

आयकर अपीलिय अधिकरण, राजकोट न्यायपीठ  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
RAJKOT BENCH, RAJKOT  
(Conducted through E-Court)**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER  
And  
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकरअपीलसं./ITA No. 373/Rjt/2015  
With  
C.O. No. 58/Rjt/2015  
निर्धारणवर्ष/Asstt. Years: 2011-12

ACIT, Central Circle-1, Rajkot	Vs.	M/s. Siyaram Metals Udyog Pvt. Ltd. B-18, Shanker Tekri, Udyognagar, Jamnagar  <b>PAN: AAOCS0508E</b>
<b>(Applicant/Respondent)</b>		<b>(Respondent/Cross Objector)</b>

आयकरअपीलसं./ITA Nos. 163 & 164/Rjt/2017  
निर्धारणवर्ष/Asstt. Years:2012-13 & 2013-14

Siyaram Metal Udyog Pvt. Ltd. B-18, Shanker Tekri, Udyog Nagar, Jamnagar  <b>PAN: AAOCS0508E</b>	Vs.	ACIT, Central Circle-1, Rajkot
<b>(Applicant)</b>		<b>(Respondent)</b>

आयकरअपीलसं./ITA No. 150/Rjt/2017  
निर्धारणवर्ष/Asstt. Years: 2014-15

Siyaram Metal Udyog Pvt. Ltd. B-18, Shanker Tekri, Udyog Nagar, Jamnagar  <b>PAN: AAOCS0508E</b>	Vs.	ACIT, Circle-3, Rajkot
<b>(Applicant)</b>		<b>(Respondent)</b>

Assessee by :	Shri Sagar Shah, A.R.
Revenue by :	Shri Shramdeep Sinha, CIT DR

सुनवाईकीतारीख/Date of Hearing : 07/02/2023  
घोषणाकीतारीख/Date of Pronouncement: 24/02/2023

**आदेश/ORDER**

**PER BENCH:**

The captioned appeals have been filed at the instance of the assessee and the Revenue and the Cross Objection filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-11, Ahmedabad arising in the matter of assessment order passed under Section 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2011-12 to 2014-15.

2. First, we take up ITA No. 373/RJT/2015, an appeal by the Revenue for AY 2011-12.

3. The Revenue has raised following grounds of appeal:

"1) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and/or on facts in allowing addition of Rs. 13,41,60,000/- on account of unexplained capital introduction u/s. 68 of the Act.

2) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and/or on facts in restricting the profit estimated on URD purchase at Rs.72240 at 0.24% as against Rs. 18,06,014/- estimated by the A.O.

3) On the facts and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the A.O.

4) It is, therefore, prayed that the order of the CIT(A) be set aside and that of the A.O. be restored to the above extent."

4. The first issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition of Rs. 13,41,60,000/- under section 68 of the Act made on account of unexplained credit of share capital & premium.

5. The facts in brief are that the assessee is a private limited company and engaged in the business of manufacturing of Brass Parts. The assessee company was incorporated as on 01-06-2010 i.e. during the year under consideration by converting the running business of proprietary concern of Shri Ramgopal O Maheswari with 1 lakh shares of Rs. 10 each allotted to Shri Ramgopal O Maheswari and his wife Smt. Madhuben R Maheswari in the ratio of 7:3 being subscribers of MOA. Subsequently, the assessee company allotted 41,200 shares

at Rs. 1250 each (premium 1240) to Shri Ramgopal O Maheswari in lieu of net capital value of his proprietary concern of Rs. 5,15,00,000/- only. At the same, the assessee company also allotted 134160 shares to certain number of investors based in different city of India at face value of Rs. 10 and premium of Rs. 1240 per share whereas the paid-up value of the same was at Rs. 1000 per share (5 face value and 995 premium). Accordingly, the assessee company collected an amount of Rs. 13,41,60,000/- on account of partly paid-up shares issued to person other than the promoters. The assessee also submitted that out of the total investors/ shares subscribers to whom 134160 shares were issued, there were certain parties who have provided loan to the proprietary concern of Shri Ramgopal O Maheswari but converted their loan into shares. The assessee to prove the veracity of credit of partly paid share capital of Rs. 13,41,60,000/- furnished details such name of investor, number of shares issued, consideration received, justification for identity and detail of creditworthiness and genuineness of investment.

6. However, the AO found that there was search proceedings dated 23-08-2012 carried out at the premises in which it was found that the original shares certificates were not issued to the investor. These shares certificates were still lying in the counterfoil. The promoter Shri Shri Ramgopal O Maheswari in the statement recorded under section 132 of the Act also admitted that shares certificates were not issued to the investors. Likewise, the AO noted that the shares were allotted as on 31-03-2011. Accordingly, the AO was of the view that investor made such a huge investment who were also not the family members of the promoter or known to them but nor the assessee company bothered to issue the share certificates neither the investor shown concern to collect such shares certificate after passing of 18 months. There was no justification and reasonableness why such physical shares were still lying in counterfoils. The contention of the assessee that mere physical certificate not issued to the subscribers will not make the allotment of shares as bogus is not acceptable in the facts and circumstances and without justification for not issuing the certificate to

the concerned investors. Similarly, contention of the assessee that its directors were not qualified enough and the document were at the premises of consultant is also not acceptable for the reason that this fact will not absolve the assessee from its obligation. It is true that issue of physical copy of share certificate to the investor is prerogative of Companies Act 1956 or 2013 not the IT Act but the fact that investor credited such huge amount in the form of premium and share capital but neither assessee nor the such so called investor tried to comply with statutory requirements. All these facts suggest that it was the own money of the assessee received through accommodation entry in the form of share capital and premium.

7. The AO also found that the assessee company issued share at huge premium but there was no dividend issued. There was no justification for charging such huge premium. The AO also found some of the investor were not found on the given address. However, the notices under section 133(6) of the Act were issued on the new addresses and reply was also received but such reply were not satisfactory. The AO also referred several judicial pronouncements on the requirement of section 68 of the Act and human probabilities. Accordingly, the AO treated the entire credit of share capital and premium for Rs. 13,41,60,000/- as unexplained credit under section 68 of the Act and added to the total income of the assessee.

8. The aggrieved assessee preferred an appeal before the learned CIT(A) who deleted the addition made by the AO by observing as under:

*"8. The contents of the assessment order and submission of the appellant have been perused. The AO treated the amount of share application money by the outside parties as bogus and added u/s 68 on the ground that the share certificates were not handed over to the investors, that the assessee did not distribute any dividends, that the investors were not known to the assessee, that there was no justification of charging high premium as it was the first year of incorporation of the assessee, that the directors of the investment companies i.e. did not make any investment or that the investors were not having knowledge about the assessee company*

*8.1 The AO admitted in the order at page no 27 para 6 of the assessment order that after obtaining new addresses from the assessee, notices u/s 133(6) were served up on the investors and they complied with the queries of the AO in their replies. The finding of the AO, that the compliance by the investors was made only in the second attempt, does not have any bearing on the issue. The core of the issue was correct addresses of the*

*investors and service of notices to them. Moreover compliance by all of them to all the queries mentioned in the notice was of substance*

*8.2 It was evident from the assessment order that all the investors furnished replies of the queries raised by the AO in notice u/s 133(6) of the IT Act i.e. (a) how did the investors come in contact with the assessee, (b) if the IPO was made then how did they come to know about it, (c) copy of audit report, balance sheet and P&L Account of the investor, (d) copy of ledger account of transactions. (e) copy of bank statement through which the transactions took place. (f) activities of the investors, (g) whether they have received any dividend on their investments, (h) what is the purpose of investment if not dividend is received and (i) whether shares have been issued pursuant to allotment and transferred to their names.*

*8.3 The investors appearing at S No 12,6 to 9 and 11,12, as mentioned in para 4 of the assessment order, were cash creditors of the erstwhile proprietary concern of Shri Ramgopal Maheshwari These cash credits were duly examined by the AO during assessment proceedings u/s 153A simultaneously when the proceedings in the case of the assessee were also in progress The Assessment orders of the erstwhile proprietary concern of Shri Ramgopal Maheshwari and that of the assessee were completed for AY 2010-11 and 2011-12 respectively on the same date The appellant reiterated that the identity of the investors, their creditworthiness and genuineness of their transactions were established as the AO found these cash credits in the books of the proprietary concern of Shri Ramgopal Maheshwari in order It is a fact on record that Shri Ramgopal Maheshwari received loan from 8 parties during the FY 2009-10 and these creditors invested the said loan in the share capital of the assessee, when the erstwhile concern was converted into a company and also some of them made further investments in the share capital of the assessee The AO has also mentioned these facts in the assessment order However, the AO treated the investment by these 8 investors as bogus with the finding in para 62 of page 28 of the assessment order that "in this connection it is stated here that, the unsecured loans itself became the share capital. Therefore, once when the share capital is treated as bogus in the year under consideration, no adverse inference is drawn for the unsecured loans in the preceding year."*

*8.4 It was evident from the facts and circumstances as discussed above that the findings of the AO were not supported by any material on record or by law. It is beyond understanding as to how the transactions of the cash creditors in the proprietary concern i.e. Siyaram Metal Udyog accepted as genuine, can be treated as paper company when the same funds were utilized for share application in the same concern with the only difference that the concern was converted into a corporate in the succeeding financial year The AO was not justified in holding such self-contradictory approach by treating investments of these investors as bogus There was nothing on the record which could warrant the action of the AO*

*8.5 As discussed above, the appellant rebutted the finding of the AO during the assessment proceedings that there was no violation of any provisions of the IT Act if the shares were not handed over to the investors. The appellant relied on the decision of Sophia Finance Ltd 205 ITR 98 Delhi wherein it was held that any violation of the provisions of the Companies Act was a matter of concern only of the appropriate authority under that Act. The Assessing Officer conducted enquiries about the investors through Investigation wing of the Department and also by issuing notice u/s 133 (6) of the IT Act and obtained replies of the investors However, he relied on the statements recorded of the directors of some investing companies and the reports of enquiry furnished by the Investigation Wing of the Department*

6

*8.6 The finding of the AO that high premium charged on the shares was not justified was also rebutted by the assessee in reply to show cause notice of the AO It was submitted that the assessee acquired the ongoing business of Siyaram Metal Udyog a proprietary concern of Shri Ramgopal Maheshwari with all its assets and liabilities This fact was evident from the Memorandum of Association The shares were allotted in lieu of his capital balance standing in the said concern. He enclosed copy of audited balance sheet at Page No 108 of the paper book in support of his explanation Shri Ramgopal Maheshwari was having capital worth of Rs 5.15 crore as on the date of conversion of his concern as a company The business was developed by him with his hard working and also earned reputation in the market and Brass Industries The company issued shares to Shri Ramgopal Maheshwar for its capital balance in the proprietary concern on the same amount of premium which was charged from other investors He furnished chart having details of profit of the proprietary concern in the financial year 2008-09 to 2010-11*

*8.7 The AO attended proceedings alongwith case records. The case records were examined during appeal proceedings with the help of the AO, but there was no material on the record which could support the statements of the directors of some the investing companies In other words, the veracity of the contents of the statements remained unproved The AO did not establish any nexus between the assessee and the investors in these transactions The AO did not give even single instance of any cash deposit in the statements of the bank A/Cs of the investors which could lead the AO to harbour any doubt that the source of funds invested by money the investing companies originated from the unaccounted many of the assessee That could have been a vital evidence to controvert the details and evidence furnished by the assessee during the assessment proceedings The assessment order does not have any findings that the source of the investing companies originated directly or indirectly from the assessee company*

*8.8 The conclusion of the AO that the investor companies were paper companies or they were not having financial capability to make investment was not sustainable without controverting the documents furnished by the assessee. Identity and creditworthiness of these 8 investors and genuineness of their loans was accepted by the AO himself while completing assessment of the erstwhile proprietary concerns S Rangipal Maheshwar as discussed earlier. It appears that the findings were mainly fenced by the reports of the Investigation Wing of Department Admittedly the investors compted all the notices issued u/s. 133(6) of the I.T Act This fact was mentored by the AO in para 6 at page 27 of assessment order concluding this finding as. Thereafter again fresh notices u/s. 133(6) were issued on the new addresses for which replies have been received, but in the second attempt. In the said notices issued the information called for were (a) How did the investors come in contact with the assessee, (b) If the IPO then how did they come to know about it, (c) copy of audit report balance sheet P&L Account of the investor, (d) copy of ledger account of transactions bank statement rough which the transactions (e) copy of bank statement through which the transactions took place (f) activities of the investors (g) whether they have received any dividend on the investments (h) what is the purpose of investment if not dividend is received and (i) whether shares have been sued pursuant to allotment and transferred to their names"*

*The AO did not give any adverse finding about the explanation of the appellant that the company paid stamp duty and allotment intimation was filed with the office of the Registrar of Companies.*

*8.9 There was no dispute about the fact that the investors furnished copy return, PAN share application forms, bank account statements audited to sheets and profit & loss accounts copy of Incorporation Certificates res passed by the AGMs etc along with their replies to the questions in compliance to the notice us 133(6) The AO did not give any*

*plausible reason as to how and these documents did not establish genuineness of the transactions. His finding was not based on any cogent material evidence on the record.*

*8.10 The assessee maintained proper books of accounts which were duly audited by Chartered Accountant. He made credit entry in the books of accounts in the share capital account and share premium account in respect of share capital introduced by the applicants. The investors filed their returns of income, balance sheets and profit and loss accounts which established genuineness of the transactions and their creditworthiness for investment. The bank account statement also evidenced the receipt of credit through normal banking channels The AO did not conduct any enquiry about the veracity of the statements of the directors of the investing companies from their returns of income, balance sheets and profit and loss accounts, bank statements etc to establish his finding before arriving at a conclusion that they were bogus companies and involved in giving accommodation entries.*

*8.11 The assessee requested the AO during assessment proceedings for cross examination of the persons whose statements were recorded However, the AO did not take any steps to allow any opportunity to the assessee to cross examine the persons whose statements were recorded behind his back During the appeal proceeding, the assessing officer appeared along with case records The issue was discussed in detail After perusal of the case records, it was observed that there was nothing on the record which could establish that the persons, whose statements were recorded behind the back of the assessee, were cross examined by the assessee before treating their statements as evidence to draw adverse inference against the assessee The AO did not pursue the matter further Therefore, in my considered opinion, the statements of those persons cannot be used against the assessee.*

*8.12 It was observed from the assessment order that all the notices issued u/s 133(6) of the IT Act were duly served to the investors and they complied with the requirements of the AO This fact was mentioned in the assessment order in para 6 at page 27 The AO held that Though the investors had responded to all the queries raised, however, this does not substantiate the genuineness of the transactions, in the view of the discussion made in the later paras. The AO arrived at the conclusion that though the unsecured loans in the proprietary concern were found genuine but once they were utilized for purchasing shares, when the same proprietary concern was converted into a company, these loans became bogus investment. It was, thus, self evident that the AO arrive at such an in comprehensible conclusion.*

*9. The finding of the AO regarding those investors, in whose cases the cash creditor in the proprietary concern of Shn Ramgopal Maheshwar were accepted as genuine transactions, was totally against the facts and circumstances of the case Once the identity of the depositors, their creditworthiness and genuineness of the transactions was accepted as genuine, the same cannot be termed as bogus when these funds were utilized by these depositors for acquisition of shares in the assessee company by virtue of conversion of the proprietary concern of Shri Ramgopal Maheshwari into a company*

*9.1 The appellant made submissions in response to show cause notice, during the assessment proceedings, to rebut the findings of the AO His submissions were made a part of the assessment order from page no 16 to 27 Thus, after taking into consideration the facts of the case, submissions of the appellant and the findings of the AO, it was adequately clear that the assessee discharged his primary onus by submitting the required details to establish the ingredients ie the identity of the subscribers, their creditworthiness and genuineness of their transactions The Hon'ble Delhi High Court in the case of Divine Leasing & Finance Ltd 299 ITR 268 at page 288, para 16 discussed the issue of burden of onus and discharge thereof as below:-*

*"16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of section 68 of the Income-tax Act The assessee has to prima facie prove (1) the identity of the creditor/sub-scriber, (2) the genuineness of the transaction, namely whether it has been transmitted through banking or other indisputable channels, (3) the creditworthiness or financial strength of the creditor/subscriber, (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register Share Application Forms, Share Transfer Register etc it would constitute acceptable proof or acceptable explanation by the assessee (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices, (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it without more, against the assessee. (7) The Assessing Officer is duly-bound to investigate the creditworthiness of the creditor/subscriber, the genuineness of the transaction and the veracity of the repudiation."*

*Thus, in the light of above facts and submissions of the appellant, it was adequately established that the assessee discharged onus by furnishing relevant documents before the AO It was a duty of the AO to conduct further enquiries regarding the investing companies and shift the onus to the assessee The AD did not gather any evidence which could lead to a conclusion that any of the ingredients required under the provisions of section 68 of the IT Act were not fulfilled by the assessee.*

*9.2 The decision in the case of Chartered Motors Pvt Ltd ITA(55) No 26/And/2012 and ITA(SS) No 25/Ahd/2013 dated 28/08/2014 ITAT by the Hon'ble Tribunal of Ahmedabad is very important as it has wide discussion and elaboration about the issue of onus on the assessee regarding share application money The decisions relied by the appellant as well as the AO have also been examined by the tribunal in this case it was held that the initial onus to prove the nature and source of amount credited in his books of account was discharged by the assessee by furnishing documents like MOA, AOA share application & Board Resolution Certificate of Incorporation. Certificate of Commencement, acknowledgement of ITRS, audited accounts etc of concerned Companies, thereafter, the onus shifted upon the Department and it was for the Department to bring on record relevant material to show as to why inspite of the above stated documents the addition is still to be made in the hands of the assessee. The Department, in the instant case, made efforts to discharge its burden on the basis of only the statements recorded by it of the persons mentioned above and made addition by treating the share application money as bogus by paper companies*

*9.3 The assessee made a request for cross examination of the persons whose statements were recorded However, the AO did not take any steps to allow effective opportunity to the assessee to cross examine the makers of statements The AO did not pursue the matter further Therefore, it was held by the Hon'ble Tribunal that the assessee was not allowed any real opportunity to cross examine the persons who made the statements at the back of the assessee, therefore, the statements of those persons cannot be read against the assessee Accordingly, the decision of the CIT(Appeals) was reversed and the appeal of the assessee was allowed."*

9. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

10. The learned DR before us contended that once the shares have been subscribed by the parties then it is the duty of the assessee to hand over the share certificates to them. As such, there is no reason for the assessee to retain those share certificates with itself. Likewise, the company has not given any dividend to the shareholders which again creates the doubt about the genuineness of the transaction. There are series of judicial pronouncements including the judgement of Hon'ble SC in the case of PCIT vs NRA Iron & Steel Pvt Ltd. (2019) reported in 412 ITR 161 where share capital/ application money/ loan was treated as unexplained cash credit under section 68 of the Act in the identical facts & circumstances.

11. On the other hand, the learned AR before us filed a paper book running from pages 1 to 172 and two written submissions and contended that all the details with respect to the share applicants were furnished. This fact was also admitted by the AO during the assessment proceedings. Therefore, many parties who have given loan to the assessee in the earlier years which were converted into share capital in the year under consideration. Thus, on the conversion of such loans into the shares in the year under consideration, the provisions of section 68 of the Act cannot be attracted. Likewise, it was also contended that it was the 1<sup>st</sup> year of existence of the assessee and the shares were allotted on the last day of the previous year under consideration, thus the question of making the payment of the dividend does not arise.

11.1 Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

12. We have heard the rival contention of both the parties and perused the materials available on record. The facts of the case are not in dispute, therefore, we are not inclined to repeat the same. The provisions of Section 68 of the Act fasten the liability on the assessee to provide the identity of the

**10**

lenders/creditor/investor, establish the genuineness of the transactions and creditworthiness of the lenders/creditor/investor. These liabilities on the assessee were imposed to justify the cash credit entries under Section 68 of the Act by the Hon'ble Calcutta High Court in the case of CIT Vs. Precision Finance (P) Ltd. reported in 208 ITR 465 wherein it was held as under:

*"It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee. Mere furnishing of the particulars was not enough. "*

13. Now first we proceed to understand the identity of the party. The identity of the party refers existence of such party which can be proven based on evidences. As such, the identity of a party can be established by furnishing the name, address and PAN detail, bank details, ITR etc.

14. The next stage comes to verify the genuineness of the transaction. Genuineness of transaction refers what has been asserted is true and authentic. A genuine transaction must be proved to be genuine in all respect not merely on a piece of a paper. The documentary evidences should not be a mask to cover the actual transaction or designed in a way to present the transaction as true but same is not. Genuineness of transaction can be proved by submitting confirmation of the parties along the details of mode of transaction but merely showing transaction carried out through banking channel is not sufficient to prove the genuineness. As such the same should also be proved by circumstantial surrounding evidences as held by the Hon'ble Supreme court in the case of Shri Durga Prasad More reported in 82 ITR 540 and in case of Smt. Sumati Dayal reported in 214 ITR 801.

15. The last stage comes to verify the creditworthiness of the parties. The term creditworthiness as per Black Law Dictionary refers as:

*"creditworthy, adj. (1924) (Of a borrower) financially sound enough that a lender will extend credit in the belief default is unlikely; fiscally healthy-creditworthiness."*

16. Similarly in The New Lexicon Webster's Dictionary, the word "creditworthy" has been defined as under:-

*"creditworthy, adj. of one who is a good risk as a borrower."*

17. It is the duty of the assessee to establish that creditor/investor party has capacity to make investment and having requisite fund in its books of account and banks. The capacity to invest can be established by showing sufficient income, capital and reserve or other fund in the hands of investor. It is required by the AO to find out the financial strength of the investor to invest in shares with judicious approach and in accordance with materials available on record but not in arbitrary and mechanical manner.

18. In the light of the above discussion, we proceed to adjudicate the issue on hand. At the outset, we note assessee company was formed during the year under consideration by taking running business of proprietary concern of promoter Shri Ramgopal Maheshwari. There were 8 parties who have given advance to the impugned proprietary concern which was converted into share capital on formation of assessee company. In case of Shri Ramgopal Maheshwari, the assessment under section 153A of the Act was framed for the A.Y. 2010-11 and 2011-12 where genuineness of loan credit was examined and accepted by the AO. Therefore, in our considered view once the credit of such loan credit in erstwhile proprietary concern was accepted, then the conversion of such loan credit into share capital and premium thereon on subsequent occasion cannot be doubted.

19. Coming to the credit of share capital and premium thereon from the remaining parties, we find that during the assessment proceedings details such as name of investor, their address, copy PAN, ITR, share allotment letter etc were furnished. The AO issued notices under section 133(6)/131(1) of the Act for verification. The AO recorded finding that in the second attempt the investors made reply in response to notices issued to them. Each and every query raised by the AO was answered/ furnished along with necessary documents. However, the AO without pointing any deficiency in the above primary document held that the assessee

failed to explain the genuineness of the credit of share capital for the reason that the physical share certificates were not issued to the investors, charging of premium was not justified satisfactory and there was no dividend issued.

20. The entire thrust of the Revenue for treating share capital shown by the assessee as unexplained cash credit under section 68 of the Act is misplaced. It is for the reason that the fact that the physical share certificate issued to the shareholders were lying with the assessee cannot replace the other documentary evidences, as discussed above, filed by the assessee during the assessment proceedings. In other words, the fact that the share certificates were lying with the assessee can create suspicion in the mind but the same cannot partake the colour of the evidence especially in the circumstances where there was no change in the shareholder list as on 31<sup>st</sup> of March 2022. As such all the shares subscribers who subscribed the shares in the year ending as on 31 March 2011 were still the shareholders in the assessee company till 31 March 2022. Had the shareholders been bogus, those shareholders would have transferred the shares to the director's promoters of the company or their relatives or the associated enterprises. But it has not been done so which implies that those shareholders are still holding the control in the assessee company in the capacity of shareholders. As regard to principles laid down by the Hon'ble SC in the case of NRA Iron & Steel Pvt. Ltd. (Supra), we note that the facts are distinguishable from the present facts of the case. For this purpose, we refer the order of Pune Tribunal in the case of Deputy Commissioner of Income Tax Central Circle, Aurangabad v. Mahalaxmi TMT (P.) Ltd. Reported in 190 ITD 582 wherein it was held as under:

*12. Now proceeding to examine whether the principles laid down by the Hon'ble Supreme Court in the case of Pr. CIT v. NRA Iron & Steel (P.) Ltd. [2019] 103 taxmann.com 48/262 Taxman 74/412 ITR 161 are applicable to the present facts of the case. In that case, the assessee-company received share capital and premium of Rs. 17.60 crores in all from nineteen parties (six from Mumbai, eleven from Kolkata and two from Guwahati). The shares had a face value of Rs. 10 and were subscribed by the investor-companies at a premium of Rs. 190 per share. The AO made the addition of Rs. 17.60 crores after carrying out various inquiries as under-*  
*(i) To verify the veracity of the transactions, the notices were served on three investor-companies namely Clifton Securities Pvt. Ltd.-Mumbai, Lexus Infotech*

*Ltd.-Mumbai, Nicco Securities Pvt. Ltd. Mumbai but no reply was received. (ii) The address with respect to a company namely Real Gold Trading Co. Pvt. Ltd.-Mumbai was not correct. (iii) The notice could not be served on two investor-companies, namely Hema Trading Co. Pvt. Ltd.- Mumbai, Eternity Multi Trade Pvt. Ltd.-Mumbai. (iv) Submissions from nine companies were received (Neha Cassetes Pvt. Ltd.-Kolkata, Warner Multimedia Ltd. Kolkata, Gopikar Supply Pvt. Ltd. Kolkata, Gromore Fund Management Ltd. Kolkata, Bayanwala Brothers Pvt. Ltd. Kolkata, Shivilaxmi Export Ltd. Kolkata, Natraj Vinimay Pvt. Ltd. Kolkata, Neelkanth Commodities Pvt. Ltd. Kolkata, Prominent Vyappar Pvt. Ltd. Kolkata), however, they had not given any reasons for paying such a huge premium. Furthermore, they had declared very low income in their respective returns of income. (v) The details of share purchased and the amount of premium were not specified by certain companies namely Super Finance Ltd. Kolkata, Ganga Builders Ltd. Kolkata. Furthermore, these companies had not enclosed the bank statement. (vi) In addition to above, ld. AO found that: a. Out of the four companies at Mumbai, two companies were found to be non-existent at the address furnished. b. With respect to the Kolkata companies, nobody appeared nor did they produce their bank statements to substantiate the alleged investments. c. Guwahati companies - Ispat Sheet Ltd. and Novelty Traders Ltd., were found non-existent at the given address. d. None of the investor-companies appeared before the A.O. 12.1 Based on the above it was held the by the Hon'ble Apex Court, that the Assessee-Company failed to discharge the onus required under section 68 of the Act. Therefore, the Assessing Officer was justified in adding back the amounts to the Assessee's income. However in the case on hand, we find that the assessee has discharged its onus cast upon it under the provisions of section 68 of the Act which has been elaborated in the preceding paragraphs. 12.2 In our humble understanding, we also note that the decision in the case of NRA Iron & Steel (P.) Ltd. (supra) is based on facts. Thus such case will become binding on those cases having similar facts and circumstances and not other cases having different facts and circumstances. In this regard, we draw support and guidance from the judgment of Hon'ble Calcutta High court in the case of CIT v. Peerless General Finance & Investment Co. Ltd. [2006] 154 Taxman 179/282 ITR 209- wherein it was observed that the binding nature of a decision is of two kinds—one is in relation to the facts and the other is in relation to the principles of law. A principle of law declared would be treated as precedent and binding on all. The finding of facts would bind only the parties to the decision itself and it is the ultimate decision that binds. Where facts are distinguishable, such as assessee has replied and clarified all the doubts like non-service of summons on the directors of the investing companies due to change of address, existence of the investing companies on the portals of MCA/ROC and with the Income-tax Department long after investment, providing DIN of directors of investing companies and their other particulars, providing reasons for charging huge premium, adequate creditworthiness on the basis of assets, source of immediate availability of funds for investment, etc., then this decision in NRA Iron & Steel (P.) Ltd. (supra) cannot be applied. 12.3 Admittedly, the assessee in the case on hand has sufficiently furnished the details of the parties which have been elaborated somewhere in the preceding paragraph. Therefore in our humble understanding the principles laid down by the Hon'ble Apex court in the case of NRA Iron & steels (P.) Ltd. (supra)*

*are not applicable to the facts of the case. 12.4 It is also pertinent to note that various Hon'ble court after considering the judgment of Hon'ble Supreme Court in the case of NRA Iron & Steel (P.) Ltd. (supra) has deleted the addition made by the AO under the provisions of section 68 of the Act. In this connection we draw support and guidance form the judgment of Hon'ble Bombay High Court in case of Pr. CIT v. Ami Industries (India) (P.) Ltd. [2020] 116 taxmann.com 34/271 Taxman 424 ITR 219 where it was held as under: "21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source. 22. In NRA Iron & Steel (P.) Ltd. (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either nonexistent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case."*

20.1 In view of the above and after considering the facts in entirety, in our humble understanding, the principles laid down by the Hon'ble Supreme Court in the case of NRA Iron & Steel Pvt. Ltd. (Supra) are not applicable in the given facts and circumstances.

21. It is equally important to note that it was the 1<sup>st</sup> year of operation of the assessee company and that might be the reason for not declaring the dividend. Moreover, the declaration of the dividend by the company has nothing to do with the share capital received by the assessee. Accordingly, we are of the view that no adverse inference can be drawn against the assessee in the event of non-declaration of dividend in the year under consideration.

22. In view of the above elaborated discussion and after considering facts in totality, we hereby hold that the assessee discharged the onus cast under section 68 of the Act. Hence we do not find any reason to interfere in the finding of the

learned CIT(A). Thus, the ground of appeal of the Revenue on merit is also hereby dismissed.

23. **The last** issue raised by the assessee and the Revenue is that the learned CIT(A) erred in restricting the addition made on purchases from unregistered dealer from @6% to 0.24%.

24. During the search proceeding, at the premises of the assessee company, there was booklet of self-made voucher found and seized. The AO found that such vouchers are maintained with respect to purchases of brass items from unregistered dealer for A.Y. 2011-12 to 2013-14. The AO noted that all these purchases were made in one or two months of each year and having purchase value of less than 20,000/-. These vouchers were not supported by other documentary evidences such as bills or receipts etc. It was also found that as per these vouchers total purchases from unregistered dealer (URD) for the year under consideration was of Rs. 2,90,23,395/- whereas the assessee in the books of account claimed purchases from URD Rs. 3,01,00,245/- only. Therefore, the AO in view of the above held that whole amount of purchases claimed from URD cannot be accepted as genuine. Thus, the AO estimated profit embedded in such URD purchases @ 6% and made addition of Rs. 18,06,014/- to the total income of the assessee.

24.1 The aggrieved assessee preferred an appeal before the learned CIT(A) who restricted the addition to the extent of 0.24% by observing as under:

*"15. The facts of the case, findings of the AO and submissions of the appellant have gone through. It was a fact that assessee was having purchases from unregistered suppliers in a considerable quantity. Admittedly, no discrepancy was found in stock during the course of search. This very fact leads to an impression that the assessee was having proper records of purchases from unregistered suppliers also. However, there is also a possibility that such suppliers do not have much bargaining capacity as they have to sell out their material in cash and in relatively small quantity. The element of profit from such purchases should be comparatively more profitable in this line of business. The AO has estimated gross profit @ 6% which is slightly higher than the percentage of gross profit disclosed by the assessee in his books of accounts. In my considered opinion, it would be in the interest of justice to restrict the addition on estimated basis to 0.24% only which is over and above the book results of the case as the assessee has already disclosed profit of @ 5.76%. Accordingly, the assessee gets part relief."*

25. Being aggrieved by the order of the learned CIT(A) both the assessee and the Revenue are before us. The Revenue is in appeal against reduction of addition from 6% to 0.24 % of the URD purchases whereas the assessee is in cross objection against the addition sustained by the learned CIT(A). The relevant grounds of objection by the assessee in CO. No. 58/RJT/2015 reads as under:

*"1. The learned Assistant Commissioner of Income Tax, Central Circle-1, Rajkot as well as the Honourable Commissioner of Income Tax (Appeals)-11, Ahmedabad has erred in law as well as in facts while estimating 6% as Profit from sale of goods made from purchase of Unregistered dealer.*

*2. The learned Assistant Commissioner of Income-Tax, Central Circle-1, Rajkot as well as the Honourable Commissioner of Income Tax (Appeals)-11, Ahmedabad has erred in law as well as in facts while making the addition without any logical base or comparable cases and thus, the book result may please be accepted because estimation of Profit @ 6% is a pure guess work without appreciating the fact that there is no difference found in physical stock verification during the search which is also confirmed by CIT(A) in his order vide Para no.15 of the appellate order.*

*3. The Honourable Commissioner of Income-Tax (Appeals)-11, Ahmedabad has erred in law as well as on facts in confirming the addition of Rs. 72,240/- being the difference G.P. of 0.24 % (6% - 5.76%).*

*The respondent craves leave to amend alter or delete any of the above grounds of cross objection."*

26. The learned DR before us contended that the assessee was not eligible for the deduction with respect to the purchases which were not supported by the documentary evidence. However, the AO was kind enough to restrict the disallowance to the small extent representing the element of profit embedded in such purchases from the unregistered parties.

27. On the other hand, learned AR submitted that the Id. CIT-A has rightly given the benefit of the gross profit already offered to tax with respect to the purchases from the unregistered parties.

27.1 Both the learned DR and the AR before us vehemently supported the order of the authorities below to the extent as favourable to them.

28. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case revolves with respect to the purchases made by the assessee from the URD. Undeniably, the URD purchases were not supported by the proper documents except the self-made vouchers which were also defective insofar no detail of the vendor was not mentioned and no signature of the vendor was there on such vouchers. Furthermore, all the vouchers showing the URD purchases were of the value of less than ₹20,000 so as to avoid provisions of section 40A(3) of the Act. Likewise, the URD purchases shown by the assessee stands at Rs. 3,01,00,245/- in the books whereas the aggregate purchases based on the self-made vouchers stands at Rs. 2,90,23,395/- leading to excess purchase of Rs. 10,76,850/- only. As per the AO, the purchases from the grey market is generally is of lesser value than the purchases shown from the registered parties. Thus, the AO has made the addition on the value of the purchases from the unregistered parties at the rate of 6% over and above the gross profit already declared by the assessee in its financial statement. However, the learned CIT(A) found that the assessee has already declared the gross profit as a whole including the purchase from registered parties at the rate of 5.76% and therefore he was of the view that if any addition is to be made it should be the difference between the profit determined by the AO on the URD purchases viz a viz the gross profit already declared by the assessee. As such the learned CIT(A) confirmed the addition made by the AO in part to the tune of Rs. 72,241/- being 0.24% of the URD purchases.

29. The controversy in the present case arises what rate of profit should be adopted on the URD purchases from the unregistered parties. Admittedly, the assessee has already shown the gross profit on the purchases from the registered and unregistered parties as a whole at the rate 5.76% which implies that the profit on such purchases has already been disclosed by the assessee to this extent. Therefore, while determining the undisclosed profit embedded in such URD purchases, the rate of profit to be estimated should also take into the consideration the amount of profit already disclosed by the assessee in the books

of accounts otherwise it would lead to the double addition. In the present case, the AO, has estimated the gross profit on such URD purchases at the rate of 6% and if the basis of the AO is considered or presumed to be true then the profit which has already been disclosed by the assessee i.e. 5.76%, the benefit of the same should be allowed.

30. Further, the rate at which purchase from the grey market was shown by the assessee cannot be relied upon as gospel truth in the absence of the facts noticed by the AO which have been elaborately discussed in the preceding paragraph. Thus, it is justifiable to add some margin to the taxable income of the assessee on account of such purchases from the unregistered parties. In the present case, in our considered view, the difference between the estimated profit determined by the AO on such URD purchases viz a viz the gross profit declared by the assessee, is liable to be added as income of the assessee in the given facts and circumstances. Hence, we do not find any infirmity in the order of the learned CIT(A). Thus the ground of appeal of the revenue and the cross objection of the assessee are hereby dismissed.

**Coming to CO. No. 58/RJT/2015 in ITA No. 373/RJT/2015 by the assessee for AY 2011-12**

31. At the outset, we note that the issue raised by the assessee vide cross objection has been dealt along with grounds of appeal raised by the Revenue in ITA No. 373/RJT/2015, where we have decided the issue against the assessee vide paragraph number 30 of this order. For detailed discussion, please refer the mentioned paragraph of this order. Hence, the ground of cross objection of the assessee is hereby dismissed.

**Coming to ITA No. 163-164 /RJT/2017 by the assessee for A.Y. 2012-13 to 2013-14**

32. At the outset, we note that the issues raised by the assessee in its ground of appeals for AY 2012-13 and 2013-14 are identical to issue raised by the

assessee in CO. No. 58/RJT/2015 for A.Y. 2011-12. However, there is small difference in the fact that in the AY 2012-13 and 2013-14, the learned CIT(A) confirmed the addition made by the AO in full whereas in AY 2011-12 restricted the addition to the extent of difference between GP estimated by the AO and the GP offered by the assessee. The cross objection of the assessee for the assessment 2011-12 has been decided by us vide paragraph No. 31 of this order where we have confirmed the order of learned CIT(A) restricting the addition to the extent of difference between GP estimated by the AO and the GP offered by the assessee. Therefore, the findings given in CO. No. 58/RJT/2015 shall also be applicable for the A. Y. 2012-13 and 2013-14. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2011-12 shall also be applied for the AY 2012-13 and 2013-14. Hence, the grounds of appeal filed by the assessee for AY 2012-13 and 2013-14 are hereby partly allowed.

**Coming to ITA No. 150/RJT/2017 by the assessee for A.Y. 2014-15**

33. At the outset, we note issue raised by the assessee in its ground of appeal for A.Y. 2014-15 are identical to issue raised by the assessee in CO. No. 58/RJT/2015 for A.Y. 2011-12. Therefore, the findings given in CO. No. 58/RJT/2015 shall also be applicable for the A. Y. 2014-15. The cross objection of the assessee for the assessment 2011-12 has been decided by us vide paragraph No. 31 of this order against the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2011-12 shall also be applied for the AY 2014-15. Hence, the ground of appeal filed by the assessee for AY 2014-15 is hereby dismissed.

34. In the combined results, the appeal filed by the Revenue bearing No.373/Rjt/2015 with C.O 58/Rjt/2015 for A.Y. 2011-12 are dismissed whereas other appeals of the Assessee bearing ITA Nos.163 & 164/Rjt/2017 for A.Y. 2012-

20

13 & 2013-14 are partly allowed and ITA No.150/Rjt/2017 for A.Y.2014-15 is hereby dismissed.

**Order pronounced in the Court on 24/02/2023 at Ahmedabad.**

**Sd/-  
(SIDDHARTHA NAUTIYAL)  
JUDICIAL MEMBER**

**Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 24/02/2023  
*Mansih*