

आयकर अपीलीय अधिकरण
कोलकाता 'ए' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA**

डॉ. मनीष बोराड, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष

Before

**DR. MANISH BORAD, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. Nos.: 1129 & 1131/Kol/2019
Assessment Years: 2014-15 & 2015-16**

DCIT, Circle-6(1), Kolkata.....Appellant

Vs.

***M/s. Cabcon India (P) Ltd.....Respondent
(PAN: AABCC2164P)***

Appearances by:

Sh. Vijay Kumar, Addl. CIT, Sr. D/R, appeared for Revenue.

Sh. A. K. Tulsyan, FCA, appeared for Assessee.

Date of concluding the hearing : September 22nd, 2022

Date of pronouncing the order : December 16th, 2022

ORDER

Per Manish Borad, Accountant Member:

Both the captioned appeals filed by the Revenue pertaining to the Assessment Years (in short "AY") 2014-15 & 2015-16 are directed against separate orders passed u/s 250 of the Income Tax Act, 1961 (in short the "Act") by Id. Commissioner of Income-tax (Appeals)-2, Kolkata [in short Id. "CIT(A)"] dated 28.01.2019 and

29.01.2019 respectively arising out of the assessment order framed u/s 143(3) of the Act dated 28.12.2016 and 29.12.2017.

2. Registry has informed that the appeal in I.T.A. No. 1129/Kol/2019 is time barred by 38 days. Condonation application has been filed by the Revenue. After perusing the same, we find force in the reasons mentioned therein and are satisfied that the Revenue was prevented for reasonable cause in filing the instant appeal within statutory time limit. We, therefore, condone the delay and admit the appeal for adjudication.

3. The Revenue is in appeal before the Tribunal raising the following grounds:

I.T.A. No.: 1129/Kol/2019 for AY 2014-15:

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in delivering his judgment without considering the factual findings of the Assessing Officer on creditworthiness of the loan creditors and genuineness of related transactions.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the criterion of identity, creditworthiness and genuineness of the transactions of the loan creditors have been established in this case.

3. That the appellant craves leave to add, delete and modify any of the grounds of appeal before or at the time of hearing.”

I.T.A. No. 1131/Kol/2019 for AY 2015-16:

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in delivering his judgment without considering the factual findings of the Assessing Officer on creditworthiness of the loan creditors and genuineness of related transactions.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the criterion of identity,

creditworthiness and genuineness of the transactions of the loan creditors have been established in this case.

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that there is no real cash entry on the credit side of the bank/cash book during the year under consideration.

4. That the appellant craves leave to add, delete and modify any of the grounds of appeal before or at the time of hearing.”

4. Since common issues are involved and facts are identical, we dispose of both these appeals by this consolidated order for the sake of convenience.

5. Brief facts of the instant appeals are that the assessee is a Private Limited Company engaged in manufacturing of conductors, aluminium wire etc. E-return of income for AYs 2014-15 and 2015-16 were filed on 26.09.2014 and 29.09.2015 declaring income of Rs.5,56,94,300/- and Rs.6,73,03,960/- respectively. The case of the assessee was selected for scrutiny through CASS followed by serving of valid notices u/s. 142(1) of the Act. As far as the issue raised in the instant appeals is concerned, the same is confined to addition u/s. 68 of the Act for the alleged unexplained share capital and share premium received during the AYs 2014-15 and 2015-16. Ld. AO noticed that during AY 2014-15 assessee has issued equity share of face value of Rs. 10/- each at the premium of Rs.70/- and apart from receiving share capital and share premium from other parties, 2,91,873 shares were allotted to M/s. Bhavsagar Commodities Pvt. Ltd. and a sum of Rs.2,33,50,000/- was received. Similarly, the alleged amount for AY 2015-16 of Rs.2,50,00,000/- was regarding share capital and share premium

received from following five concerns. (AY 2015-16 share premium of Rs. 90/- was charged on the face value of Rs. 10/- per share).

Sl. No	NAME	No. of shares	Date of allotment	Face Value	Share premium	Total
1.	Manro Finance & Traders Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
2.	Bhavsagar Commodities Pvt. Ltd	50,000	31.03.2015	10	90	50,00,000
3.	Balgopal Commodities Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
4.	Aakansha Advisory Services Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
5.	Corbal Suppliers Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
	Total	2,50,000				2,50,00,000

6. The Ld. AO had taken note of the investigation carried out in some other cases observing that Mr. Bimlesh Agarwal and Mr. Jivendra Mishra are engaged in providing accommodation entries in Kolkata and controlled many companies and have stated on oath of being engaged in the business of providing pre-arranged accommodation entries in different forms through Jamakhrchi/shell companies to various beneficiaries in lieu of commission. Ld. AO further observed that the alleged sum received by the assessee from the abovementioned entities has been arranged by the assessee through shell companies controlled by Mr. Bimlesh Agarwal and Mr. Jivendra Mishra. Ld. AO also gave reference to sample cash trail, statement of Mr. Bimlesh Agarwal and referring certain decisions came to the conclusion that

assessee company has not been able to prove the identity, creditworthiness of the share subscribers and genuineness of the transactions and made the addition u/s. 68 of the Act at Rs.2,33,50,000/- and Rs.2,50,00,000/- for AY 2014-15 and 2015-16 respectively.

7. Aggrieved, assessee preferred appeal before the Ld. CIT(A) and succeeded. Ld. CIT(A) taking note of various facts held that most of the alleged sums have been received by the assessee from its group companies. No proper opportunity was provided to the assessee to cross examine the persons namely, Mr. Bimlesh Agarwal and Mr. Jivendra Mishra whose statement are used against the assessee. Notice u/s. 133(6) of the Act was duly served to the share subscribers except in one case. Assessee has filed complete details to prove the identity and creditworthiness of the creditors and genuineness of the transactions. Ld. CIT(A) also held that all the alleged shareholders are duly registered under the Registrar of Companies and are active companies. Also, Sri Bimlesh Agarwal and Shri Jivendra Mishra have retracted their statements subsequently and, therefore, their statements have no evidentiary value. Ld. AO failed to find the evidence furnished by the assessee as false or fabricated and only believed on the information received from Investigation Wing in proceedings carried out in some other cases. Ld. CIT(A) thereafter referring to various judgments and decisions came to the conclusion that Ld. AO was not justified to invoke the provisions of section 68 of the Act, since both the income and source of the share application money received was fully explained by the assessee and the

assessee has discharged its onus to prove the identity, creditworthiness of the creditors and genuineness of the transaction.

8. Aggrieved, revenue is now in appeals before this Tribunal challenging the finding of the Ld. CIT(A) deleting the addition of Rs.2,33,50,000/- and Rs.2,50,00,000/- for AYs 2013-14 & 2014-15 respectively.

9. Ld. DR vehemently argued referring to the detailed finding of the Ld. AO submitted that Ld. AO has referred to the cash trail and the alleged sum has been received from shell companies wherein circulation of funds is carried out and there are many layers of movement of funds and once the cash is deposited in one particular company's account, the funds are thereafter rotated from one shell/paper company to another and finally the beneficiaries are provided the share application money. He further submitted that Mr. Bimlesh Agarwal and Mr. Jivesh Mishra have accepted to be engaged in providing accommodation/bogus entry and also running hundreds of shell companies and, therefore, the addition made u/s. 68 of the Act may be confirmed.

10. On the other hand, Ld. Counsel for the assessee apart from referring to the detailed submissions filed before the Ld. CIT(A) as well as the finding of the Ld. CIT(A) further submitted that the alleged addition has been made merely on the basis of the statement of Mr. Bimlesh Agarwal and Mr. Jivesh Mishra and before making such addition assessee was not provided any opportunity to cross examine these two persons which is a gross

violation of principle of natural justice. Further, he submitted that both these persons have retracted their statements subsequently, therefore, the previous statements on which the addition has been made carries no evidentiary value. Further, Ld. AO apart from alleging that the alleged shareholders are shell companies has not brought out any evidence to prove that the documents filed by the assessee are false or fabricated. Further, he stated that the alleged sum was not credited to the bank account and the cheques were in hand and the said allotment of shares was through journal entries and on such transactions of section 68 are not applicable. He also submitted that the company mainly Bhavsagar Commodities Pvt. Ltd. from which the assessee received share application money of Rs.2,33,50,000/- and Rs.50,00,000/- during AYs 2014-15 and 2015-16 respectively is an active company till date and its name has been changed to M/s. Girichar Tradecom Pvt. Ltd. and the audited financial statements are duly submitted till 31.03.2021 and also the director Mr. Kamal Kumar Changia still continues as director since date of appointment on 03.08.2010. Reference was also given to the facts that some of the alleged shell companies are group concerns are having common director/shareholders. He also submitted that notices issued u/s. 133(6) of the Act duly served upon the alleged shareholders except in one case and time was sought by this concern from the AO to file necessary details but Ld. AO did not accept the request and assumed that these parties are shell companies. Thus, he prayed that order of Ld. CIT(A) may be confirmed. Reliance was placed on following decisions:

1. *Decision of Hon'ble Bombay High Court in the case of Ivan Singh - vs.- ACIT (2020) 116 taxmann.com 499 (Bombay)*
2. *Decision of Hon'ble Bombay High Court in the case of PCIT -vs.- Realvalue Realtors (P.) Ltd. (2020) 113 taxmann.com 62 (Bombay)*
3. *Decision of Hon'ble Delhi High Court in CIT -vs.- Usha Stud Agricultural Farms Ltd. (2009) 183 Taxman 277 (Delhi)*
4. *Order of ITAT Kolkata Bench in the case of ITO -vs.-M/s. Standard Leather Pvt. Ltd. (ITA No. 2620/Kol/2013 dated 07.09.2016)*
5. *Order of ITAT Kolkata Bench in the case of DCIT -vs.-M/s. Global Mercantiles Pvt. Ltd. (ITA No. 1669/Kol/2009 dated 13.01.2016)*
6. *Order of ITAT Delhi Bench in the case of Shri Vardhman Overseas Ltd. -vs.- ACIT (2008) 24 SOT 393 (Delhi)*
7. *Order of ITAT Delhi Bench in the case of DOT -vs.-M/s Tirupati Udyog Ltd. (ITA No. 7158/Del/2018 dated 26.05.2022)*
8. *Order of ITAT Surat Bench in the case of Geeri Fashion (P) Ltd. vs. ITO (2021) 130 taxmann.com 495 (Surat-Trib.)*
9. *Order of Hon'ble Calcutta High Court in the case of Jatia Investment Co. -vs.- CIT (1994) 206 ITR 718 (Cal HC)*
10. *Order of Hon'ble Madras High Court in the case of VR Global Energy (P.) Ltd. -vs.- ITO (2018) 96 taxmann.com 647 (Madras)*
11. *Order of Hon'ble Supreme Court dismissing SLP in the case of ITO -vs.- VR Global Energy (P.) Ltd. (2020) 113 taxmann.com 31 (SC)*
12. *Order of jurisdictional ITAT in the case of ITO -vs.-Bhagwat Marcom (P.) Ltd. (2019) 109 taxmann.com 330 (Kol-T)*
13. *Order of jurisdictional ITAT in the case of ITO -vs.-M/s Anand Enterprises Ltd. (ITA No. 1614/Ko/2016 dated 26.09.2018)*
14. *Order of jurisdictional ITAT in the case of ITO -vs.-M/s DSR Impex Pvt. Ltd. (ITA No. 2087/Ko/2017 dated 05.02.2020)*
15. *Order of Delhi ITAT in the case of DCIT -vs.- M/s NCR Business Park (P.) Ltd. (2022) 141 taxmann.com 563 (Delhi-T)*
16. *Order of Hon'ble Calcutta High Court in the case of PCIT -vs.- Anmol Stainless (P.) Ltd. (2022) 138 taxmann.com 535 (Calcutta HC)*

along with copy of decision of Kolkata ITAT in ACIT -vs.- M/s Anmol Stainless Pvt. Ltd. (ITA No. 1862/Kol/2017 dated 19.07.2019)

17. Kolkata ITAT decision in the case of M/s Shah Tracom Pvt. Ltd. - vs.- ITO (MA No. 01/Kol/2021 dated 25.02.2021)

18. Kolkata ITAT decision in the case of M/s Sanmin Trading & Holding Pvt. Ltd. -vs.- ITO (ITA No. 2020/Kol/2019 dated 13.11.2020)

11. We have heard rival submissions and carefully gone through the material available on record and the various judicial precedents placed before us. Revenue's grievance is against the finding of the Ld. CIT(A) deleting the addition made u/s. 68 of the Act at Rs.2,33,50,000/- and Rs.2,50,00,000/- for AYs. 2013-14 and 2014-15 respectively. We observe that the assessee company is engaged in manufacturing of conductors, aluminium wires etc. issued equity shares. During AY 2014-15, equity shares of the face value of Rs.10/- were issued at a premium of Rs.70/- and allotted for a total sum of Rs.6,73,00,000/-. During AY 2015-16 equity shares were issued at the face value of Rs.10/- and share premium of Rs.90/- per share thereby received total sum of Rs.2,50,00,000/-. So far as AY 2014-15 is concerned, Ld. AO only disputed the equity shares allotted to Bhavsagar Commodities Pvt. Ltd. which subscribed for Rs.2,91,875/- equally shares and paid total sum of Rs.2,33,50,000/-. For AY 2015-16, Ld. AO treated the total sum of Rs.2,50,00,000/- as unexplained cash credit u/s. 68 of the Act, received from following five parties:

Sl. No	NAME	No. of shares	Date of allotment	Face Value	Share premium	Total
1.	Manro Finance & Traders Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000

2.	Bhavsagar Commodities Pvt. Ltd	50,000	31.03.2015	10	90	50,00,000
3.	Balgopal Commodities Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
4.	Aakansha Advisory Services Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
5.	Corbal Suppliers Pvt. Ltd.	50,000	31.03.2015	10	90	50,00,000
	Total	2,50,000				2,50,00,000

12. The main reason for which the AO treated the alleged sum as unexplained was on account of statements of Mr. Bimlesh Agarwal and Mr. Jivesh Mishra which were recorded by the Income Tax Department on earlier occasions in some other case wherein these two persons accepted in their sworn statements that they are engaged in providing accommodation entries and controlled many companies which are jamakharchi/shell companies used to provide share capital to the beneficiaries in lieu of commission. The Ld. AO also gave reference to the statements of these two persons gave example of sample cash trail wherein cash is deposited in some so-called shell companies and thereafter funds are rotated and finally the fund is received by beneficiary company against issue of equity shares. Ld. AO also mentioned that the director of the company could not be examined personally to understand the genuineness of share transactions and for non-appearance of the directors of the company irrespective of the fact that all the relevant documents were placed before him, he observed that the assessee company has not been able to prove the identity and

creditworthiness of the share subscriber companies and genuineness of the transaction.

13. We further observe that this common issue was decided in favour of the assessee by Ld. CIT(A) by examining the facts of the case and giving reference to various judgments and for sake of reference the finding of the Ld. CIT(A) for AY 2014-15 is extracted below:

“I have considered the grounds of appeal, statement of facts and submission of the authorized representative of the appellate company as well as the order of the assessing officer framed in the light of the materials available on record before the assessing officer during the assessment proceedings.

The AR of the appellant has submitted that this ground is directed against the addition of share application money of Rs. 2,33,50,000/- on the allegation that the same is unexplained cash credit u/s 68 of the Act. The addition was made on the allegation that the assessee was not able to prove the identity, genuineness and credit worthiness of the investor companies. With regard to the receipt of share application money in question amounting to Rs. 2,33,50,000/-, the appellate has submitted that the assessee has received share application money from M/s. Bhavsagar Commodities Pvt Ltd and the said share applicant is a group company and person related to the group of the assessee or it can be said that the investment is within the group and some investors and its director are closely related persons to each other. As such there is no doubt about the genuineness of the transaction involved. The AR further has given details of name of shareholder and relation of share subscribed company in his submission as mentioned supra. The money received by the assessee is from its own group companies. Therefore, their identity cannot be doubted at all. The AO made the addition on the basis of statements of entry operators who alleged to provide some accommodation entries to the assessee group, that the 3 ingredients of section 68 could not be proved by the assessee and the Ld. AO has also relied on various decisions of judicial authority on the issue of addition u/s 68 of the Act;

On the first count, the Ld. AO has made the addition based on his contention that the character of share applicant is of shell companies by relying upon statement of Mr. Bimlesh Agarwal in relation to some other assesseees which were subsequently retracted by him by filing retraction affidavit duly sworn before the Notary Public. The A.O has made the addition by alleging that Mr. Bimlesh Agarwal and Sangeeta Agarwal (Relative of Bimlesh Agarwal) was the director of M/s Bhavsagar Commodities Pvt Ltd and hence he assumed that Mr. Bimlesh Agarwal has arranged accommodation entry for the assessee. First of all, it is submitted that both Mr. Bimlesh Agarwal and Sangeeta Agarwal was not the director of M/s Bhavsagar Commodities Pvt. Ltd. during the impugned Assessment Year i.e. A.Y 2014-15, they ceased to be directors of the said company on 03.08.2010 itself. The transaction of the assessee has taken place in AY 2014-15 i.e. near about 4 years after the impugned person ceased to be the director of the applicant. Therefore, his association with the share applicant in past can in no way be linked to the transaction made by the assessee with the applicant company in the current year. Secondly, statement of Mr. Bimlesh Agarwal was recorded much earlier by the department with respect to some other case and not relevant to the case of the assessee. Therefore, reliance placed by the AO on the statement is completely wrong. Thirdly, Mr. Bimlesh Agarwal has never mentioned the name/of the assessee as well as share applicant in his statement which were relied upon by the AO for making the addition. Hence, this is a general statement taken with respect of some other assesseees and is in no way connected with the assessee/ share applicant company. Further, the alleged entry operators whose statements has been relied by the AO have no locus standi. In the entire order the Ld. AO has made general allegations based on his own assumptions. The impugned order seriously lacks specific, findings on his part. He simply relied on a report which was neither prepared by him nor did he examine the same to know the whereabouts of such report. He has used serious adjectives like "Shell/ Paper Companies" to support his contentions but did not point out a single material that has been unearthed by the A.O except blindly relying on the statements of so called "entry operators". In the order statement of entry operators is given where the entry operators have never mentioned the name of the assessee. Hence, the statement relied upon by the A.O has no context with the assessee. There is even no link established by the AO on the basis of how the

said statements are applicable to the assessee. Therefore the allegation of the AO is baseless and merely on presumption only.

On the Second count, the AO alleged that the share applicant company is a mere paper company and the 3 ingredients of section 68 could not be proved by the assessee. In the entire order the Ld. AO has made general allegations based on his own assumptions. The impugned order seriously lacks specific findings on his part. He only alleging the shareholders to be mere paper companies, made the addition in the hands of the assessee. The Ld. AO did not brought on record any document or proof to prove the allegation made by him. He just making general assumptions made the addition. During the course of assessment proceedings, the assessee company has filed all the details and documents as required by the AO. Further, the Ld. AO failed to appreciate the facts that the share applicants are body corporate, registered with the ROC. They are also assessed to Income Tax. The return filing acknowledgement, audited balance sheet, certificates confirming the payments of share application money & source thereof and the bank particulars of all the share applicants have been filed in the course of assessment proceedings. It is the requirement of natural justice to examine the documents submitted in support of share capital raised and if do not find any defect in the documents submitted, then merely based on the statement no addition is permissible in law. The assessment of a particular year must be based on legitimate material from which a reasonable inference of income earned during the year could be drawn and that the initial burden of finding such material is on the Income-tax authorities not on the assessee. All the documents which were necessary to prove the identity, genuineness and creditworthiness of the transaction were duly submitted before the AO. The AO however, without considering the same made the addition in the hands of the assessee. The facts worth considering in this context, which the A.O. had disregarded, are that the purported amount was credited adopting proper banking channel, i.e., through account-payee cheques. The same fact is apparent from bank statement of the share applicant. That the said company is a body corporate registered with Registrar of Companies and are also assessed to income-tax under the Income-Tax Act 1961. Hence, the genuineness of the above party is beyond doubt and as investments are reflected in the respective files, no doubt can be raised as regards genuineness and credibility. The Ld. AO without taking into cognizance the documents submitted, alleged that the assessee was not able to prove the identity,

genuineness and credit worthiness of the investor. The AO having a biased intention added the entire amount to the income of the assessee. The Ld. AO has grossly erred in performing his statutory duties and shifted the entire onus on the assessee. The assessee tried to furnish the details to prove the 3 ingredients of section 68, which A.O refused to take cognizance of the same. From the above it is established that the AO proceeded with a biased intention to make addition u/s 68 of the act. Therefore the allegation the AO in this count fails.

At the nutshell all the decision relied by the AO are not applicable to the appellants case as the facts are completely different as explained in each judgment and their reference in the present case in completely irrelevant. Hence, relying on these judgments are misconception of the AO and cannot be relied for adjudication. In the instant case, the AO, failed to take into cognizance the details and documents submitted in the course of assessment proceedings. The documents submitted were good enough to satisfy all the three precedents as laid down u/s 68 of the Act with regard to the identity and credit worthiness of the share applicant, and genuineness of the transactions. The share applicants is a body corporate, registered with the ROC and is available at the given address. The share applicant including have furnished copy of PAN and the companies are registered with ROC having CIN, therefore, the identity should not be under the scanner in the instant case. The share application money was received through proper banking channels, the shareholders had sufficient fund for the purpose of investment & the investments are reflected in their books of account and Bank A/c of the shareholders confirms the transactions. Hence, there should not be any doubt on the identity of the share applicants as the documents filed before the AO such as PAN, company master data as per ROC record etc. are good enough to establish the identity of the share applicant. Further, the investment is reflected in respective files, certificates regarding the payment of share application money, source thereof and bank statement of both the parties suggest that they had the creditworthiness to make such share application and the transaction was genuine. Shares have been duly allotted to all the applicants from whom share application money were received. The details regarding the applicant with their address as per ROC records and other documents of the share applicants like Balance Sheet, relevant Bank statement, etc. are submitted herewith in Paper Book to show their identity & credit worthiness & also the genuineness of the

transaction. All the share applicants are Income tax assesses, having registered PAN and filing returns. Under the circumstances, the addition made by the AO is arbitrary, illogical and totally unjustified.

I find that in this regard, it is better to understand the section 68 of the act. The Section 68 under which the addition has been made by the Assessing Officer reads as under.

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. "

The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of CIT v. Smt. P, K. Noorjahan [1999] 237 ITR 570. It is noted that against the said decision of Hon'ble Gujarat High Court the special leave petition filed by the Revenue has also been dismissed by the Hon'ble Apex Court.

The main plank on which the AO made the addition was because the statement of persons who were directors up to Aug, 2010. In such a case the Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd. (supra) 159 ITR 78 and the Hon'ble Gujarat High Court, in the case of Dy, CIT v, Rohini Builders [2002] 256 ITR 360/[2003] 127 Taxman 523, has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor).

In the case of Nemi Chand Kothari 136 Taxman 213, (supra), the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of onus on assessee under section 68. by holding that the same should be decided by taking into consideration the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the report are reproduced herein below:-

"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:

"Burden of proving fact especially within knowledge.- When any fact is especially within the knowledge of any person, the burden) of proving that fact is upon him."

****** What, thus, transpires from the above discussion is that white section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and IT is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub- creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been, eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the assessee."*

***** "..... creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor... "

***** "In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee..."

"Keeping in view the above position of law, when we turn to the factual matrix of the present, case, we find that so far as the appellant is concerned, he has established the identity of the creditors. The appellant had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had

received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that, the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from, undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness."

Further, in the case of CIT v. S. Kamaljeet Singh [2005] 147 Taxman 18(A)!.) their lordships, on the issue of discharge of assessee's onus in relation to a cash credit appearing in his books of account, has observed and held as under:-

"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AAC, setting aside the assessment order."

I also take note of the decision of the Hon'ble High Court, Calcutta in the case of S.K. Bothra & Sons. HUF v, Income-tax Officer. Ward-46(3), Kolkata 347 ITR 347 wherein the Court 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 front the Assessing Officer to assessee.

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."

When a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, it is now well settled by the decision of the Calcutta High Court that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this regards our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the Commissioner of Income Tax, Kolkata-III vs. Dataware Private Limited ITAT No. 263 of 2011 Date: 21st September, 2011 wherein the Court held as follows:

"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter

into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."

The reliance is placed to the decision of the Hon'ble Supreme Court while dismissing SLP in the case of Lovely Exports as has been reported as judgment delivered by the CTR at 216 CTR 295:

"Can the amount of share money be regarded as undisclosed income under section 68 of the Income tax Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee- company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.

The reliance is also placed to the decision of the Hon'ble Calcutta High Court while relying on the case of Lovely Exports, in the appeal of Commissioner of Income Tax, Kolkata-IV Vs Roseberry Mercantile (P) Ltd., ITAT No. 241 of 2010 dated 10- 01-2011 has held:

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction."

It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4, 00, 000/- and Rs.20,00,000/- towards shore capital and share premium respectively amounting to Rs.24,00, 000/- from four shareholders being private limited

companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory'. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.

On appeal the Learned CIT(A) by following the decision of the Supreme Court in the case of CIT vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

Reliance is also placed to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner of Income Tax vs M/s. Nishan Indo Commerce Ltd dated 2 December, 2013 in Income Tax Appeal NO.52 OF 2001 wherein the Court held as follows;

"The Assessing Officer was of the view that the increase in share capital by RS.52,03,500/- was nothing but the introduction of the assessee's own undisclosed funds/income into the books of accounts of the assessee company. The Assessing Officer accordingly treated the investment as unexplained credit under Section 68 of the Income Tax Act and added the same to the income of the assessee.

Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) being the First Appellate Authority and contended that the Assessing Officer had no material

to show that the share capital was the income of the assessee company and as such the addition made by the Assessing Officer under Section 68 of the Act was wrong.

The learned Commissioner of Income Tax (Appeals) after hearing the department and the Assessee Company deleted the addition of Rs. 52,03,500/- to the income of the assessee company during the Assessment Year in question. The learned Commissioner of Income Tax Appeals found that there were as many as 2155 allottees, whose names, addresses and respective shares allocation had been disclosed.

The Commissioner of Income Tax Appeals, further found that the assessee Company received the applications through hankers to the issue, who had been appointed under the guidelines of the Stock Exchange and the Assessee Company had been allotted shares on the basis of allotment approved by the Stock Exchange. The Assessee Company had duly filed the return of allotment with the Registrar of Companies, giving complete particulars of the allottees.

The Commissioner of Income Tax (Appeals) found that inquires had confirmed the existence of most of the shareholders at the addresses intimated to the Assessing Officer, but the Assessing Officer took the view that their investment in the Assessee Company was not genuine, on the basis of some extraneous reasons. The Commissioner of Income Tax (Appeals) took note of the observation of the Assessing Officer that enquiry conducted by the Income Tax Inspector had revealed that nine persons making applications for 900 shares were not available at the given address and rightly concluded that the total share capital issued by the Assessee Company could not be added as unexplained cash credit under Section 68 of the Income Tax Act. Moreover, if the nature and source of investment by any shareholder, in shares of the Assessee Company remained unexplained, liability could not be foisted on the company. The concerned shareholders would have to explain the source of their fund.

The learned Commissioner on considering the submissions of the, respective parties and considering the materials, found that the Assessing Officer had applied the provisions of Section 68 of the Income Tax Act arbitrarily and illegally and in any case without giving the assessee adequate opportunity of representation and/or hearing.

Learned Tribunal agreed with the factual findings of the learned Commissioner and accordingly the learned Tribunal dismissed the appeal of the Revenue and affirmed the decision of the learned Commissioner.

Mr. Dutta appearing on behalf of the petitioners cited judgment of the Division Bench of this Court in Commissioner of Income Tax Vs. Ruby Traders and Exporters Limited reported in 236 (2003) ITR 3000 where a Division Bench of this Court held that when Section 68 is resorted to, it is incumbent on the assessee company to prove and establish the identity of the subscribers, their credit worthiness and the genuineness of the transaction.

The aforesaid judgment was rendered in the context of the factual background of the aforesaid case where, despite several opportunities being given to the assessee, nothing was disclosed about the identity of the shareholders. In the instant case, the assessee disclosed the identity and address and particulars of share allocation of the shareholders. It was also found on the facts that all the shareholders were in existence. Only nine shareholders subscribing to about 900 shares out of 6, 12,000 shares were not found available at their addresses, and that too, in course of assessment proceedings in the year 1994, i.e., almost 3 years after the allotment.

By an order dated 2nd May, 2001, this Court admitted the appeal on three questions which essentially centre around the question of whether the Appellate Commissioner- erred in law in deleting the addition of Rs. 52, 03, 500/- to the income of the assessee as made by the Assessing Officer. We are of the view that there is no question of law involved in this appeal far less any substantial question of law.

The learned Tribunal has concurred with the learned Commissioner on facts and found that there were materials to show that the assessee had disclosed the particulars of the shareholders. The factual findings cannot be interfered with, in appeal. We are of the view that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds.

Further, reliance is also placed to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner of Income Tax vs M/s.

Leonard Commercial (P) Ltd on 13 June, 2011 in 1TAT NO 114 of 2011 wherein the Court held as follows:

"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.

In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under section 68 of the Income- tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find

any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share capital with premium from share applicant. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and investments. 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. For proving the identity of share applicants, the assessee furnished 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, as noted supra, the Company is having capital in several crores of rupees and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicant, so creditworthiness is proved. Third ingredient is genuineness of the transactions, for which it is noted that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicant. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application.

I also note that recently the 1TAT Kolkata in the following cases has deleted the addition on account of share application in similar circumstances. The details of these cases are as under:-

- 1. M/S Wiz Tech Solutions Pvt. Ltd., under I.T.A. No. 1162/Kol/2015 for Assessment Years: 2012-13 vide order dated 14.06.2018.*
- 2. DCIT Vs Global Mercantiles Pvt. Ltd in 1TA No. 1669/Kol/2009 dated 13-01-2016.*

3. *R.B Horticulture & Animal Projects Co. Ltd, ITA No. 632/Koll2011 dated 13-01-2016.*

4. *ITA No. 1061/Kol/2012 in the case of ITO, Wd-3(2) Kol, vs. M/s. Steel Emporium Ltd. dated 05-02-2016.*

5. *ITO vs Cygnus Developers (I) P Ltd. in ITA No. 282/Kol/2012 dated 2.3.2016*

There is nothing on record to suggest that the assessee's aforesaid transactions were bogus. There is no evidence on record to suggest or to draw any adverse inference against the assessee. No direct or indirect relation of any nature whatsoever has been brought on record in this regard. The assessing officer's suspicion is basically based on the statement of two persons recorded by the Directorate of Income Tax (Investigation). In the assessment order the assessing officer has referred to and relied upon the statement recorded by the Directorate of Income Tax (Investigation) to allege and hold that the company to whom the appellate company has taken share capital was aimed to provide accommodation entry of share capital etc. There is no direct evidence or cogent material was brought on record by the assessing officer to implicate the assessee. There is no cogent material or any evidence to show that the share capital taken by the assessee or any amount whatsoever was returned back by the assessee to any person in cash or in any other manner whatsoever. The Assessing Officer did not make any independent enquiry on various documents and evidences furnished in course of the assessment proceedings. None of the documents and evidences were found to be bogus or manipulated. The explanations submitted by the assessee and the judgments of Hon'ble Supreme Court and various judgements of Hon'ble High Courts and Income Tax Appellate Tribunal including Jurisdictional High Court and Jurisdictional Tribunal were not distinguished nor found to be inapplicable to the facts of this case. The assessee has furnished legal documentary evidence which the Assessing Officer has chosen to ignore/not dealt with. The Assessing Officer disregarded the submissions of the assessee and all legal documentary evidences produced / furnished by it in relation to the share capital. The Assessing Officer did not bring on record any legal evidence or material on record to hold that the assessee's transactions relating to share capital were bogus.

The appellant had fully and truly discharged the burden. This proposition is supported by the judgement of the Patna High Court in

the case of Additional CIT v. Bahri Brothers Pvt Ltd, (1985) 154 ITR 244 and the judgement of the Supreme Court of India in case of CIT vs Orissa Corporation Pvt Ltd, (1986) 159 ITR 78 (SC). Thus, the assessee having discharged the burden, it is the AO which had to verify the genuineness of the transaction. It is submitted that the Assessing officer did not discharge the burden which had shifted on him and just mechanically adhered to disallow the share capital claimed by the assessee without rebutting any of the submission of the assessee. The allegations of the Assessing Officer were all based on mere surmise, conjectures and suspicions. The Assessing Officer had allowed his vision to be colored by extraneous circumstances and events which had no bearing and role in deciding the genuineness or otherwise of the transactions of share capital. In fact, the Assessing Officer had not dealt with the specific facts of the case.

I find that in the present case the assessee had furnished all the evidences and these evidences were neither found by the Ld. Assessing Officer to be false or fabricated. Rather, he believed on the information received from the Investigation wing to be more authentic. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transaction of the assessee were bonafide and genuine and the addition of the same just by mere suspicion is erred as per law. I find that the assessing officer has been guided by the report of the investigation wing. However, I do not find that the assessing officer have brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus share capital. Nothing has been brought on record to show that the persons investigated, including entry operators have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. The Hon'ble Supreme Court way back in the case of Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The observations of the Hon'ble Apex Court are equally applicable to the case of the assessee. The assessing officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee, hence in my view under these circumstances nothing can

be implicated against the assessee. I find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations levelled by the AO against the assessee, which in my considered opinion has no legs to stand and therefore has to fall. The AO could not controvert the facts which are supported with material evidences furnished by the assessee which are on record.

Therefore, on analyzing of the facts as well as the evidence produced by the assessee, I find that the Assessing Officer has not brought any material on record to controvert the fact duly established by the supporting evidences. In absence of any contrary fact, the mere reliance by the Assessing Officer on the report of Investigation Wing is not sufficient to establish the fact that the transaction is bogus. The finding of the Assessing Officer is based merely on the suspicion and surmises without any tangible material to show that the assessee has introduced his own unaccounted income in the share capital. Therefore, in absence of any evidence, it cannot be held that the assessee has introduced his own unaccounted money by way of bogus share capital. I find that the none of the replies as received by the AO were found irregular or incoherent with the submissions of the assessee and all the adverse inference drawn are basically figment of his mind and are not backed by material on record or facts of the case. The inability of the AO to verify the explanation offered by the assessee is not a valid ground to reject the explanation. The reliance in this regard is placed on the decision of the Hon'ble Madras High Court: in the case of S Hastimal vs CIT reported in 49 ITR 263 (Mad). The assessee is entitled to have evidence produced to be considered and an inference to be drawn therefrom. The rejection of an explanation of the assessee by ignoring to consider important pieces of evidence is an error of law. Reliance in this regard is placed on the decisions D Yasodamma, Gudur vs CIT reported in 70 ITR 515 (AP) at 517 and Bhagwati Prasad Misra vs CIT reported in 35 ITR 97 (Orissa)

I further find that the AO was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances, human conduct, and preponderance of probability without bringing on record any legal evidence against the assessee. I rely on the judgement of Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. (supra) for this proposition. The various facets of the arguments of the AR supra, with regard to impleading the assessee for drawing adverse inferences which remain unproved based on the evidences

available on record, are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the AR are also not reiterated for the sake of brevity. The AR of the appellate cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the AR (supra) and have been duly considered to arrive at conclusion. The assessee refers to the various judgements where it was found that transactions are supported by documentary evidences. The various courts held that the same could not be held to be bogus on the basis of general adverse reports of Investigation Wing and/or for other agencies of the government.

It is settled law that, no addition can be made on the basis of surmises, suspicion and conjectures. Reliance is also placed on the decision of the Hon'ble Supreme Court of India the case of C.I.T. (Central) Calcutta vs. Daulat Ram Rawatmull (87 ITR 349) wherein it had held that "The onus to prove that the apparent is not the real is on the party who claims it. to be so.

In fact, any suspicion, however so ever strong, cannot take place of proof as clearly laid down by the Hon'ble Supreme Court in the case of Umacharan Shaw & Bros, vs. CIT [1959] 37 ITR 271.

The principles of adherence to judicial precedents were laid down by the Supreme Court in the case of Union of India v. Kamlakshi Finance Corpn. Ltd. AIR 1992 SC 711 while laying down the following principles in this regard:

The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

The mere fact that the order of the appellate authority is 'not acceptable' to the department, is in itself an objectionable phrase, and is the subject-matter of an appeal, can furnish no ground for not following it, unless its operation has been suspended by a competent court. The Supreme Court remarked that -

"It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of

the Tribunal is binding upon the Appellate Collectors and Assistant Collectors, who function under the jurisdiction of the Tribunal" (P. 712)

The Hon'ble apex Court in the case of CIT us. Lovely exports (P) Ltd. (Supra) dismissing SLP by passing the following speaking order:

"Can the amount of share money be regarded as undisclosed income under s. 68 of IT Act, 1961? We would find no merit in this SLP for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO then the department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment."

We respectfully submit that sitting within the jurisdiction of Hon'ble jurisdictional High Court, we have necessarily to follow the interpretation made by it of such order in SLP. In view of this and finding that the order dismissing the SLP in CIT us. Lovely Exports (P) Ltd. (supra), is a speaking order, the said order would bind the authorities below as a law declared by the Hon'ble apex Court under Art. 141 of the Constitution.

It has been held by the Hon'ble Supreme Court in CIT v. P. Mohanakala [2007] 161 TAXMAN 169 (SC) that

"The opinion of the Assessing Officer is required to be formed objectively with reference to the material on record. Application of mind is the sine qua non for forming the opinion."

It is respectfully submitted that under the law/the assessing officer is the prosecutors as well as adjudicator and it is the duty of the assessing officer to collect sufficient material and/or evidence before making any addition towards share application money and principles of natural justice must be followed.

We further submit that the burden of proof can seldom be discharged by the assessee company to the tilt. If the assessing officer harbours doubts of the legitimacy of the subscription, he is empowered, any duty bound to carry thorough investigations. But if the AO fails to unearth any wrong doing or illegal dealings, he 'cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the assessee company.

The Hon'ble Supreme Court in CIT v. Steller Investment Ltd. [2001] 251 ITR 263 (SC) has affirmed the decision of Hon'ble Delhi High Court and has held that:-

"The subscribed capital of the assessee-company had been increased. The ITO assessed the company accepting the increase in the subscribed capital. The Commissioner concluded, in section 263 proceedings, that the ITO, did not carry out detailed investigation inasmuch as there was a device of converting black money by issuing shares with the help of formation of Investment Company. Holding that there was a failure on the part of the ITO to enquire into the genuineness of subscribers of the share capital, the Commissioner set aside the assessment order. The Tribunal reversed the order of the Commissioner and also rejected the reference application. On an application under section 256(2), the High Court held that no question of law arose from the Tribunal's order. The High Court also observed that it was evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, could the amount of share capital be regarded as undisclosed income of the assessee. It held that it might be that there were some bogus shareholders in whose names shares had been issued and the money might have been provided by some other persons and if the assessment of the persons who were alleged to have really advanced the money was sought to be reopened, that would have made some sense but there was no reason why this amount of increased share capital could be assessed in the hands of the company itself.

On appeal to the Supreme Court, "The Supreme Court was in agreement with the High Court. Plainly, the Tribunal came to a conclusion on facts and no interference was called for.

The Hon'ble Supreme Court held that "We have read the question which the High Court answered against the revenue. We are in agreement with the High Court. Plainly, the Tribunal came to a conclusion on facts and no interference is called for. The appeal is dismissed. No order as to costs."

I place reliance on the decision of the Hon'ble Apex Court in this regard in the case of Dhakeshwari Cotton Mills Ltd vs. CIT reported in 26 ITR 775 (SC) wherein it has been held that

"No addition can be made without material and on mere suspicion."

The jurisdictional High Court in the matter of CIT, Siliguri v. M/s. Nowera Valley Plantation (P) Ltd. (ITAT 38 of 2012, GA 400 of 2012) that:

"Once the assessee is able to establish the identity of the share applicants and genuineness of transaction, it is for the revenue to look into the financial worthiness of share applicants, not that of assessee."

Further it has been held by the Hon'ble Calcutta High Court in the matter of CIT v. Dataware Private Limited (ITAT No. 263 of 2011, GA No. 2856 of 2011) 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.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing Officer of the assessee is bound to accept the same as genuine when identity of the creditor and the genuineness of the transaction through account payee cheque has been established."

In the aforesaid case the issue related to examination of genuineness and the source of application money of Rs. 1 crore received by the Assessee Company from M/s. Harrington Traders Pvt. Ltd. (referred to by Hon'ble High Court as "creditor") during the assessment proceedings the Appellant Company furnished the confirmation letter and the details of transactions namely, its PAN etc. to the AO during the second round of assessment proceedings as per directions of ITAT. The Hon'ble Jurisdictional High Court held that after getting the PAN of the shareholder and other information of the transaction, the AO should make enquiry from the AO of the shareholder as to the genuineness of the transaction and whether the transaction has been accepted by him."

It has been held by Hon'ble jurisdictional High Court in S.K. Bothra & Sons, HUF v. ITO [2011] 203 TAXMAN 436 (Cal)

"The Assessing Officer would not be justified if he merely directed the inspector to verify the statements, and later on the basis of his report, straightaway arrive at the conclusion that the transactions were not genuine without giving further opportunity to the assessee to explain the alleged information disclosed by the Inspector to the Assessing Officer."

The jurisdictional High Court of Kolkata in the case of CIT v. Roseberry Mercantile (P) Ltd has held that:-

"Where the Hon'ble High Court following the decision of the Supreme Court in the case of CIT vs. M/s. Lovely Exports Pvt Ltd. Reported in (2008) 216 CTR 195 allowed the appeal by holding that share capital premium of Rs.24,00,000/- received from investors was not liable to be taxable u/s 68 as unexplained Credits and it should not be taxed in the hands of appellant company"

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."

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."

The Hon'ble Jurisdictional High Court in the case of CIT vs. Sanchati Projects (P.) Ltd. [ITAT 140 of 2011 dated 08.06.2011] it was 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 Rs. 82,00,000/- from 8 different parties. The Assessing Officer, however, treated the share application money of Rs. 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."

Further, the Hon'ble 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 company therein u/s. 68 of the Act, the Hon'ble Jurisdictional High Court 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 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 to rest by the decision of the jurisdictional High Court on the issue."

The Hon'ble Calcutta High Court in the case of CIT vs Roseberry Mercantile (P) Ltd wherein the questions raised before their lordships and decision rendered thereon is as under:-

"On the facts and in the circumstances of the case, Ld. CIT (A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT (A) ought to have held that the assessee had not established the genuineness of the transaction."

Held: After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of CIT v. M/s. Lovely Exports Pvt Ltd, we are at one with the tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed."

The Hon'ble Jurisdictional High Court decision in the case of CIT vs Mitul Krishna Kapoor in ITA No. 333 of 2009 dated 9.6.2016 wherein the question raised and the decision rendered thereon are reproduced below:-

"Whether on the facts and in the circumstances of the case the Learned Tribunal is justified in law in confirming the order of C.I.T.(Appeals) in deleting addition of Rs.33,90,000/- and Rs.72,57,686/-made under Section 68 of the Income Tax Act,1961?

Addition of a sum of Rs.33.90 lakhs was made on the basis that the assessee had allegedly taken loan from the corpus fund, which the assessee has denied.

The assessing officer proceeded to add this sum of Rs. 33.90 under section 68. C.I.T.(A)has clearly held that there is no knowledge as to what the corpus fund is. The C.I.T. also opined that there was no material on the basis of which the aforesaid addition could be made and on that basis the C.I.T. deleted the addition. The learned Tribunal concurred with such finding of the C.I.T. (A).

As regards other sum of Rs.72, 57,686/- is concerned, the addition was found altogether unmeritorious because "all these amounts are paid by cheque out of accounted fund in the regular books of accounts. A copy of the confirmation along with the bank statement in respect of the assessee's accounts with Bharat Overseas Bank is filed, duly confirmed by Shri A E Medhora on behalf of M/s. Novrojee & Co. A copy of the bank account disclosed and the regular books of accounts were filed before the Ld. CIT (A) which were also made available before the AO. Based on these submissions, the Id. CIT (A) has deleted the same."

The facts and circumstances of the case, we are sorry to say, depict clear abuse of power of the assessing officer.

We were inclined to impose exemplary costs upon the revenue but refrained from doing so because notice of this appeal has not been given to the respondent. No one has appeared. The question formulated in this case is answered in the affirmative and against the revenue.

The appeal is, therefore, dismissed."

In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, I hold that an addition cannot be sustained merely based on inferences drawn by circumstance.

To sum up section 68 of the Act provides that if any sum found credited in the year in Aspect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received (from group company since last four years) was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act.

In view of the aforesaid findings and respectfully following the decisions of Hon'ble Apex Court, Hon'ble Jurisdictional High Court, Hon'ble other High Court, Hon'ble Jurisdictional Tribunal (supra) and Co-ordinate bench decisions of various tribunals, supra, I have come to the conclusion that the issue is squarely covered by the decision of various courts and tribunals as mentioned and discussed above and also various other decisions relied upon by the AR which are not considered here for the sake of brevity. I have no option but to accept the arguments tendered by the AR of the appellant in this respect. Further, I have no hesitation to hold that the impugned addition made by invoking the provisions of section 68 by the AO is not justified in the circumstances and accordingly, the AO is directed to delete the addition made on this account. These grounds of appeal are allowed.

In the result, the appeal of the appellant is allowed.”

14. The above finding of the Ld. CIT(A) takes note of the relevant facts which, *inter alia*, includes that assessee has proved the primary onus casted upon it by filing necessary details in which no defect has been pointed out by the revenue authorities. Further, we take note that before us complete details of the documents of the alleged shareholder companies have been filed and also before the lower authorities and the same are as follows:

A. List of share allottees as on 31.03.2015 of M/s. Cabcon India Pvt. Ltd. along with Return of Allotment of securities in Form No. PAS-3

B. List of share allottees as on 31.03.2014 of M/s. Cabcon India Pvt. Ltd. along with Return of Allotment of securities in Form No PAS-3

C. Documents of the Share applicants to show their identity, credit worthiness & also the genuineness of the transactions

1) M/s. Manro Finance & Traders Pvt Ltd.

1.1 Copy of PAN Card

1.2 Copy of ITR Acknowledgement for the A.Y 2015-16

1.3 Copy of ITR Acknowledgement for the A.Y 2021-22

1.4 Copy of Audited Accounts for the F.Y 2014-15

1.5 Copy of Memorandum & Articles of Association

1.6 Bank Statement for the relevant period evidencing payment of Share application money

1.7 Details of source of funds utilized for making the investment

1.8 Copy of Master details of the company as per MCA

1.9 Copy of assessment order u/s 143(3) for the AY 2015-16

Documentary evidence of source of Share applicant – Ms. Kiran Daga & Mr. Vedant Daga

1.10 Bank Statement for the relevant period evidencing payment made to Manro Finance & Traders Pvt Ltd.

2) M/s. Balgopal Commooeal Pvt Ltd.

- 2.1 Copy of PAN Card.
- 2.2 Copy of ITR Acknowledgement for the A.Y 2015-16.
- 2.3 Copy of ITR Acknowledgement for the A.Y 2021-22.
- 2.4 Copy of Audited Accounts for the F.Y 2014-15.
- 2.5 Copy of Memorandum & Articles of Association.
- 2.6 Bank Statement for the relevant period evidencing payment of Share application money.
- 2.7 Details of source of funds utilized for making the investment.
- 2.8 Copy of Master details of the company as per MCA.

3) M/s. Girichar Tradecom Pvt. Ltd. (Formerly known as M/s. Bhavsagar Commodities Pvt Ltd.)

- 3.1 Certificate of Incorporation pursuant to change of name
- 3.2 Copy of PAN Card
- 3.3 Copy of Notice u/s 131 along with the reply dated 07.12.2017
- 3.4 Copy of ITR Acknowledgement for the A.Y 2015-16.
- 3.5 Copy of ITR Acknowledgement for the A.Y 2021-22
- 3.6 Copy of Audited Accounts for the F.Y 2014-15.
- 3.7 Copy of Memorandum & Articles of Association.
- 3.8 Bank Statement for the relevant period evidencing payment of Share application money
- 3.9 Details of source of funds utilized for making the investment.
- 3.10 Copy of Master details of the company as per MCA
- 3.11 Copy of assessment order u/s 143(3) for the AY 2014-15
- 3.12 Copy of assessment order u/s 143(3) for the AY 2015-16

4) M/s. Aakansha Advisory Services Pvt Ltd.

- 4.1 Copy of PAN Card.

4.2 Copy of ITR Acknowledgement for the A.Y 2015-16.

4.3 Copy of ITR Acknowledgement for the A.Y 2021-22

4.4 Copy of Audited Accounts for the F.Y 2014-15.

4.5 Copy of Memorandum & Articles of Association.

4.6 Bank Statement for the relevant period evidencing payment of Share application money

4.7 Details of source of funds utilized for making the investment.

4.8 Copy of Master details of the company as per MCA.

Documentary evidence of source of Share applicant - M/s Silvertoss Distributors Pvt Ltd.

4.9 Copy of Audited Accounts for the F.Y 2014-15.

4.10 Bank Statement for the relevant period evidencing payment made to M/s. Aakansha Advisory Services P Ltd and M/s, Corbal Suppliers Pvt Ltd.

4.11 Copy of Master details of the company as per MCA.

5) M/s. Corbal Suppliers Pvt Ltd.

5.1 Copy of PAN Card

5.2 Copy of ITR Acknowledgement for the A.Y 2015-16

5.3 Copy of ITR Acknowledgement for the A.Y 2021-22

5.4 Copy of Audited Accounts for the F.Y 2014-15

5.5 Copy of Memorandum & Articles of Association

5.6 Bank Statement for the relevant period evidencing payment of Share application money

5.7 Details of source of funds utilized for making the investment

5.8 copy of Master details of the company as per MCA

Documentary evidence of source of Share applicant - M/s KLS Mercantile Pvt Ltd.

5.8 Copy of Audited Accounts for the F.Y 2014-15.

5.9 Bank Statement for the relevant period evidencing payment made to M/s. Corbal Suppliers Pvt Ltd.

5.10 Copy of Master details of the company as per MCA.

Documentary evidence of source of Share applicant - M/s Aastha Tradelink Pvt Ltd.

5.11 Copy of Audited Accounts for the F.Y 2014-15

5.12 Bank Statement for the relevant period evidencing payment made to M/s. Corbal Suppliers Pvt Ltd.

5.13 Copy of Master details of the company as per MCA

D. Other Relevant Documents

6. Copy of Audited Accounts of assessee for the FY 2014-15

7. Shareholding pattern of M/s Cabcon India Pvt Ltd for the FY 2014-15

8. Shareholding pattern of M/s Manro Finance & Traders Pvt Ltd for the FY 2014-15

9. Shareholding pattern of M/s Balgopal Commodeal Pvt Ltd for the FY 2014-15

10. Shareholding pattern of M/s Bhavsagar Commodities Pvt Ltd for the FY 2014-15

15. From perusal of the above details, we notice that the copies of PAN, Income Tax Returns, audited financial statements, bank statements, source of fund utilised for making the investment, master data of the company as per the Registrar of Companies appearing on the portal of Ministry of Corporate Affairs and also the assessment order u/s. 143(3) of the Act in most of the shareholder companies have been filed. Nowhere during the proceedings carried out before the lower authorities and before us, the revenue has been able to point out any defect in these documents nor the revenue has been able to prove that these are

false or fabricated. The shareholder companies those assessed to tax and have also passed through scrutiny proceeding regularly filed income tax returns then how can the source of share capital received from the alleged companies can be doubted is beyond imagination. Whenever, an assessee discharged its onus to explain the source of the alleged sum then it was upon the revenue authorities to come out with certain evidence to show that the alleged source was arranged/accommodation entry. The revenue authorities seem to have failed to appreciate the fact that most of the alleged sum have been received by the assessee's group companies only and the directors/shareholders are common. The major thrust of the revenue authorities on which the alleged addition has been made is the statement of Mr. Bimles Agarwal and Mr. Jivesh Mishra. We find that the statement given by both the persons to be accommodation entry providers stands retracted at a later stage detail of the same have been duly captured by Ld. CIT(A) in the impugned order. Once the statements have been retracted, they have no evidentiary value. Even Ld. AO did not find it important/necessary to provide the assessee with an opportunity of cross examination of Mr. Bimlesh Agarwal and Mr. Jivesh Mishra whose statements have been relied on by the AO which is clearly a violation of principle of natural justice. We find support for this proposition by the judgment of Hon'ble Supreme Court in the case of *Andaman Timber Industries Ltd. (2015) 281 ITTR 241* and that of Hon'ble jurisdictional High Court in the case of *CIT Vs. Eastern Commercial Enterprises (1984) 210 ITR 103* wherein Hon'ble Court has held that as a matter of fact, the right

to cross examine of witness adverse to the assessee is an indispensable right and the opportunity of such cross examination is one of the corners of natural justice. In our considered view even on this ground of not providing the assessee an opportunity of cross examination, the proceeding held by the AO deserves to be quashed.

16. Further, we find that in the alleged statement of Mr. Bimlesh Agarwal and Mr. Jivesh Mishra relied on by the Ld. AO as well as the reference given to the Investigation Wing carried out by the income Tax Department there is no whisper about the name of the assessee company, nowhere in the statements the name of the assessee company has been taken which can indicate that assessee has taken an accommodation entry. Further, the statements relied on by the Ld. AO for making the additions have been subsequently retracted by filing an affidavit and, therefore, has no evidentiary value and cannot be relied on for the purpose of making the addition and for this, we find support from the decision of Hon'ble jurisdictional High Court in the case of *CIT Vs. Eastern Commercial Enterprises (1999) 210 ITR 103 (Cal)* and decision of this Tribunal in case of *Saimed Innovation Vs. ITO, ITA No. 2231/Kol/2016* dated 13.09.2017.

17. We also note that one of the reasons for which Ld. AO made the addition was of non-appearance of the directors and however, we find that the notice issued u/s. 133(6) of the Act were duly served upon the share subscriber companies and they have given replies to the AO seeking time. Even otherwise all the details of the

share subscribers companies were very much available with the AO including the PAN and, therefore, in view of the judgment of the Hon'ble Supreme Court in the case of *CIT Vs. Orissa Corporation Pvt. Ltd.* 159 ITR 78 wherein it has been laid down that where it was in the knowledge of the revenue that the said creditors were income tax assesseees and their index nos. were in the domain of the revenue and the revenue apart from issuing notice u/s. 131 of the Act did not pursue the matter further and since the assessee has discharged the burden that lies on him then the conclusion by the Tribunal deciding in favour of the assessee cannot be held as unreasonable or perverse order based on no evidence.

18. Similar view was also taken by Hon'ble Delhi High Court in case of *CIT vs. Kamdhenu Steel & Alloys* 361 ITR 220 (Del.) wherein Hon'ble Court held that once the assessee discharged it onus by filing necessary evidence then the onus shifts upon the revenue for dislodging the initial burden discharged by the assessee and to throw the ball again in the assessee's court demanding the assessee to give some more proof and if the same is not done at the end of revenue then the assessee cannot be subject to the addition for not explaining the share application money.

19. Further, similar view was also taken by Hon'ble Gujarat High Court in the case of *DCIT vs. Rohini Builders* 127 Taxman 523 wherein the Court 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.

20. We, therefore, under the given facts and circumstances of the case and respectfully following the judicial precedents referred hereinabove and those relied by Id. CIT(A) are inclined to hold that since the assessee has duly discharged its primary onus by filing all necessary evidence which in our considered view are sufficient enough to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction of receiving share application money at Rs.2,33,50,000/- and Rs.2,50,00,000/- for AYs. 2014-15 & 2015-16 respectively, and, thus, the AO was not justified in making the said addition merely on the basis of the statement of the persons without giving any opportunity of cross examination to the assessee and secondly, not considering the fact that these statements have been retracted and they have no evidentiary value and further Ld. AO failed to take note of the fact that most of the alleged shareholders are active companies and have been subjected to the scrutiny proceedings u/s 143(3) of the Act and are regularly assessed to income tax, books of accounts are regularly audited most of them are the companies having regular business activity, common directors/shareholders. Thus, in our considered view the Ld. AO erred in invoking the provisions

of section 68 of the Act and thus, we find no infirmity in the finding of the Ld. CIT(A) deleting the alleged addition. Therefore, all the grounds raised by the Revenue are dismissed.

21. In the result, both the appeals in I.T.A. Nos. 1129 & 1131/Kol/2019 for AYs 2014-15 & 2015-16 of the revenue are dismissed.

Kolkata, the 16th December, 2022.

Sd/-
[Sonjoy Sarma]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 16.12.2022

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. DCIT, Circle-6(1), Kolkata.**
- 2. M/s. Cabcon India (P) Ltd., 4A, Swaika Centre, Pollock Street, Dalhousie, Kolkata-700 001.**
3. CIT(A)-2, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata