

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH
KOLKATA**

आयकर अपीलिय अधीकरण, न्यायपीठ “C” कोलकाता,

**BEFORE SHRI SONJOYSARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.38/Kol/2021
Assessment Year: 2009-10**

Income Tax Officer Ward-9(1) Kolkata	Vs.	Mainak Suppliers Pvt. Ltd. 178, M. G. Road Kolkata-700007 (PAN: AAFCM6497F)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri HukumaSema, CIT
Respondent by : Shri Miraj D. Shah, AR

Date of Hearing : 02.11.2022
Date of Pronouncement : 28.12.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of CIT(A)-7, Kolkata vide Appeal No. 307/CIT(A)-7/Ward-9(1)/Kol/14-15 dated 08.09.2020 passed against the assessment order by ITO, Ward-9(1), Kolkata u/s. 143(3)r.w.s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 29.03.2014.

2. Revenue has taken as many as nine grounds, all of which are against granting of relief by the Id. CIT(A) to the assessee on account of addition made by the Id. AO of ₹ 21,08,00,000/- in respect of share capital and share premium, treated as undisclosed cash credit under section 68 of the Act, as the assessee failed to prove the genuineness

of transaction and creditworthiness of the subscribers. All the nine grounds are not reproduced for the sake of brevity.

3. Present appeal is against the assessment order passed under section 143(3) which is giving effect to the order passed under section 263 of the Act. Brief facts of the case along with chronology of relevant events are stated as under:

- i. Assessee filed its return on 31.08.2009, reporting loss of ₹2,811/-. Case of the assessee was reopened by issuing notice under section 148 of the Act. Assessee had allotted 21,07,000 shares at the rate of ₹1/-per share with a premium of ₹99/- per share to sixteen subscribers during the year.
- ii. Assessment order was passed under section 147 read with section 143(3) dated 31.12.2010, determining total income at ₹50,340/-. This order was set aside by the ld. CIT by exercising revisionary powers section 263 vide order dated 20.03.2013.
- iii. Ld. AO thereafter, issued notice under section 142(1), directing the assessee to submit, *inter alia*, details of shareholders along with necessary evidence in support of its claim for share capital and share premium. Notice under section 133(6) to all the sixteen subscribers of shares and summons under section 131(1) to the director of the assessee, were issued. Share applicant companies had duly replied to the ld. AO in respect of information sought u/s. 133(6) of the Act and confirmed the execution of transaction with the assessee. For the summon issued u/s. 131(1) of the

Act to one Director Smt. Ritu Jain, it was submitted that she could not attend the hearing being out of station on one day and not keeping well on the other day. However, all the details along with relevant documentary evidences were furnished in response to the summon so issued.

- iv. Assessee duly complied with all the requirements of the Ld. AO by producing books of account along with supporting documents, share application forms, allotment advice, evidence regarding the investment made by the subscribers, copy of audited financial statements along with bank statement and other details. However, Ld. AO was not impressed with these submissions and resorted to making addition of the entire share application money along with share premium, totalling to ₹21,08,00,000/- on the sole ground that compliance u/s. 131 by the directors of the assessee and share applicant companies was not done by way of their personal appearance before the ld. AO. He thus made the addition of share capital and share premium as unexplained income of the assessee u/s. 68 of the Act.

4. Aggrieved, assessee went in appeal before the Ld. CIT(A), who, after elaborate factual exercise, took into consideration all the documentary evidence and details placed on record for the sixteen share subscriber companies. Ld. CIT(A) also recorded the factual findings in respect of net worth of the subscriber companies and also about their compliance to the notice issued u/s. 133(6) of the Act. By considering all these, ld. CIT(A) deleted the addition so made by the Ld. AO. Aggrieved, revenue is now in appeal before the Tribunal.

5. Before us Shri HukumaSema, Ld. CIT appeared for the revenue and Shri Miraj D. Shah, AR appeared for the assessee.

6. Ld. CIT, DR before us submitted that Ld. CIT-III, Kolkata had set aside the assessment completed u/s. 143(3)/147 of the Act as the assessment framed was erroneous and prejudicial to the interest of revenue for not verifying the subscribers to the share capital of the assessee and directed the Ld. AO for *de novo* consideration of the issue. He submitted that the direction was given by the Ld. CIT u/s. 263 of the Act which reads as under:

“i) Examine the genuineness and source of share capital, not on a test check basis, but in respect of each and every shareholder by conducting independent enquiry not through the assessee. The bank account for the entire period should be examined in the course of verification to find out the money trail of the share capital.

ii) Further the AO should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them on oath to verify their credentials as director and reach a logical conclusion regarding the controlling interest.

iii) The A. O. is directed examine the source of realization from the liquidation of assets shown in the balance sheet after the change of Directors, if any.”

6.1. He thus, submitted that AO has not complied with the directions given by the Ld. CIT to conduct the required examination in respect of source of share capital, directors of the company and hence, the addition made by the AO has to be upheld.

7. Per contra, Shri Miraj D. Shah, AR represented the assessee, placed on record a paper book containing 296 pages and made the following submissions in support of his case:

(i) In the course of assessment proceedings, assessee had submitted all the relevant documents *viz.*, ITR Acknowledgment, audited financial statements and bank statement of the assessee as well as the share applicant companies. All the share applicant companies had duly replied directly to the ld. AO, to the notices issued u/s. 133(6) of the Act, copies of the same are placed in the paper book.

(ii) Share applicant companies had filed following documents in response to notices issued u/s. 133(6) of the Act:

- (a) ITR Acknowledgment
- (b) Audited financial statement
- (c) Bank statements
- (d) Share application form
- (e) Share allotment advice

(iii) Ld. Counsel pointed that reply to 133(6) notices furnished by all the sixteen share applicant companies are under proper seal and stamp from the office of the Ld. AO as is evident from the copies of the same placed in the paper book.

(iv) Ld. Counsel also explained the source from which the funds were raised by the respective sixteen share applicant companies, for the purpose of acquiring shares of the assessee. Details of source of funds (source of source) are given in the reply to notices issued u/s. 133(6) of the Act by each of the share applicant company.

(v) It was also submitted that audited Balance Sheet of each of the share applicant companies reflected the amount of investment made by them in the assessee as against their respective net worth, the details of net worth of each of the share

applicant company and the percentage of their respective net worth utilized as investment in the share capital of the assessee, which was furnished before the Ld. AO, is tabulated as under:

MAINAK SUPPLIERS PVT LTD								
AY : 2009-2010								
<u>Details of Share Application</u>								
SL No	Name of Share Applicants	Share Capital	Reserves & Surplus	Misc. Expenditures	Accumulate Loss	Net worth	Amount Invested in assessee company	Investment (6) to Net worth (5)
		1	2	3	4	5 (1+2+3+4)	6	7 (%)
1	M/s. Adonis Marketing (P) Ltd.	1540000.00	142560000.00	36450.00	-7224.37	144129225.63	10000000.00	6.94
2	M/s. Baisali Distributors (P) Ltd.	1100000.00	99000000.00	28350.00	-1255.00	100127095.00	6000000.00	5.99
3	M/s. Daniel Merchants (P) Ltd.	1100000.00	99000000.00	28350.00	-1655.00	100126695.00	6000000.00	5.99
4	M/s. Deepsikha Vinimay (P) Ltd.	1100000.00	99000000.00	28350.00	-3575.00	100124775.00	6000000.00	5.99
5	M/s. Faithfull Commodities (P) Ltd.	1460000.00	134640000.00	35550.00	-2994.05	136132555.95	12000000.00	8.81
6	M/s. Highland Dealers (P) Ltd.	1100000.00	99000000.00	28350.00	-550.00	100127800.00	6000000.00	5.99
7	M/s. Highland Suppliers (P) Ltd.	1160000.00	104940000.00	30150.00	-1125.00	106129025.00	12000000.00	11.31
8	M/s. Highland Tradelink (P) Ltd.	1500000.00	138600000.00	35550.00	-7489.56	140128060.44	20000000.00	14.27
9	M/s. Highlight Sales (P) Ltd.	1100000.00	99000000.00	28350.00	-975.00	100127375.00	6000000.00	5.99
10	M/s. Highlight Suppliers (P) Ltd.	1520000.00	140580000.00	36450.00	-760.00	142135590.00	20000000.00	14.07
11	M/s. Mahananda Vinimay (P) Ltd.	1100000.00	99000000.00	28350.00	-325.00	100128025.00	16000000.00	15.98
12	M/s. Promise Suppliers (P) Ltd.	1100000.00	99000000.00	28350.00	-812.58	100127537.42	16000000.00	15.98
13	M/s. Srijan Commotrade (P) Ltd.	1607000.00	149193000.00	38250.00	-3661.05	150834588.95	8700000.00	5.77
14	M/s. Target Dealers (P) Ltd.	1560000.00	144540000.00	35550.00	-2591.05	146132958.95	22000000.00	15.05
15	M/s. Trinetra Vincom (P) Ltd.	1430000.00	131670000.00	35550.00	-1406.64	133134143.36	20000000.00	21.03
16	M/s. Welcome Commotrade (P) Ltd.	1100000.00	99000000.00	28350.00	-1040.00	100127310.00	16000000.00	15.98
	TOTAL						210700000.00	

(vi) Details of share applicants were also submitted which included their respective CIN(Company Identification Number) issued by the Ministry of Company Affairs, PAN (Permanent Account Number) issued by the Income Tax Department and their corporate addresses, which are tabulated as under:

Details of Share Applicants				
SN	Name of Applicants	CIN	PAN	Corporate Office Address
1	M/s. Adonis Marketing (P) Ltd.	U51909WB2008PTC127321	AAHCA1673P	63, Radha Bazar, Kolkata-700001
2	M/s. Baisali Distributors (P) Ltd.	U51909WB2008PTC127192	AADCB5099C	23, Brabourne Road, Kolkata-700001
3	M/s. Daniel Merchants (P) Ltd.	U51909WB2008PTC127297	AACCD9339G	116, Canning Street, Kolkata-700001
4	M/s. Deepsikha Vinimay (P) Ltd.	U51109WB2008PTC127252	AACCD9343C	31, Brabourne Road, Kolkata-7000001
5	M/s. Faithfull Commodities (P) Ltd.	U51109WB2008PTC127254	AABCF2532N	138, Canning Street, Kolkata-700001
6	M/s. Highland Dealers (P) Ltd.	U51909WB2008PTC127190	AACCH0715N	29, Strand Road, Kolkata-700001
7	M/s. Highland Suppliers (P) Ltd.	U51909WB2008PTC127320	AACCH0878C	15B, Clive Row, Kolkata-700001
8	M/s. Highland Tradelink (P) Ltd.	U51909WB2008PTC127323	AACCH0875R	11, Clive Row, Kolkata-700001
9	M/s. Highlight Sales (P) Ltd.	U51909WB2008PTC127191	AACCH0716R	23, Canning Street, Kolkata-700001
10	M/s. Highlight Suppliers (P) Ltd.	U51909WB2008PTC127210	AACCH0718B	15B, Clive Row, Kolkata-700001
11	M/s. Mahananda Vinimay (P) Ltd.	U51900WB2008PTC127281	AAFCM6864L	27, Brabourne Road, Kolkata-700001
12	M/s. Promise Suppliers (P) Ltd.	U51909WB2008PTC127184	AAECP7460Q	133, Canning Street, Kolkata-700001
13	M/s. Srijan Commotrade (P) Ltd.	U51909WB2008PTC127276	AAMCS2510E	23/24, Radha Bazar, Kolkata-700001
14	M/s. Target Dealers (P) Ltd.	U51909WB2008PTC127251	AADCT0040K	115, Canning Street, Kolkata-700001
15	M/s. Trinetra Vincom (P) Ltd.	U51109WB2008PTC127253	AACCT9844N	29, Strand Road, Kolkata-700001
16	M/s. Welcome Commotrade (P) Ltd.	U51909WB2008PTC127303	AAACW8087E	63, Radha Bazar, Kolkata-700001

vii) It was also pointed that in the assessment order, ld. AO had not stated the fact of replies received by him from all the sixteen share applicant companies in response to notices issued u/s. 133(6) of the Act. All these replies were directly sent by the respective share applicant company to the office of ld. AO.

(viii) In respect of non-compliance to summon issued u/s. 131 of the Act, it was submitted that it was issued on only one of the directors of the assessee *viz.*, Smt. Ritu Jain who could not appear in person owing to her travel on one day and not keeping well on the other, though all the required details with documentary evidences were placed on record by her. Assessee also submitted that summon u/s. 131 of the Act were never issued on the share applicant companies for which certified true copy of order sheets of the assessment proceedings obtained from the office of the Ld. AO were referred to by the Ld. Counsel in the course of hearing before

us. Ld. Counsel pointed to the order sheet entry dated 26.02.2014 which states that “*issue summon u/s. 131(1) to all the directors to appear personally with supporting documents on 11.03.2014*”. Ld. Counsel also referred to the order sheet entry dated 06.02.2014 which states that “*issue notice u/s. 133(6) of the Act to the shareholders*”. It was thus contended that assessee had discharged its onus in respect of the share application money received by it and therefore, no addition is called for in this respect, in the hands of the assessee.

8. Ld. Counsel reiterated the above submissions before us. He further argued that ld. AO has not pointed out any defect in any of the explanations or evidence filed by the assessee as well as those filed by the sixteen share applicant companies in response to notices issued u/s. 133(6) of the Act. He thus, contended that Ld. AO has made the addition with a predetermined mind set by merely reiterating the observations of the Ld. CIT made in revisionary order passed u/s. 263 of the Act.

8.1. Ld. Counsel further submitted that each of the sixteen share applicant companies are regularly assessed to income tax for which he referred to their respective intimation issued u/s. 143(1)(a) of the Act or assessment order passed u/s. 143(3)/147 of the Act, as the case may be. All these intimations/assessment orders for the sixteen share applicant companies are placed on record in the paper book which were also furnished before the Ld. AO. Ld. Counsel also submitted that the investment made by each of the sixteen share applicant companies has been duly reflected in

their audited financial statements and disclosed in their respective income tax returns. Ld. Counsel further pointed to the fact that in the course of assessment proceedings u/s. 147 of the Act, assessee had furnished all the documentary evidence and details as desired by the Ld. AO, who on being satisfied with the replies received from the assessee as well as from the share applicant companies against notices u/s. 133(6) of the Act, accepted the impugned share capital and share premium and completed the assessment without making addition on this account.

8.2. Ld. Counsel further submitted, the very fact that notices u/s. 133(6) of the Act were served on the share applicant companies and were replied back with all the required documents and details, evidently establishes their identities. Further, they are all registered companies under the Companies Act, 1956 and are active companies on the MCA portal. He also referred to the copies of bank accounts of the respective share applicant companies to demonstrate the genuineness of the transaction so also their audited financial statements wherein these investments by them in the assessee have been duly recorded and reflected. He also referred to the details of networth which has been tabulated above to demonstrate their creditworthiness so as to make investment in the assessee company. Ld. Counsel further submitted that though for the impugned assessment year, there is no statutory requirement to explain the source of source, however, assessee had duly fulfilled its onus by giving all the details in respect of source of funds in the hands of each of the share applicant companies, details of which are

provided in the replies filed by them against notice issued u/s. 133(6) of the Act. He thus, strongly submitted that Ld. AO had not brought anything contrary to these undisputable facts and has merely acted on whims and fancies.

8.3. To buttress his submissions, Ld. Counsel placed on record the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *CIT, Kolkata-III vs. Dataware Pvt. Ltd.* ITAT No. 263 of 2011 dated 21.09.2011 wherein 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."*

8.4. He further placed his reliance on the decision of the Hon'ble Jurisdiction High Court of Calcutta 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."

8.5. Reliance was also placed on the decision of Hon'ble Madras High Court in the case of CIT vs. Creative World Telefilms P. Ltd. [2011] 333 ITR 100 (Mad.) wherein it was held as under:

"In the case in hand, it was not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement "not traceable". The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal could not be faulted. No substantial question of law was involved in the appeal."

8.6. He also placed reliance on the decision of Hon'ble Madras High Court in the case of Pranav Foundations Ltd. (2015) 229 Taxman 58 (Mad.) wherein it was held as under:

"In view of the fact that all the four parties, who are subscribers of the shares, are limited companies and enquiries were made and received from the four companies and all the companies accepted their investment. Thus, the assessee has categorically established the nature and source of the said sum and discharged the onus that lies on it in terms of section 68. When the nature and source of the amount so invested is known, it cannot be said to undisclosed income. Therefore, the addition of such subscriptions as unexplained credit under section 68 is unwarranted."

8.7. Ld. Counsel also submitted that mere non-appearance of directors is no basis for invoking provisions of section 68 of the Act for which he placed reliance on the decision of

Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation (P) Ltd. [1986] 159 ITR 78 (SC) wherein it was held as under:

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

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

8.8. Ld. Counsel submitted that instead of pointing out any defect or discrepancy in the evidence and the details furnished by the assessee, ld. AO drew adverse inference merely only on the basis that the directors of the subscriber companies did not appear personally before him. In this respect he placed reliance on the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of Crystal Networks Pvt. Ltd. vs. CIT (2013) 35 taxmann.com 432 (Cal).

9. We have heard the rival contentions and gone through the material placed on record. Admittedly, it is a fact on record that notices u/s. 133(6) of the Act were issued by Ld. AO to all the sixteen share subscriber companies and all of them had duly replied directly to the ld. AO, along with relevant documents and details. Copies of the replies duly acknowledged under seal and stamp of the office of the Ld. AO are placed on record. We note that Ld. AO without even going through and discussing these details submitted by the sixteen subscriber companies, insisted for personal appearance to prove the identity, creditworthiness of the subscriber companies and the genuineness of the transactions.

9.1. To our mind, ld. AO could have taken an adverse view only if he could point out the discrepancies or insufficiency in the evidence and details received in his office from all the sixteen subscriber companies and also pointing out as to what further investigation was needed by him by way of recording of statement of the directors of the assessee and the subscriber companies. We draw our force from the decision of the Hon'ble Bombay High Court in the case of PCIT vs. Paradise Inland Shipping Pvt. Ltd. [2017] 84 taxmann.com 58 (Bom) wherein it was held that once the assessee has produced documentary evidence to establish the existence of the subscriber companies, the burden would shift on the revenue to establish its case.

9.2 We also draw our force from the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of Crystal Network Pvt. Ltd. vs. CIT (*supra*) which held as under:

"We find considerable force from the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter creditworthiness. As rightly pointed out by the learned counsel that the CIT(Appeals) has taken the trouble of examining of all other materials and documents viz., confirmatory statements, invoices, challans and vouchers showing supply of bidi as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued in our view is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the produce of the assessee or not. When it was found by the CIT(Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."

10. We also take note of the fact that all the share subscriber companies have filed their return of income with the department which have been either processed u/s. 143(1) of the Act for which intimations have been issued or have been assessed u/s. 143(3) or 147 on substantive basis, for which the respective intimation/assessment orders are placed on record in the paper book. We also take note of the fact that all the sixteen share subscriber companies have responded to the notice issued u/s. 133(6) of the Act and Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents furnished by the share

subscribing companies. These evidences furnished by them have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the addition made by him. Ld. AO has simply added the amount of share capital and share premium on the ground that assessee has not produced the directors/shareholders. Ld. AO has ignored the reply given in response to notice issued u/s. 133(6) of the Act which are on record under duly acknowledged seal and stamp of his good office. From the perusal of the order of Ld. CIT(A), we note that Ld. CIT(A) has perused the evidence in the nature of documents and details and on their examination has deleted the addition made by the Ld. AO. Thus, going by the records placed by the assessee and by all the share subscribing companies in response to notices issued u/s 133(6), it can be safely held that the assessee has discharged its initial burden and the burden shifted on the ld. AO to enquire further into the matter which he failed to do so.

10.1. Ld. CIT(A) has elaborately appreciated the evidence and details placed on record and has given his factual findings, crux of which is contained in para 8.1 of his order, which is extracted below for ease of reference:

“8.1. Basically the law requires documentary evidences on record in dealing with the issue of authenticity. It is not the case of the AO that necessary documentary evidences are not on record but the only major reliance placed on his action is based on non-attendance of the directors of the appellant company along with directors of subscriber companies before him u/s 131 of the Act. It is no longer res integra that such non-attendance should be considered as a factor which should be used by the AO in coming to an adverse conclusion against the appellant. On an overall

analysis of the issue, I find that the AO has not made out his case with cogent material on record that the appellant could come under the purview of section 68 of the Act with regard to share capital as reflected in the balance sheet when there is no finding with any cogent material evidence that the same was actually bogus in nature. It is accordingly observed that creditworthiness of the share subscribers to make investment in the share capital of the appellant company cannot be a disputed matter as per material facts on record. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their creditworthiness and source of funds, as well as the genuineness of the transactions being investments in the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any-doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant during the year under consideration as clearly evident not only from their respective books of accounts but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which la on the appellant, in relation to section 68 of the Act, has been duly discharged by it and nothing further remains to be proved by it on the issue. Hence, I am inclined to accept the arguments tendered by the AR of the appellant in this respect. In view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances and accordingly, direct him to delete such addition of Rs.21,08,00,000/- made on this account. Thus, these grounds of the appeal are allowed.”

10.2. Further, we note that ld. CIT(A) has taken into consideration the creditworthiness of all the sixteen subscriber companies by going through the records and the net worth of each of them (refer the details tabulated above). It is also noted that all the investing companies have substantial own funds available with them to make investment in the assessee. In this respect, all the investing companies have also explained their source of funds in their reply to notices issued u/s. 133(6) of the Act.

10.3. From the perusal of the paper book and the replies filed by share subscribing companies in response to notice u/s. 133(6) of the Act, it is vivid that all the share applicants are (i) income tax assessees, (ii) they are filing their income tax returns, (iii) share application form and allotment letter is available on record, (iv) share application money was paid by account payee cheques, (v) details of the bank accounts belonging to share applicants and their bank statements are on record, (vi) in none of the transactions, there are any deposit of cash before issuing cheques to the assessee, (vii) all the share applicants are having substantial creditworthiness represented by their capital and reserves.

10.4. For expressing our views as aforesaid, we draw our force also from the decision of Hon'ble jurisdictional High Court of Calcutta in the case of PCITvs. Shree Leathers in ITAT/18/2022 (IA No. GA/02/2022) dated 14.07.2022 wherein Hon'ble High Court succinctly dealt with the aspect whether notices u/s. 133(6) of the Act are issued which are duly acknowledged or responded but ignored by the AO leads to perversity in the assessment order. Relevant extract from the said decision is reproduced as under:

“...Bearing the above legal principles in mind, if we examine the case on hand, it is clear that the assessing officer issued show cause notice only in respect of one of the lender M/s. Fast Glow Distributors. The assessee responded to the show cause notice and submitted the reply dated 22.12.2017. The documents annexed to the reply were classified under 3 categories namely: to establish the identity of the lender, to prove the genuineness of the transactions and to establish the creditworthiness of the lender. The assessing officer has brushed aside these documents and in a very casual manner has stated that mere filing PAN details, balance sheet does not absolve the assessee from his responsibility of proving the nature of transaction. There is no discussion by the assessing officer on the correctness

of the stand taken by the assessee. Thus, going by the records placed by the assessee, it could be safely held that the assessee has discharged his initial burden and the burden shifts on the assessing officer to enquire further into the matter which he failed to do. In more than one place the assessing officer used the expression "money laundering." We find such usage to be uncalled for as the allegations of money laundering is a very serious allegations and the effect of a case of money laundering under the relevant Act is markedly different. Therefore, the assessing officer should have desisted from using such expression when it was never the case that there was any allegations of money laundering. Paragraph 5.4 and 5.5 of the assessment order are all personal perception and opinion of the assessing officer which needs to be ITAT 18 OF 2022 ignored. Much reliance was placed on the statement of Shri Ashish Kumar Agarwal, which statement has been extracted in full in the assessment order and it cannot be disputed that there is no allegation against the assessee company in the said statement. There is no evidence brought on record by the assessing officer to connect the said entry operator with the loan transaction done by the assessee. Therefore, the statement is of little avail and could not have been the basis for making allegations. The assessing officer ignored the settled legal principle and in spite of the assessee having offered the explanation with regard to the loan transaction, no finding has been recorded as regards the satisfaction on the explanation offered by the assessee. Therefore, the assessing officer ignored the basic tenets of law before invoking his power under [Section 68](#) of the Act. Fortunately, for the assessee, CIT(A) has done an elaborate factual exercise, took into consideration, the creditworthiness of the 13 companies the details of which were furnished by the assessee. More importantly, the CIT noted that all these companies responded to the notices issued under [Section 133 \(6\)](#) of the Act which fact has not been denied by the assessing officer. On going through the records and the net worth of the lender companies, the CIT has recorded the factual findings that the net worth of those companies is in crores of rupees and they have declared income to the tune of Rs. 45,00,000/- and 75,00,000/-. Therefore, the assessing officer if in his opinion found the explanation offered by the assessee to be not satisfactory, he should have recorded so with reasons. We find that there is no discussion on the explanation offered ITAT 18 OF 2022 by the assessee qua, one of the lenders. Admittedly, the assessee was not issued any show cause notice in respect of other lenders. However, they are able to produce the details before the CIT(A) who had in our view rightly appreciated the facts and circumstances of the case. As pointed out earlier, the assessing officer brushed aside the explanation offered by the assessee by stating that merely filing PAN details, balance sheet does not absolve the assessee from his responsibilities of proving the nature of transactions. It is not enough for the assessing officer to say so but he should record reasons in writing as to why the documents which were filed by the assessee along with the reply dated 22.12.2017 does not go to establish the identity of the lender or prove the genuineness of the transaction or establish the creditworthiness of the lender. In the absence of any such finding, we have to hold that the order passed by the assessing officer was utterly perverse and rightly interfered by the CIT(A). The Tribunal re-appreciated the factual position and agreed with the CIT(A). The tribunal apart from taking into consideration, the legal effect of the statement of Ashish Kumar Agarwal also took note of the fact that the notices which were issued by the assessing officer under [Section 133 \(6\)](#) of the Act to the lenders where

duly acknowledged and all the lenders confirmed the loan transactions by filing the documents which were placed before the tribunal in the form of a paper book. These materials were available on the file of the assessing officer and there is no discussion on this aspect. Thus, we find that the tribunal rightly dismissed the appeal filed by the revenue.”

11. In respect of reliance placed by the revenue on the decision of Hon'ble Supreme Court in the case of PCITvs. NRA Iron & Steel Pvt. Ltd. 412 ITR 161 (SC), we note that Hon'ble Supreme Court in para 8.2 of the said decision has made the following observations:

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

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

Proof of Identity of the creditors;

Capacity of creditors to advance money; and

Genuineness of transaction

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

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

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

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness."

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

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

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Office is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of namelenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

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

11.3. Hon'ble Supreme Court, thus, held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then, AO is duty bound to conduct an independent enquiry to verify the same. However, as noted above, ld. AO in this case has not made any independent

enquiry to verify the genuineness of the transactions. Assessee, having furnished all the details and documents before the ld. AO and the ld. AO has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged its initial burden casted upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, it shifted on the ld. AO to examine the evidences furnished and even make independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee by confronting with the same to the assessee. In view of this, the aforesaid decision of the Hon'ble Supreme Court in the case of PCIT vs. NRA Iron and Steel Pvt. Ltd., in our humble view, is not applicable to the facts and circumstances of the case in hand.

12. Considering the facts and circumstances of the case and the material placed on record, we find that assessee has discharged its onus to prove the identity and creditworthiness of the share subscribing companies and the genuineness of the transactions. Accordingly, considering these facts and in the light of the judicial precedents referred above, we find no reason to interfere with the fact-based findings given by the Ld. CIT(A) and uphold his decision to delete the addition made by the Ld. AO towards share capital and share premium u/s. 68 of the Act.

Accordingly, grounds taken by the revenue in this respect are dismissed.

13. In the result, appeal of the revenue is dismissed.

Order is pronounced in the open Court on 28th December, 2022

Sd/-

(Sonjoy Sarma)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 28th December, 2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. CIT(A)-7, Kolkata
 4. The Pr. CIT, Kolkata.
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar

ITAT, Kolkata Benches, Kolkata