We have gone through the assessment order and the order of CIT(A) and noted that the AO noticed from the Bank Account submitted by the assessee that these are non-genuine transactions. The entire basis of the AO was on the investigation done by the office of DGIT Investigation, Mumbai. From the above assessment order, it is clear that the AO has not made any enquiry or investigation and no evidence to controvert the factual details submitted by the assessee was brought on record by the Assessing Officer. The statement of Shri Pravin Kumar was supplied and no cross-examination was provided. There nothing on record about the result of investigation having done by the DGIT (Investigation), Mumbai. The papers filed by the assessee clearly demonstrate that the identity, creditworthiness and genuineness of the transaction is proved. The assessee has prima facie discharged its onus and AO has not carried out any inquiry. In view of the above, we confirm the order of CIT(A) and this issue of Revenue's appeal is dismissed."

The facts of the instant case before us squarely fit in into the facts before the co-ordinate bench of this tribunal in the aforesaid case. Though this decision was rendered in the context of transactions with 5 parties mentioned supra, the same documents that were filed for these 5 parties were filed by the assessee herein for the other two parties also viz Reynolds Petro Chem Ltd and

Utkantha Trading Pvt Ltd. Hence the decision rendered thereon would apply with equal force for these two companies also.

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

9.12. We also find that the Hon'ble Jurisdictional High Court in the case of CIT vs Orchid Industries Pvt Ltd reported in 397 ITR 136 (Bom) 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."

9.13. We find that the various case laws relied upon by the Id CITA including the various decisions of Hon'ble Jurisdictional High Court among other High Courts are squarely applicable to the facts of the instant case before us.

9.14. In view of the aforesaid observations in the facts and circumstances of the case and by respectfully following the various judicial precedents relied upon hereinabove, we hold that the Id CITA had rightly deleted the addition made u/s 68 of the Act in the instant case on which we do not find any infirmity in his order. Accordingly, the grounds raised by the revenue are dismissed."

18. Respectfully following the above said decision, as the facts being identical, we are of the view that various decisions of Hon'ble Jurisdictional High Court among other High Courts are squarely applicable to the facts of the instant case before us. Accordingly, we allow the ground raised by the assessee.

19. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 17th October, 2022.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai / Dated 17/10/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum