

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.570/Kol/2021
Assessment year: 2012-13

ITO, Ward-12(1), Kolkata Appellant
vs.

Trinetra Merchants (P) Ltd..... Respondent
14A, Clive Row, 1st Floor,
Dalhousie, Kolkata-1.
[PAN: AABCT7086M]

Appearances by:

Shri Manish Tiwari, FCA, appeared on behalf of the appellant.

Shri Partha Pratim Barman, Addl. CIT, appeared on behalf of the Respondent.

Date of concluding the hearing : October 12, 2022

Date of pronouncing the order : November 03, 2022

आदेश / ORDER

मनीष बोरड, लेखा सदस्य द्वारा / Per Manish Borad, Accountant Member:

This appeal filed by the Revenue pertaining to the Assessment Year (in short "AY") 2012-13 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the "Act") by Commissioner of Income Tax (Appeals)-7, Kolkata [in short Id. "CIT(A)"] dated 13.07.2020 which is arising out of the assessment order framed u/s 143(3) of the Act dated 10.03.2015.

2. Registry has informed that the appeal is time barred by 343 days. Condonation application has been filed by the Revenue. Perusal of the same shows that the delay was on account of COVID-19 restrictions. We, therefore, in view of the judgment of The Hon'ble Supreme Court vide Miscellaneous Application No. 21 of 2022 find that the limitation period in filing appeal between 15.03.2020 till

28.02.2022 has been excluded for calculating the limitation period in filing appeal under this period. Since the period of limitation in this case falls during this period, the same deserves to be extended and we, therefore, condone the delay of 343 days and admit the Revenue's appeal for adjudication.

2. The Revenue has raised the following grounds of appeal:

"1. Whether on the facts and in the circumstances of the case Ld CIT(A) was justified in deleting the addition of Rs 5,29,00,000/- made by the Assessing Officer on account of share capital and premium in the course of assessment in absence of identity of the creditors, genuineness and creditworthiness of the entire transactions.

2. Whether on the facts and in the circumstances of the case, Ld CIT(A) Was justified in deleting the addition of Rs 5,29,00,000/-- made by the A.O where no personal attendance was made by any director of the share allottee companies during the course of assessment proceedings and such identity and creditworthiness of the creditors and genuineness of transactions could not be verified.

3. The principle which has been laid down by the Hon'ble Supreme Court in the case of Pr.CIT(Central)-1 Kolkata Vs NRA Iron & Steel Pvt Ltd (412 ITR 161) suggested that,

I)That the assessee is under a legal obligation to prove the receipt of share capital/ premium to the satisfaction is under a legal obligation to prove the receipt of share capital premium to the satisfaction of the A.O, failure of which, would justify addition of the said amount to the income of the assessee...". In the facts and under the circumstances of the Case, the assessee company has failed to do so other than submission of mere statements of various kinds. Thus, the decision of the Ld. CIT (A) is erroneous in holding that the raised share capital was not the assessee's own income.

II)That the A.O. is duty bound to investigate the creditworthiness of the Creditor/subscriber to verify the identity of the subscriber, and to ascertain whether the transaction is genuine, or these are bogus entries of name lenders. In the facts of the case ,in spite of best efforts made by the assessing officer, he could not verify the same as there was no response from the companies to whom shares were allotted on private placement basis. Thus the decision of the Ld. CIT(A) is erroneous in holding that the raised share capital was not the assessee's own income..

III)That if the enquires and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness ,then the genuineness of the transactions would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the act. In the facts of the case, the Ld.CIT(A) Completely ignored this aspect, thus has erred in giving relief to the assessee.

4. On the facts of the present case, clearly the assessee company failed to discharge the onus required under section 68 of the Act, the A.O. was justified in adding back the amounts to the income of the Assessee and the Ld.CIT(A) has erred in allowing relief to the assessee.

5. As per the A.O so far the creditworthiness of the share subscribers is concerned, there must be some positive evidence to show the nature and source of the resources of the share subscribers. More over where an assessee fails to prove satisfactorily the source and the nature of certain amount of credit during the accounting year the A.O is entitled to draw the inference that the receipt are of an assessable nature.

6. The appellant craves to add, alter, amend, delete or substitute any of the grounds and or take additional grounds before or at any Time of hearing of this appeal.”

3. Brief facts of the case are that the assessee is a private limited company. Nil income declared in the return filed on 16.03.2013 pertaining to assessment year 2012-13. The case was selected for scrutiny through CASS for the reason “*large share premium received*” which was followed by serving of valid notices u/s 143(2) and 142(1) of the Act. The ld. Assessing Officer observed that the assessee company has received a total sum of Rs.5,29,00,000/- which included share capital of Rs.52,900/- and share premium of Rs.5,28,47,100/-. The assessee was asked to explain the said cash credit. The assessee filed various details in order to explain the said share capital and share premium but failed to satisfy the Assessing Officer. The ld. Assessing Officer was also not satisfied with the large premium received by the company and after applying the judgment of the Hon’ble Supreme Court in the case of *CIT vs. Durga Prasad More 82 ITR 540* and in the case of *Sumati Dayal vs. CIT 214 ITR 801* and after applying the test of

human probability came to conclusion that it is possible for the company to receive such a huge share premium on its equity shares. Accordingly, addition u/s 68 of the Act for unexplained share capital and share premium at Rs.5,29,00,000/- was made and income assessed of Rs.5,29,00,000/-.

4. Aggrieved, assessee preferred appeal before the ld. CIT(A) challenging the addition made by the ld. Assessing Officer. The assessee filed complete details of PAN, addresses, name and address of directors, bank statement, income-tax return, audited financial statement and copies of assessment orders u/s 143(3) of the Act (as available) of the eight shareholders who were allotted the equity shares for the alleged sum. The assessee also placed reliance on various judicial pronouncements stating that the assessee has discharged its primary onus to explain the alleged cash credit and no adversity was found by the Assessing Officer. The ld. CIT(A) on examining the said details was satisfied that the identity and creditworthiness of the cash creditors and the genuineness of the transaction were established and held that since no evidence was adduced on record to show that the investment made with the appellant company in the shape of share application money disclosed in the returns of the share applicants were rejected before respective assessing authorities, the alleged addition deserves to be deleted.

5. Aggrieved, the Revenue is now in appeal before this Tribunal. The ld. Departmental Representative vehemently argued supporting the order of the Assessing Officer and further stated that the assessee company has no regular business activity and it is beyond human probability that a company with such a small business can attract the share applicants to pay a huge share premium. Further, it was stated that the appellant company seems to be a paper/shell company and

the addition made by the Assessing Officer should be confirmed. The ld. DR heavily relied on the judgment of Hon'ble Supreme Court in the case of *PCIT(Central)-1, Kolkata vs. NRA Iron & Steel Pvt. Ltd.* 412 ITR 161 wherein the Hon'ble Court held as under:

I)That the assessee is under a legal obligation to prove the receipt of share capital/ premium to the satisfaction is under a legal obligation to prove the receipt of share capital premium to the satisfaction of the A.O, failure of which, would justify addition of the said amount to the income of the assessee...". In the facts and under the circumstances of the Case, the assessee company has failed to do so other than submission of mere statements of various kinds. Thus, the decision of the Ld. CIT (A) is erroneous in holding that the raised share capital was not the assessee's own income.

II)That the A.O. is duty bound to investigate the creditworthiness of the Creditor/subscriber to verify the identity of the subscriber, and to ascertain whether the transaction is genuine, or these are bogus entries of name lenders. In the facts of the case ,in spite of best efforts made by the assessing officer, he could not verify the same as there was no response from the companies to whom shares were allotted on private placement basis. Thus the decision of the Ld. CIT(A) is erroneous in holding that the raised share capital was not the assessee's own income..

III)That if the enquires and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness ,then the genuineness of the transactions would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the act. In the facts of the case, the Ld.CIT(A) completely ignored this aspect, thus has erred in giving relief to the assessee.

6. On the other hand, the ld. counsel for the assessee apart from placing reliance on the detailed findings of the ld. CIT(A) also took us through the written submissions filed before the ld. CIT(A), details of the appellant company which included its audited financial statement, income tax return, bank statement and following documents of investor companies placed in the paper-book:

3. Details of investor company

a) Chintamani Roadways Pvt. Ltd. (Rs.5,00,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of ROC Master Data.

b) Dhankuber Vintrade Private Ltd. (Rs.1,73,50,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of order u/s 143(3) dated 13.06.2014
- Copy of ROC Master Data.

c) Dolphin Tradecomm Pvt. Ltd. (Rs.20,00,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of ROC Master Data.

d) Pushpkala Vanujya Pvt. Ltd. (Rs.69,50,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of order u/s 143(3) dated 05.09.2014
- Copy of ROC Master Data.

e) Saurav Tradecom Pvt. Ltd. (Rs.20,00,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of order u/s 143(3) dated 12.03.2015
- Copy of ROC Master Data.

f) Shrestha Commfeed Pvt. Ltd. (Rs.25,00,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of confirmation
- Copy of ROC Master Data.

g) Subhmangal Commoddeal Pvt. Ltd. (Rs.1,34,00,000/-)

- Copy of Audited Financial Statements.
- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of order u/s 143(3) dated 20.03.2015
- Copy of ROC Master Data.

h) Topflow Suppliers Pvt. Ltd. (Rs.82,00,000/-)

- Copy of Audited Financial Statements.

- Copy of ITR Acknowledgement.
- Copy of Relevant Bank Statement.
- Copy of order u/s 143(3) dated 11.09.2014
- Copy of ROC Master Data.

7. The Id. counsel for the assessee further submitted that out of eight share applicants in most of the cases, these companies have also been subjected to scrutiny assessment u/s 143(3) of the Act, therefore, their creditworthiness of carrying out business transaction cannot be doubted. Further, it was submitted that the share applicants have sufficient share capital and reserve and surplus which can justify the investments made by these companies in the share capital and share premium of the assessee company. All the transactions have been carried out through banking channel and the Assessing Officer has given no adverse comment on any of the financial documents of the share applicant companies filed before it. Therefore, since the assessee has successfully discharged the primary onus of explaining the source of the share capital and share premium to the best possible extent, and the Id. Assessing Officer having failed to find any defect in such details then under such circumstances addition made by the Assessing Officer u/s 68 of the Act for unexplained cash credit was uncalled for and the Id. CIT(A) has rightly deleted the same. In support of its contention, reliance was placed on following decisions:

- i) *CIT vs. Gagandeep Infrastructure (P) Ltd.* 80 taxmann.com 272 (Bombay)
- ii) *Green Infra Ltd. vs. ITI, Ward1(1)* 159 TTJ 728
- iii) *PCIT vs. Chain House International (P) Ltd.* 98 taxmann.com 47;
- iv) *CIT vs. Lovely Exports Ltd.* (2008) 216 CTR 195 (SC);
- v) *CIT vs. Kamdhenu Steel & Alloys Limited* [ITA No.972 of 2009];

vi) DCIT vs. Rohini Builders 127 Taxman 523;

vii) CIT vs. Orissa Coprn (P) Ltd. 159 ITR 78

8. We have heard rival contentions and perused the records placed before us and carefully gone through the decisions referred and relied by both the parties. The only issue in dispute is regarding the deletion of addition made by the Assessing Officer for unexplained cash credit totalling to Rs.5,29,00,000/- received by the assessee which comprised of the share capital of Rs.52,900/- and share premium of Rs.5,28,47,100/-. We observe that the alleged sum was received by the assessee company from following shareholders:

SL	Name & PAN	Address	No. of shares	Total Share capital (including premium)
1	Chintamani Roadways Pvt. Ltd. PAN: AABCC8739N	4A, Ganpat Bagla Road, Kolkata - 700007.	50	5,00,000/-
2	Dhankuber Vintrade Pvt. Ltd. PAN: AADCD9266B	66,Nalini Seth Road, Gr Floor, Kolkata-700007	1,735	1,73,50,000/-
3	Dolphin Tradecomm Pvt. Ltd. PAN: AADCD0325P	23/1, Maharshi Devendra Road, Gr Floor, Kolkata-700007.	200	20,00,000/-
4	Pushpakala Vanijya Pvt. Ltd. PAN: AAGCP0980KK	66,Nalini Seth Road, Gr Floor, Kolkata-700007	695	69,50,000/-
5	Saurav Tradecom Pvt Ltd. PAN: AAMCS5700L	23/1, Maharshi Devendra Road, Gr Floor, Kolkata-700007.	200	20,00,000/-

6	Shrestha Commfeed Pvt. Ltd. PAN:	33/1, N.S. Road, Room No-771, Kolkata-700001	250	25,00,000/-
7	Subhmangal Commfeed Pvt. Ltd. PAN: AAQCS1098D	233/1, Maharshi Devendra Road, 1 st Floor, Kolkata- 700007.	1,340	1,34,00,000
8	Topflow Suppliers Pvt. Ltd. PAN: AAECT1303Q	66, Nalini Seth Road, 5 th Floor, Kolkata- 700007	820	82,00,000/-
TOTAL			5,290	5,29,00,000/

9. Further, the assessee has filed various details including PAN & address of share allottee company. Name and address of directors of allottee company, share application form, entire bank statement, source of fund, audited financial statement and IT acknowledgement, scrutiny assessment orders u/s 143(3) wherever available in respect of the above-stated eight shareholders. Further, it is brought to our notice by the ld. counsel for the assessee that all the alleged shareholders had sufficient base of share capital and reserve and surplus to justify and explain the share application money paid by these companies. The same is depicted below in the form of a chart:

Name of Share holder Companies	Share Capital, Reserves & Surplus	Application Money	Percentage
Chintamani Roadways Pvt. Ltd.	38,95,130/-	5,00,000/-	12.83
Dhankuber Vintrade Pvt. Ltd.	14,30,01,750	1,73,50,000/-	12.13
Dolphin Tradecomm Pvt. Ltd.	2,34,04,084/-	20,00,000/-	8.54
Pushpkala Vanijya Pvt. Ltd.	10,69,01,817/-	69,50,000/-	6.50

Saurav Tradecom Pvt. Ltd.	56,34,10,099/-	20,00,000/-	0.35
Shrestha Commfeed Pvt. Ltd.	50,01,320/-	25,00,000/-	50%
Subhmangal Commoddeal Pvt. Ltd.	15,16,51,795/-	1,34,00,000/-	8.83
Topflow Suppliers Pvt. Ltd.	4,69,51,118/-	82,00,000/-	17.46
		5,29,00,000/-	
		-	

10. Further, we notice that in all the above referred documents pertaining to the eight shareholders filed before Id. Assessing Officer but he without pointing out any defect in these details only insisted for the physical appearance of the directors of the share applicant companies and since they failed to appear, just for this reason, the Id. Assessing Officer came to conclusion that the transaction of receiving share capital and share premium is not genuine and the assessee has failed to explain the same which calls for an addition u/s 68 of the Act. However, when the issue travelled before Id. CIT(A), he after examining the correctness of the documents filed by the assessee and judicial precedents decided in favour of the assessee and deleted the impugned addition observing as follows:

“4.2. I have considered the submission of the AR of the appellant in the backdrop of the assessment order in deciding the issue at hand. I have taken note of the various pertinent points as put forth by the AR in support of his stand that the Assessing Officer had not considered the factual matrix of the issue at hand and proceeded to make an addition not commensurate by any standard of judicious judgment but by only extraneous elements not germane to the issue at hand. I have also considered the various judicial decisions referred to by the AO as well as the AR of the appellant in support of their respective stands in the matter. I have also considered the relevant materials on record in deciding the matter. The brief facts as stated in assessment order in this issue are that the AO treated the entire share capital along with share premium raised by the appellant to the extent of

Rs.5,29,00,000/- to be assessable u/s 68 of the Act. The main premise of AO is that the appellant has failed to comply to Summons issued u/s 131 of the Act and it also failed to explain any basis for huge share premium. On the other hand the AR of the appellant contested that the action of the AO to make addition under section 68 was not applicable in the appellant's case for the year under consideration for the following reasons: (a) that identities of the share subscribers stood proven as per documentary evidences (supra) (b) that creditworthiness of the share subscribers stood proven (supra) (c) that the genuineness of the transactions stood proven (supra) and (d) that the share applicants have been regularly assessed to tax by the respective AOs who have not made any adverse comments on their investments made in appellant company in order issued u/s 143(3) of the Act. In such view of the matter, I find the A.O cannot abruptly come to the conclusion that section 68 of the Act was applicable in the appellant's case just for the alleged shortcomings as stated by the AO. On perusal of paper book I find that all relevant documentary evidences were before the AO who could have decided the case on merit but however this did not happen. The evidences in respect of all the share applicants appear from Page 39 of the paper book submitted by the appellant. Since in the instant case, the share applicants in response to the notices issued upon them had filed their written submission and no defect whatsoever was found therein, there was no reason for drawing any adverse inference merely for the reason of non-appearance of the directors of the appellant company. The appellant has submitted several judicial pronouncements to the effect that mere non-appearance of the share applicant is no basis for invoking provisions of Sec. 68 which includes the decision of the Hon'ble Supreme Court in the case of CIT vs. Orissa Corpn. (P) Ltd. [1986] 159 ITR 78 (SC) wherein the Hon'ble Supreme Court held as under:

“In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises.

The High Court was, therefore, right in refusing to refer the questions sought for. Decision of the High Court affirmed.”

In view of the foregoing discussion as well as the judicial precedents pertinent to the issue at hand (supra), I do not find any premise to endorse the action of the Assessing Officer in making the impugned addition of Rs.5,29,00,000/- as unexplained cash credit u/s 68 of the Act merely on the basis of non-compliance to section 131 of the Act. I also find that the AO himself did not impose any penalty upon the appellant for non-compliance to summons u/s 131 of the Act.

4.3 With regard to the issue of charging high premium on the shares issued by the appellant company, I find that fixing of share premium was a commercial decision and therefore the same cannot be interfered with by the AO particularly when share premium was not chargeable to tax during the relevant assessment year. I find that indeed Share Premium is a capital receipt, and in the absence of any statutory provisions, share premium cannot be assessed as income during this assessment year. The matter is decided by various High Courts and by various ITAT decisions as mentioned in the written submission of the AR (supra). The AO has drawn adverse inference on account of high share premium charged by the appellant but I find that the appellant has also made investments during the year in other private limited Companies with same high premium and those investments have been accepted as genuine by the AO. Thus to treat the share premium as unexplained cash credit by AO was not justified in any manner. It has been held in a plethora of case decisions that once the identities and creditworthiness of the share subscribers and genuineness of the transactions are established, Sec. 68 cannot be invoked on the ground of high share premium. This issue has been decided by the courts as follows:

1. PCIT vs. Chain House International (P) Ltd. [2018] 98 taxmann.com 47 (Madhya Pradesh). Once genuineness, creditworthiness and identity of investors are established, no addition could be made as cash credit on ground that shares were issued at excess premium (SLP against the order has been dismissed by the Hon'ble Supreme Court.

2 Principal Commissioner of Income Tax vs. Rohtak Chain Co. (P) Ltd. [2019] 110 taxmann.com 59 (SC). In this case also the SLP filed by revenue against High Court ruling that once genuineness, creditworthiness and identity of investors were established, no addition could be made as cash credit on ground that shares were issued at excess premium has been dismissed.

3. Principal Commissioner of Income-tax vs. Bharat Securities (P) Ltd. [2020] 113 taxmann.com 32 (SC) In this case also the SLP of the revenue against High Court ruling that once genuineness, creditworthiness and identity of investors are established, no

addition could be made as cash credit on ground that shares were issued at excess premium has been dismissed.

4.4. *I find that in order to satisfy the nature and source of money received by the appellant, the identity of shareholders, creditworthiness of shareholders and the genuineness of the entire transaction has to be established. I find that all the eight shareholders are bodies corporate with separate identification number allotted by Registrar of Companies, they have PAN and assessed to tax by the income tax department. The assessment orders passed u/s 143(3) in 6 cases and intimation order passed u/s 143(1) in remaining two cases have been filed by the appellant. Further the share subscribers have confirmed the transaction. Thus in view of these documentary evidences, I have no hesitation to hold that identities of all the shareholders are established beyond doubt.*

4.5. *Further to explain the creditworthiness of shareholders, I have examined the net worth of each of them and I find the share subscribers have sufficient net worth of their own to make investments as elucidated below:*

<i>Name of Share holder Companies</i>	<i>Share Capital, Reserves & Surplus</i>	<i>Application Money (%)</i>	<i>Percentage</i>
<i>Chintamani Roadways Pvt. Ltd.</i>	<i>38,95,130/-</i>	<i>5,00,000/-</i>	<i>12.83</i>
<i>Dhankuber Vintrade Pvt. Ltd.</i>	<i>14,30,01,750/-</i>	<i>1,73,50,000/-</i>	<i>12.13</i>
<i>Dolphin Tradecomm Pvt. Ltd.</i>	<i>2,34,04,084/-</i>	<i>20,00,000/-</i>	<i>8.54</i>
<i>Pushpkala Vanijya Pvt. Ltd.</i>	<i>10,69,01,817/-</i>	<i>69,50,000/-</i>	<i>6.50</i>
<i>Saurav Tradecom Pvt. Ltd.</i>	<i>56,34,10,099/-</i>	<i>20,00,000/-</i>	<i>0.35</i>
<i>Shrestha Commfeed Pvt. Ltd.</i>	<i>50,01,320/-</i>	<i>25,00,000/-</i>	<i>50</i>
<i>Subhmangal Commodeal Pvt. Ltd.</i>	<i>15,16,51,795/-</i>	<i>1,34,00,000/-</i>	<i>8.83</i>
<i>Topflow Suppliers Pvt. Ltd.</i>	<i>4,69,51,118/-</i>	<i>82,00,000/-</i>	<i>17.46</i>

I also find from relevant bank statements that all the shareholders had sufficient available balance before making payment to the appellant company and hence in the light of the above fund position & bank statement, the creditworthiness of shareholders cannot be doubted.

4.6. *That, as evident from the 8 (eight) share subscriber's information on record, all of them were either subjected to assessment u/s 147/143(3) of the Act or the returns accepted by the AO. That the profiles of the assessment status of each of the*

1. Chintamani- Roadways Pvt. Ltd.: The Share applicant was assessed under the jurisdiction of ITO, Ward-1 (2), Kolkata and the Return was duly processed u/s 143(1) of the I T Act, 1961 and the amount of Rs.5,00,000/- invested in shares of the appellant company was accepted.

2. Dhankuber Vintrade Pvt. Ltd.: Assessment order was passed by the jurisdictional AO [ITO, Ward-5(1), Kolkata] u/s 143(3) of the Act for the AY 2012-13 vide order dated 13.06.2014 and as such identity of the share applicant is established beyond doubt and the amount of Rs.1,73,50,000/- invested in shares of the appellant company was accepted.

3. Dolphin Tradecomm Pvt. Ltd.: The Share applicant was assessed under the jurisdiction of ITO, Ward-1 (4), Kolkata and the Return was duly processed u/s 143(1) of the I T Act, 1961 and the amount of Rs.20,00,000/- invested in shares of the appellant company was accepted.

4. Pushpkala Vanijya Pvt. Ltd.: Assessment order was passed by the jurisdictional AO [ITO, Ward-9(3), Kolkata] u/s 143(3) of the Act for the AY 2012-13 vide order dated 05.09.2014 and as such identity of the share applicant is established beyond doubt and the amount of Rs.69,50,000/- invested in shares of the appellant company was accepted.

5. Saurav Tradecom Pvt. Ltd.: Assessment order was passed by the jurisdictional AO [ITO, Ward-9(4), Kolkata] u/s 143(3) of the Act for the AY 2012-13 vide order dated 12.03.2015 and as such identity of the share applicant is established beyond doubt and the amount of Rs.20,00,000/- invested in shares of the appellant company was accepted.

6. Shrestha Commfeed Pvt. Ltd.: The Share applicant was assessed under the jurisdiction of ITO, Ward-4(3), Kolkata and the Return was duly processed u/s 143(1) of the I.T. Act, 1961 and the amount of Rs.25,00,000/- invested in shares of the appellant company was accepted.

7. Subhmangal Commodeal Pvt. Ltd.: Assessment order was passed by the jurisdictional AO [ITO, Ward-9(4), Kolkata] u/s 143(3) of the Act for the AY 2012-13 vide order dated 20.03.2015 and as such identity of the share applicant is established beyond doubt and the amount of Rs.1,34,00,00,000/- invested in shares of the appellant company was accepted.

8. Topflow Suppliers Pvt. Ltd.: Assessment order was passed by the jurisdictional AO [ITO, Ward-90), Kolkata] u/s 143(3) of the Act for the AY 2012-13 vide order dated 11.09.2014 and as such

identity of the share applicant is established beyond doubt and the amount of Rs.82,00,000/- invested in shares of the appellant company was accepted.

As far as genuineness of the transactions is concerned, I find that the shareholders have made investment in appellant company by way of banking channels. No cash has been deposited before making any payment to appellant. The investments are duly reflected in respective audited accounts of shareholders and the appellant. The shareholders have confirmed their investments and also explained the source of their investments. In such view of the matter, the genuineness of transactions is also established beyond doubt.

4.7. On the ground of High Share Premium, the AO in his order has relied upon the decision in the case of **CIT vs. Durga Prasad More 82 ITR 540 (SC)** and **Sumati Dayal vs. CIT 214 ITR 801 (SC)** and has invoked the test of human probabilities. I have gone through the decision in the case of **Green Infra Ltd. vs. ITO [2013] 38 taxmann.com 253 (Mumbai)** and **ITO vs. Trident Shelters Ltd. ITA No. 1160/Hyd/2012 dated 22.01.2014** that fixing of issue price is a commercial decision and in the absence of any provision under the Act, the same cannot be interfered with. Even section 56(2)(vii)(b) does not permit the AO to question the share premium charged by the assessee. It merely provides for charging share premium to tax in the circumstances and to the extent provided therein. Reference in this regard is made to the decision of the Hon'ble jurisdictional ITAT in the case of **Subhlakshmi Vanijya Pvt. Ltd. vs. CIT [2015] 60 taxmann.com 60 (Kolkata-Trib.)** wherein the Hon'ble ITAT held as under:

"13.aj. We are in full agreement with the Id. AR that the judgment in the case of Vodafone India Services (P) Ltd.{supra} is an authority for the proposition that share capital/premium are capital receipts and cannot be charged to tax. We also fully endorse the argument about the introduction of section 56(2)(vii)(b) w.e.f. assessment year 2013-14 which provides for charging share premium to tax in the circumstances and to the extent provided therein....."

The issue of invoking the test of human probabilities on account of high share premium is directly in favour of the appellant by the decision of the Hon'ble ITAT Bangalore in the case of **Janani Infrastructure Pvt. Ltd. v ACIT in ITA No. 698- 699/Bangalore/2018 decided on 02.08.2019** wherein it was held as under:-

"61. We noticed that the Ld CIT(A) has applied the theory of Human Probabilities. We also noticed that the Hyderabad bench of Tribunal has observed in the case of Bharati Cement Corporation (supra) that the test of human probabilities cannot be

applied to business transactions, as they are based on cogent materials. In any case, the Ld D.R has agreed that the receipt of share premium has to be tested u/s 68 of the Act. Hence the theory of human probabilities cannot be applied in this case.”

Therefore the AO has erred in invoking the test of human probabilities.

*4 8. The AO has further relied upon the decision in the case of **M/s Bisakha Sales Pvt. Ltd. vs. CIT [2014] 52 taxmann.com 305 (Kolkata- Trib.)**. In this case, it was held that where assessee-company received share application money with huge and unjustified share premium from corporate entities, merely because said amount was received through banking channel, Assessing Officer was not justified in accepting said transactions as genuine without making proper enquiries. Apparently, he AO * has not properly appreciated that decision of the Hon'ble ITAT. The Hon'ble ITAT has never held that share capital and share premium can be assessed as unexplained cash credit merely for high share premium even though the identities and creditworthiness of the share applicant and genuineness of the transactions have been established. What is held by the Hon'ble ITAT is that revision proceedings u/s 263 are valid where the transactions have been accepted as genuine without making proper enquiries.*

4.9. Basically the law requires documentary evidences on record in dealing with the issue of authenticity. It is not the case of the AO that necessary documentary evidences are not on record but the only major reliance placed on his action is based on non-attendance of the directors of the appellant company along with directors of subscriber companies before him u/s 131 of the Act. It is no longer res integra that such non-attendance should be considered as a factor which should be used by the AO in coming to an adverse conclusion against the appellant. On an overall analysis of the issue, I find that the AO has not made out his case with cogent material on record that the appellant could come under the purview of section 68 of the Act with regard to share capital as reflected in the balance sheet when there is no finding with any cogent material evidence that the same was actually bogus in nature. It is accordingly observed that creditworthiness of the share subscribers to make investment in the share capital of the appellant company cannot be a disputed matter as per material facts on record. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their creditworthiness and source of funds, as well as the genuineness of the transactions being investments in the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant during the year under consideration as clearly evident not only from their respective books of accounts but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments and the sources of such funds are

also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which lay on the appellant, in relation to section 68 of the Act, has been duly discharged by it and nothing further remains to ¹ be proved by it on the issue. Since the conditions precedent for discharging of burden of proof under the provisions of section 68 of the Act is met with adequate evidences, the addition made under such pretext deserves to be deleted. In this respect it is imperative to refer to the decision of the jurisdictional High Court in the case of CIT vs. Sagun Commercial (P) Ltd. [ITA No. 54 of 2001 dated 17.02.2011] wherein it was held as under:

“After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion. We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income tax (Appeals) and the Tribunal below and answer the questions formulated by the Division Bench in the affirmative and against the Revenue. The appeal is, thus, dismissed. ”

4.10. Further, the Hon'ble jurisdictional High Court in the case of CIT vs. Gayatri Portfolio Fund (P) Ltd [ITA No. 664 of 2004 dated 26.08.2014], it was observed as under:

“We find that the learned Tribunal has confirmed the order passed by the CIT who had overturned the order of the Assessing Officer by making the following observation:

“...We find that the identity of the 5 parties investing in the share capital is not in doubt. They are body corporates and their complete addressees are on record. This is the very first assessment in the life of the assessee company. The amounts were deposited by these 5 corporates per account payee cheques. These parties were not shareholders of the assessee company at the time when the case was reopened under section 147 or when the summons were issued to them. We find that the assessee has filed before the A.O. copies of share application forms duly signed along with the complete addresses of the investors along with

their I. T. file numbers, account payee cheque numbers and the assessee's bank statements disclosing the deposits of these amounts. In these facts we find that the assessee has discharged its initial onus to prove the identity of the investors as well as their creditworthiness. It is not the case of the Revenue that the investor parties did not exist or that the money was not invested by them through banking channels." Having found such, the Tribunal had relied on the judgement in Hindusthan Tea Trading Co. Ltd. v. CIT (Cal): 263 ITR 289 (Cal) to uphold the order of the CIT. In view of the findings above noted, no substantial question of law arises and therefore, the appeal and the application are dismissed."

4.11. Again, the **Hon'ble** Jurisdictional High Court in the case of CIT vs. Sanchati Projects **(P.) Ltd. [ITAT 140** of 2011 dated 08.06.2011] has observed as under:

"It **appears from** record that the assessee company during the relevant assessment **year under appeal** raised its share capital by way of receiving share application money **against 1,64,000** equity shares aggregating to 82,00,000/- from 8 different parties. **The Assessing Officer**, however, treated the share application money of **t.45,00,000/- received** from five different persons as unexplained cash credit in the hands of the **assessee**.

According to the Assessing Officer, those parties had the same addresses as that of the assessee and they had no fixed assets and utilised their capitals in share application of the assessee company. The Assessing Officer, therefore, was of the view that the money ultimately went to the beneficiary through these companies and there was no advertisement even published by the assessee company inviting share application and no Registrar was engaged for such raising of share capital.

Being dissatisfied the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), however, set aside the said order of assessment and came to the conclusion that all the share applicant/companies were assessed to the tax and their PAN and acknowledgement of I.T. returns along with their audited balance sheets, bank statements showing transactions etc. were made available to the Assessing Officer. It was pointed out that there was no legal bar of more than one company being registered at the same address and, thus, according to the Commissioner of Income-tax (Appeals), the doubt raised by the Assessing Officer about all those companies at the same address did not hold good.

Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said

Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals).

After hearing Mr. Nizamuddin, learned advocate appearing on behalf of the appellant and after going through the aforesaid materials, we agree with the Tribunal below that the Assessing Officer failed to establish that the share applicants did not have the means to make investment and that such investment actually emanated from the coffers of the assessee company. The receipt of share capital money had been duly recorded in the books of the assessee company and the payment of share application money was also duly recorded in the audited account of each of the share applicants.

We, thus, find that both the authorities below on the basis of the aforesaid materials on record were quite justified in deleting the aforesaid addition of Rs. 45,00,000/- done by the Assessing Officer. We are of the view that the order impugned does not suffer from any defect whatsoever and no question of substantial error of law arises justifying our interference. The appeal is thus summarily dismissed.”

4.12 There is no evidence adduced on record to show by the A.O that the identities of the share **applicants are not proved** and/or that the subscription made by **them** to the share **capital of the appellant** was not genuine and/or the source of investment was not fully **explained to the** satisfaction of the AO. Further, the Jurisdictional High Court in **the case of CIT vs. Dataware Private Ltd. [ITAT No. 263 of 2011 dated 21.09.2011] wherein** while examining the issue of addition of share application **money received by** the assessee therein u/s 68 of the Act, it was held that after **getting the PAN** number and getting the information that the creditor is assessed **under the Act**, the Assessing Officer should enquire from the Assessing Officer of the **creditor** as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing Officer of the Creditor but instead of adopting such course, the Assessing Officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. The Hon'ble High Court further held that so long as it is not established that the return submitted by the creditor (subscriber shareholder) has been rejected by its Assessing Officer, the Assessing Officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established. In the present case also, no evidence was adduced on record to show that the investments made with the appellant in the shape of share application monies disclosed in the returns of the share applicants were rejected by their respective Assessing Authorities and accordingly, the issue is set at rest by the decision of the jurisdictional High Court on the issue which is applicable in the present context. In view of the foregoing, the

AO is directed to delete the impugned addition of Rs.5,29,00,000/- made u/s 68 of the Act. These grounds are allowed.

11. Further, we notice that Ld. Departmental Representative has heavily relied on the judgment of the Hon'ble Supreme Court in the case of NRA Iron and Steel (P) Ltd. (supra), we find that the Hon'ble Supreme Court in para 8.2 of the said decision has made the following observations:

“8.2 As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer CIT v. Precision Finance (P.) Ltd. [1995] 82 Taxman 31/[1994] 208 ITR 465 (Cal.):

Proof of Identity of the creditors;

Capacity of creditors to advance money; and

Genuineness of transaction

This Court in the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC) laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.”

Further, in para 9 of the said decision, the hon'ble Supreme Court has observed as under:

“9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor

companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness. “

Thereafter the Hon'ble Supreme Court summed up the principles which emerged after deliberating upon various case laws as under:

“11. *The principles which emerge where sums of money are credited as Share Capital/Premium are:*

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*
- ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*
- iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.*

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.”

The Hon'ble Supreme court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then the AO is duty bound to conduct an independent enquiry to verify the same. However, as noted above, the Assessing Officer in this case has not made any independent enquiry to verify the genuineness of the transactions. The assessee having furnished all the details and documents before the Assessing Officer and the Assessing Officer has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged initial burden upon him to furnish the

evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the burden shifted upon the Assessing Officer to examine the evidences furnished and even made independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee. In view of this, the aforesaid decision of the Hon'ble Supreme Court in the case of PCIT vs. NRA Iron and Steel Pvt. Ltd., in our humble view, is not applicable to the facts and circumstances of the case in hand.

12. Now, after going through the detailed findings of the Id. CIT(A) and also documents placed before us, we find that assessee has successfully discharged his primary onus casted upon him to explain the source of alleged share capital and share premium. The Assessing Officer did not find any fault or any shortcoming in the compliances made by the appellant company. It is also an evident fact that the only basis for making the alleged addition by the Assessing Officer was non-appearance of the directors of the share allotted company but as claimed by Id. Counsel for the assessee, the time allowed for compliance was too short and the assessee filed all the confirmations in respect of such share subscribers which were not doubted by the Assessing Officer. Facts are brought to our notice out of the eight shareholders five have been assessed for the same assessment year u/s 143(3) of the Act and complete details of their financials and bank transactions have been examined by the Assessing Officer in the scrutiny proceedings. This is also an admitted fact that each of the shareholders were duly served notice u/s 133(6) of the Act which is sufficient to prove the identity of such shareholders. As far as the genuineness of the transaction is concerned, the same have taken place through banking channel which is traceable from the origin to

the destination of such payments and further confirmed from the documents furnished before us. All these transactions are duly recorded in the respective balance sheets of the shareholder companies. Creditworthiness of the transaction was also proved from the fact that all the shareholder companies were having more than sufficient share capital and reserve and surplus fund for giving share application money. Even otherwise the Assessing Officer has not made the addition for charging of higher share premium and has made the addition of unexplained cash credit but still charging of share premium is a commercial decision and the same can be challenged only with sufficient documentary evidence.

13. We also observe that as per the proviso inserted in section 68 of the Act by Finance Act 2012 that the assessee company receiving share capital and share premium are required to prove the source of source to the satisfaction of the Assessing Officer has been inserted w.e.f. 01.04.2013 and the same is not applicable in the case of assessee for assessment year 2012-13 and since the assessee has filed sufficient details to our satisfaction to prove the identity, genuineness and creditworthiness of the transaction, we fail to find any infirmity in the findings of the ld. CIT(A) deleting the said alleged addition. Our view is further supported by judicial pronouncements:

i) CIT vs. Gagandeep Infrastructure (P) Ltd. 80 taxmann.com 272 (Bombay) wherein it was held by High Court that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it

is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso.

ii) *PCIT vs. Chain House International (P) Ltd. 98 taxmann.com 47* wherein Madhya Pradesh High Court held that “The question raised by the revenue in regard to issuing the share at a premium is purely a question of fact. It is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe to shares at such a premium or not and moreover the section 68 does not envisages any law on share premium it only requirement is to identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants which same has been discharged by the respondent authority and the HIGH COURT OF M.P. BENCH AT INDORE Pg. No.--58-- (ITA No.112/2018 & Other connected matters) same has been accepted by the appellate authorities thus, the same cannot be reconsidered in these appeals as it is a pure question of fact.” SLP preferred by revenue was dismissed by Hon’ble Supreme Court and the same is reported in 103 taxmann.com 435(SC).

iii) *CIT vs. Kamdhenu Steel & Alloys Limited [ITA No.972 of 2009] dated 23.12.2011* wherein the Delhi High Court in a batch of 11 appeals was required to adjudicate on the very issue of addition made by the A.O u/s 68 in respect of share application monies received by the assessee as alleged unexplained cash credit. In all these cases, the Department had alleged that the share application monies were received from persons who were ‘entry operators’ and the monies received by way of share application was nothing but was routing of unaccounted money of assessee in the form of subscription to share capital. However, in the assessments made the A.Os had not brought on record any material or evidence to substantiate such finding. Accordingly, on appeal the appellate authorities had deleted the additions made u/s 68 of the Act.

iv) *DCIT vs. Rohini Builders 127 Taxman 523* observed that the assessee had discharged its onus of proving the identity of creditors by giving their complete addresses, permanent accounts number and copies of assessment orders. It was further observed that the assessee had also proved capacity of creditors by showing that amounts were received by account payee cheques. The High Court held that only on the ground that some of the creditors could not be served with notice u/s 131 or they failed to appear before Assessing Officer the loans could not be treated as non-genuine and therefore upheld the order of the Tribunal deleting the addition u/s 68 of the I.T. Act 1961.

v) *CIT vs. Orissa Corpn (P) Ltd. 159 ITR 78* where the Court held that “In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said

creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises.

14. We, therefore, respectfully following the ratio laid down by the Hon'ble Court referred hereinabove and in the facts and circumstances of the case, hold that the assessee has successfully discharged its onus by proving the identity and creditworthiness of the share applicants and genuineness of the transaction, therefore no interference is called for in the findings of the Id. CIT(A). Thus all the grounds raised by the Revenue are dismissed.

15. In the result, the appeal of the Revenue is dismissed.

Kolkata, the 3rd November, 2022.

Sd/-

[संजय गर्ग /Sanjay Garg]

न्यायिक सदस्य /Judicial Member

Sd/-

[डॉक्टर मनीष बोरड /Dr. Manish Borad]

लेखा सदस्य /Accountant Member

Dated: 03.11.2022.

RS

Copy of the order forwarded to:

1. ITO, Ward-12(1), Kolkata
2. Trinetra Merchants (P) Ltd.
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches