

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

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

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

**I.T.A. No.: 1637/KOL/2019
Assessment Year: 2014-15**

***M/s. Aroto Trade India Private Limited.....Appellant
[PAN: AACCA 1766 C]***

Vs.

ITO, Ward-9(1), Kolkata.....Respondent

Appearances by:

Sh. Miraj D. Shah, Adv., appeared on behalf of the Assessee.

Sh. Vijay Kumar, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : January 19th, 2023

Date of pronouncing the order : April 11th, 2023

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short "AY") 2014-15 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the "Act") by Id. Commissioner of Income-tax (Appeals)- 15, Kolkata [in

short ld. "CIT(A)"] dated 25.04.2019 arising out of the assessment order framed u/s 143(3) of the Act dated 29.12.2016.

2. The assessee is in appeal before this Tribunal raising the following grounds:

"1) For that the Assessment order passed was in violation of principals of natural justice and hence the entire proceeding was bad in law and thus the assessment order be cancelled/ quashed.

2) For that the order passed by the learned CIT (Appeals) is bad in law and therefore the same was unjustified and be deleted.

3) For that the addition made u/s 68 of the Income Tax act, 1961 for non-compliance of summon u/s 131 of the Income Tax Act, 1961 is not justified and hence the same be deleted.

4) For that the learned CIT (Appeals) erred in confirming the addition of Rs. 1,71,37,590/- made on account of unexplained cash credit in the books of the assessee being share capital contribution u/s 68 of the Income Tax Act, 1961 this was not justified and thus the same be deleted.

5) For that the learned CIT (Appeals) erred in confirming the interest u/s 234 A/B/C the same was unjustified and hence the same be directed to recomputed the interest as per law.

6) The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules 1963.

7) For that the learned CIT (Appeals) relied on judgments and definition without giving any proper opportunity to the Appellant to distinguish the same and therefore the Appellate order was bad in law.

8) The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal."

3. Brief facts of the case as culled out from the records are that the assessee is private limited company engaged in the business of

trading and investment. Income of Rs. 1,14,260/- declared in the e-return filed for AY 2014-15 on 27.09.2014. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. During the course of assessment proceedings ld. AO noticed that the share capital of the assessee including premium has increased to the tune of Rs. 1,71,37,590/-. Notices u/s 133(6) of the Act were sent to the share subscriber companies which were duly served and replies were received. Thereafter, ld. AO based on the examination of the financial statements, came to a conclusion that the income returned by the share subscribers is very negligible and they do not have sufficient revenue and other assets to justify the investment in the assessee company. He, accordingly invoked the provisions of Section 68 of the Act and placing reliance on various judgments held that the assessee has introduced his own undisclosed funds in the garb of subscription of share capital by shareholders and as the creditworthiness of the shareholders could not be established, addition of Rs. 1,71,37,590/- for unexplained share capital was made u/s 68 of the Act and income assessed at Rs. 1,72,51,850/-.

4. Aggrieved, the assessee preferred appeal before ld. CIT(A) and filed detailed submissions and also placed reliance on plethora of judgments. It was submitted that the assessee has discharged his primary onus casted upon it and has provided all the relevant information as was available with it and which in its knowledge and which in view of the assessee were sufficient to explain the alleged receipt of share capital and share premium. Ld. CIT(A) was

not satisfied and he confirmed the finding of ld. AO based on the surrounding circumstances and test of human probability.

5. Aggrieved, the assessee is now in appeal before this Tribunal. Ld. Counsel for the assessee vehemently argued referring to the written submissions filed before ld. CIT(A) placed at pages 2 to 77 of the paperbook. It was also submitted that out of the alleged sum Rs. 70,47,350/- was received in the earlier year from most of the share applicants and on such sum provisions of Section 68 of the Act cannot be invoked. As regards the amount received during the year it was submitted that all necessary evidences were filed to explain the alleged sum. Even notices issued to the alleged parties have been duly served and the replies have been received by ld. AO confirming the transaction of subscribing to the share capital of the assessee company along with the share premium. Reliance placed on various judgments referred in the written submissions and further, reliance placed on the recent judgment of the Hon'ble Jurisdictional High Court in the case of *PCIT vs. M/s. Sreeleathers* reported in [2022] 448 ITR 332 (Cal).

6. On the other hand, ld. D/R vehemently argued supporting the orders of both the lower authorities and stated that the financials of the alleged share subscribers filed before the lower authorities indicate that they are accommodation entry providers and *Jama-Kharchi* companies and do not have sufficient creditworthiness to make the alleged investment.

7. We have heard rival contentions and perused the records placed before us. The addition u/s 68 of the Act at Rs.

1,71,37,590/- is in challenge before us by the assessee. The said sum is on account of increase in the share capital and share premium of the assessee company which both the lower authorities have held to be unexplained calling for the addition u/s 68 of the Act. The details of the alleged sum is mentioned below which is from 32 share applicants:

| SN | Name | Address | PAN | Total Premium Amount | Share Premium Received prior to AY 2012-2013 |
|----|--|--|------------|----------------------|--|
| 1 | Amit & Sumit Credit (India) Pvt. Ltd | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AACCA1495J | 1,98,000 | 1,98,000 |
| 2 | Aristo Trade & Credit Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AACCA1492R | 3,22,500 | |
| 3 | Divine Construction & Metals Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AAACD9027F | 3,000 | 3,000 |
| 4 | Deepmala Vyapaar Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AABCD9197P | 14,97,000 | 14,97,000 |
| 5 | Ekata Retailers Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AAACE5597M | 8,18,100 | |
| 6 | Greenrose Commodities Pvt. Ltd. | 8, Lyons Range, Ground Floor, Kolkata-700001 | AABCG9057F | 1,69,500 | |
| 7 | Kit Distributors Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AACCK2931M | 2,49,750 | 2,45,750 |
| 8 | Mortex Light India Pvt. Ltd | 77, N. S. Road, 5 th Floor, Kolkata-700001 | AADCM2726K | 4,47,750 | |
| 9 | Mahima Trade & Credit Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AABCM7154R | 4,99,500 | 4,99,500 |
| 10 | Newera Fiber & Fabrics Pvt. Ltd. | 77, N. S. Road, 5 th Floor, Kolkata-700001 | AABCN1455E | 2,28,750 | |
| 11 | Pavitra Commodities Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AADCP1883C | 1,50,000 | 1,50,000 |
| 12 | Parjadeen Sales Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AABCP5500A | 37,50,000 | |
| 13 | Pingle Commtrade Pvt. Ltd. | 77/79, N. S. Road, 5 th Floor, Kolkata-700001 | AADCP1882D | 1,50,000 | 1,50,000 |

I.T.A. No.: 1637/KOL/2019
Assessment Year: 2014-15
M/s. Aroto Trade India Private Limited.

| | | | | | |
|----|------------------------------------|--|-------------|-----------|----------|
| 14 | Pakton Commodities Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AADCP1884F | 99,750 | 99,750 |
| 15 | Panorama Fiscal Services Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AABCP6489N | 2,01,750 | |
| 16 | Rishikesh Commercial Co. Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AABCR3317F | 3,43,500 | |
| 17 | Skyline Vinimay Pvt. Ltd. | 77/79, N. S. Road, 5 th Floor, Kolkata-700001 | AALCS0347N | 1,50,000 | 1,50,000 |
| 18 | Spotlite Dealer Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AAHCS8911J | 3,03,600 | 3,600 |
| 19 | Sadhana Trade & Credit Pvt. Ltd. | 48, Canning Street, Janaki Centre, 6 th Floor, Kolkata-700001 | AADCS59461R | 8,49,750 | 2,00,000 |
| 20 | Shweta Trade Services Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AADCS9455K | 9,33,750 | 9,33,750 |
| 21 | Sunflower Commodities Pvt. Ltd. | 77/79, N. S. Road, 5 th Floor, Kolkata-700001 | AALCS0345Q | 1,24,500 | 1,24,500 |
| 22 | Trimudra Credit Ltd. | 8, Lyons Range, Ground Floor, Kolkata-700001 | AABCT0282B | 9,750 | 9,750 |
| 23 | Tropex Suppliers Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AABCT1459N | 58,500 | 58,500 |
| 24 | Ujjawal Mercantile Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AAACU3435G | 1,53,750 | 1,53,750 |
| 25 | Ultra Marketing Pvt. Ltd. | 77, N. S. Road, 5 th Floor, Kolkata-700001 | AAACU3818K | 12,48,000 | 2,58,000 |
| 26 | Universal Vanijya Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AAACU9138Q | 1,24,500 | 1,24,500 |
| 27 | Venus Vanijya Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AACCV5146P | 2,25,000 | |
| 28 | Virtual Communications Pvt. Ltd. | 40/3, Strand Road, 5 th Floor, Kolkata-700001 | AABCV3096P | 4,30,500 | 4,30,500 |
| 29 | Vital Fiscal Services Pvt. Ltd. | 48, Canning Street, Janaki Centre, 6 th Floor, Kolkata-700001 | AAACV9361L | 1,35,000 | |
| 30 | Walden Barter Pvt. Ltd. | 77/79, N. S. Road, 5 th Floor, Kolkata-700001 | AAACW2857N | 12,18,000 | 8,00,000 |
| 31 | Winsome Agency Pvt. Ltd. | 77/79, N. S. Road, 5 th Floor, Kolkata-700001 | AAACW7206N | 1,24,500 | 1,24,500 |

| | | | | | |
|----|------------------------------|--|------------|-------------|-----------|
| 32 | Wizard Merchandise Pvt. Ltd. | 113, N. S. Road, 5 th Floor, Kolkata-700001 | AAACW7204P | 19,20,000 | 8,33,000 |
| | | | Total | 1,71,37,950 | 70,47,350 |

8. From perusal of the above details, we find that the sum of Rs. 70,47,350/- was received by the assessee prior to the AY 2012-13 and since the said sum was received by the assessee in the earlier years and duly credited in the books of accounts, the provisions of Section 68 of the Act may have been invoked in the year in which such sum was received but could not be invoked for the year under appeal. Therefore, out of the alleged sum of Rs. 1,71,37,950/- the addition of Rs. 70,47,350/- is deleted being the sum not received during the year and therefore, ld. AO erred in invoking the provisions of Section 68 of the Act.

9. As far as the remaining amount of Rs. 1,00,90,600/- is concerned firstly, we observe that it includes the sum received from 22 share subscribers who gave part of the money in the preceding years and that has been accepted by the Revenue authorities. We also notice that ld. AO issued notices u/s 133(6) of the Act to all the alleged share subscribers and the notices were duly served and the replies were sent directly to ld. AO enclosing therein the following details:

- (a) Income Tax Return of the share holders
- (b) Certificate of incorporation of the share holders
- (c) Audited Accounts of the share holders
- (d) Share Application Forms
- (e) Share Allotment Letters
- (f) Copy of the bank account of the share holders
- (g) Transaction with the appellant was duly highlighted in the bank statement
- (h) Copy of Ledger Account
- (i) Evidences of source of source of the share holders

10. We also notice that all the share subscriber companies are duly assessed to tax and in the written submissions filed before Id. CIT(A) details of the CIN, PAN, bank statement, confirmation letters have been filed and it is also stated that the share subscribers had sufficient free capital and reserves to justify the investment made in the assessee company. Id. AO has mainly disputed the creditworthiness of these share applicants. However, once the assessee has discharged its initial burden of proof casted upon it, u/s 68 of the Act to explain the alleged sum, it is the turn of Id. AO to examine these documents and find out the discrepancies and other defects so as to again make the assessee liable to furnish further evidences to explain the transaction. However, in this case Id. AO has not made any such effort and merely based on the financials of the share subscriber companies came to a conclusion that such companies could not invest into the share capital of the assessee company. We fail to understand that when the assessee company has furnished sufficient details which clearly proves the identity and creditworthiness of the share subscribers to invest the said sum, genuineness of the transaction being the investment in equity capital of the assessee company through banking channel and duly supported by the financials of the assessee company justifying the premium then under such circumstances it is not justified to invoke the provisions of Section 68 of the Act. We drew support from the decision of this Tribunal in the case of *ITO vs. M/s. Kemex Engineering (P) Ltd.* in ITA No.75/Kol/2021 order dated 01.02.2023 wherein similar issue was under consideration, however, the facts of the present

assessee are on much better footing since in the instant case the share subscribers have furnished the requisite information directly to ld. AO. Relevant finding of the Tribunal is reproduced below:

“7. We have heard the rival contentions and perused the material available on record and have given our thoughtful consideration to the elaborate observations and findings given by the Ld. CIT(A) while giving relief to the assessee. At the outset, we note that notices u/s. 133(6) of the Act were issued by the Ld. AO to all the five subscribers, who had replied giving all the details and documents required by the Ld. AO along with confirming the transaction of they making investment in the share capital of the assessee. We also take note of the fact that the share subscribers had furnished copies of their ITR acknowledgments which showed that each of them were regular income tax assessees, testifying their identity.

7.1. From the perusal of the paper book and the documents placed therein, it is seen 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 made by account payee cheques, (v) details of the bank accounts belonging to share applicants and their bank statements, (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.

7.2. We also take note of the elaborate and well reasoned findings and decisions arrived at by the Ld. CIT(A) by taking into consideration all the details and documents placed on record. The relevant findings and decisions from the following paras are extracted as under:

“4.5. To sum up the foregoing, it is observed that all the notices u/s. 133(6) were served at the respective addresses of each of the five shareholders by registered post. The share subscribers had furnished copies of income-tax Acknowledgments which showed that each of them were regular income-tax assessees who were assessed in their own rights with reference to their audited financial results. These facts established the identity of the share applicants. It is further noted that each of the share subscriber had furnished copies of the audited accounts for the FY 2011-12. Examination of these accounts

revealed that each share subscribing company was having substantial own funds in the form of capital & reserves which were several times more than the share subscription amount paid to the appellant. In find that only a fraction of the net owned funds of the respective subscribing companies was invested in assessee's equity shares. The investments made by each of the share subscribers were paid by way of account payee cheques and/or RTGS and there was no prior cash deposit in their bank accounts. In view of the aforesaid facts it can be safely inferred that the assessee had discharged its onus of substantiating the creditworthiness of the shareholders. The shareholders had also furnished copies of their share allotment advices. They had also explained the nature of their respective source of funds. All these facts considered cumulatively substantiate the genuineness of the transactions involving subscription of share capital.

4.6. It is noted that in the impugned order much emphasis was placed on the act that the shareholders did not respond to the notices u/s. 131. I however, find that although the share subscribing companies did not appear before the AO yet the material documents requisitioned by the AO in his notice u/s. 131 had already been furnished before the AO by the shareholders. From the perusal of the assessment order, I find that save & except making an assertion that the Directors of the share applicant companies failed to appear before him, the AO did not bring on record any substantive material to disprove the documentary evidences which the appellant as well as the share subscribers had placed on AO's record in support of the share subscription transactions. The material available on record shows that the AO had also made independent enquiries from the shareholders u/d. 133(6) of the Act. The facts and circumstances furnished by the shareholders in response thereto, supported the AR's contention that the identity of all the five share subscribing companies stood established. Referring to the copies of the bank statements, the AR established that payment of subscription amounts were recorded in the bank statements of the respective companies. The entries in the bank statement proved that the share subscription amount was transferred through banking channel. Besides the entries in the bank statements also substantiated that before payment of share subscription mounts, no cash was deposited in the bank accounts of the subscribing companies. The AR further pointed out that appellant had furnished explanations before the AO with regard to immediate

sources from which share subscription amounts were paid. On these facts therefore, I find that in terms of section 106 of the Evidence Act, the creditworthiness of the share subscribers and the genuineness of the transactions could not have been doubted by the AO merely on the ground that Directors of the share subscribers did not appear before the AO for verification. Gainful reference in this regard may be made to following observations made the Hon'ble Bombay High Court in the case of CIT Vs. Orchid Industries Limited (397 ITR 136).

“6. The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons disclosed that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the assessee. The judgment in case of Gagandeep Infrastructure (P) Ltd. (supra) would be applicable in the facts and circumstances of the present case.”

4.8. There is per se no quarrel with the proposition put forth by the AO that in tax proceedings the AO is not required to accept apparent as real. The AO has both duty as well as obligation to bring out the truth and present the real facts. For that purpose the AO is permitted to undertake investigation and enquiries so as to unearth the actual and real facts. The AO has been given power by the Legislature to prove that apparent is not real and thereafter make the assessment with reference to actual state of affairs. There is also no denial that the AO while assessing the income is permitted to take into consideration the human probabilities and if he proves that the conduct of the parties is not in conformity with the actions of prudent person then he may overlook the form of the transaction and find out the substance of the transaction and determine the tax consequences based on the real facts. In the impugned order the AO has doubted the genuineness of the entire transaction on the ground that it was against the human probability that the companies would invest in shares of the appellant company. The AO has also alleged that the

unaccounted monies belonging to the assessee and ploughed back in the form of share capital by adopting the modus operandi where the unaccounted cash was rotated in four-five layers and thereafter the money was brought into the assessee's bank account in the form of share capital. I however find that before these conclusions were recorded the AO himself did not bring on record sufficient tangible and cogent material to support his conclusion that the amount credited in the assessee's books in the form of share capital and premium actually represented assessee's undisclosed income.

4.15. Applying the judicial principles laid down in the above decisions to the appellant's case. I find that the AO had made addition u/s. 68 without proper application of mind and incorrect appreciation of the relevant provisions of the Act. In the above judicial decisions, it has been held that before an addition u/s. 68 is made, it is necessary for the AO to bring on record irrefutable material or evidence which would prove that there was no valid issuance of the shares and for that reason the assessee had failed to prove identity & creditworthiness of the shareholders and also failed to substantiate genuineness. If these touchstones are applied to the appellant's case then I find that the copies income tax acknowledgments and service of notices at their addresses established the identity of all the share subscribers. In the balance sheets of the respective share subscribers, the investments in assessee's share were recorded and each subscriber in its balance sheet had disclosed sufficiently large investible funds. The assessee had also filed copies of the bank statements of the respective share subscribing companies which established that the share subscription amounts were received through banking channel. The sources of making payment were also furnished and the entries in bank statements indicated that there was no deposit of cash prior to clearance of the cheques in assessee's favour. All these facts and documents considered cumulatively establish that the assessee had discharged the onus of proving creditworthiness of the share subscribers and the genuineness of the transactions. I therefore hold that the AO was not justified in making the impugned addition of Rs.,1,82,50,000/- u/s. 68 of the Act which is accordingly deleted. These grounds are therefore allowed."

7.3. Before arriving at our finding, we refer to the following judicial precedents to buttress our observations and conclusions:

i) The decision of Hon'ble Jurisdictional High Court of Calcutta in the case of CIT v. Dataware Pvt. Ltd. in 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."

ii) Decision of Hon'ble Madras High Court in the case of CIT v. 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."

iii) Judgment of Hon'ble Jurisdictional High Court in the case of Exoimp Resources (India) Ltd. vs. CIT (supra), wherein it was held as follows:

"It is incumbent upon the Assessing Authority to examine the explanation of the creditor and arrive at a conclusion as to whether the explanation was satisfactory. The conclusion arrived by the Assessing Authority is to be communicated to the assessee if such explanation is not considered satisfactory. If thereupon the assessee submits any comments or furnishes further information, in that event, the Assessing Authority has to examine the same and arrive at his own conclusion. The inbuilt safeguard provided in section 68 cannot

be ignored by the Assessing Authority at his sweet will. The Assessing Authority can add the share capital as undisclosed income if no explanation is offered by the assessee. But since the details/explanations were offered, it was incumbent on the Assessing Authority to examine the same and arrive at a cogent conclusion. Assessing Officer having failed to discharge such obligation the addition is not sustainable in law., case of CIT vs. Lovely Exports Ltd. (2008) 216 CTR 195 (SC) that where share application money.”

7.4. In the course of assessment proceeding, Ld. AO directed the assessee to produce the director of the assessee and also the directors of the subscriber companies along with relevant documentary evidence and details which was not complied with in full. Ld. Counsel 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 v. 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 assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion 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. We notice that all the details were very much placed before the Assessing Officer but while framing the assessment, no efforts have been made by the Assessing Officer to examine the correctness of various proof, filed by the assessee by carrying out any investigation.

Merely for non-appearance of the directors, the ld. Assessing Officer disregarded all these documents which have been placed before various statutory authorities including Registrar Of Companies, Income Tax Department and Schedule Banks. The assessee by way of filing all these documents necessary to prove identity, creditworthiness and genuineness of the alleged transaction, has discharged the initial burden casted upon it under the provisions of section 68 of the Act. Unless and until, the assessing authority finds any lacuna or adversity or defect in the said documents, the burden to prove remains on the Revenue authorities. In the instant case, ld. Assessing Officer failed to discharge the burden and summarily disregarded the documents filed by the assessee by merely referring to some decisions and not going into the facts of the case except referring to the price per share.

9. We further observe that provision for examining the source of source under the provisions of section 68 of the Act has been brought in by Finance Act 2012 w.e.f. 01.04.2013 as per which “where an assessee is a company (not being a company in which public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee company shall be deemed to be not satisfactory unless: a) the person being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited and b) such explanation in the opinion of the Assessing Officer has been found to be satisfactory.” Since the instant appeal pertains to assessment year 2012-13, and the said amendment brought in by Finance Act 2012 is effective from 01.04.2013, it is not applicable on the case before us. Even otherwise, it is not in dispute that the assessee has filed all the relevant documents of the share subscriber companies and further, in order to prove the source of source, copies of bank statements, audited balance sheets of all the nine subscriber companies are placed on record.

10. As far as the decision of Coordinate bench of ITAT, Kolkata in the case of Bishakha Sales Pvt. Ltd. (supra) referred by the Assessing Officer in making the addition, in our view, it does not support the addition as the said decision is delivered in the context of proceedings u/s 263 of the Act on the issue of enquiry regarding huge premium received on share application.

11. Further, in respect of ground nos. 3, 4 and 5, reference to the judgment of Hon'ble Supreme Court in the case of NRA Iron & Steel Pvt. Ltd. (412 ITR 161) is found to be distinguishable on facts in as much as in the said decision, Ld. AO has made extensive enquiries and some of investors were found to be non-existent. Upon going through the facts involved in that judgment, it is noted that, in the decided case the AO had made extensive enquiries and from that he had found that some of the investor companies were non-existent, which is certainly not the case before the undersigned. In the decided case, certain investor companies also failed to produce their bank statements proving the source for making investments in assessee company. In the facts of the present case however not only have the shareholders furnished their bank statements and investment schedules to establish the source of funds but they have also furnished their respective sources of funds in response to notices issued by the AO u/s. 133(6) of the Act.

12. We, therefore, respectfully following the judgment referred hereinabove by the Hon'ble Courts and also considering the facts and circumstances of the case, are of considered view that since the assessee has sufficiently explained the identity and creditworthiness of the share subscriber companies and the genuineness of the transaction of applying for the equity shares of the assessee company and since nothing contrary to the evidence filed by the assessee has been placed on record by the Revenue, except the reason that the directors failed to appear to the summons issued u/s. 131 of the Act, we find no reason to interfere with the meritorious finding of the Ld. CIT(A). We accordingly dismiss the grounds raised by the revenue in this respect.

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

11. Further, we find that recently the Hon'ble Jurisdictional High Court in the case of *M/s. Sreeleathers (supra)* adjudicating similar issue relating to the addition u/s 68 of the Act and dealing with the onus casted upon the assessee to establish the existence, genuineness and creditworthiness of the new loans held as follows:

“3. We have heard Mr. Vipul Kundalia, learned Senior Standing Counsel along with Mr. Anurag Roy, learned Advocate for the

appellant and Mr. Avratosh Mazumder, learned Senior Advocate assisted by Mr. Avra Mazumder and Mr. Md. Bilwal Hossain, learned Advocates for the respondents.

*4. Before we examine the correctness of the order passed by the Tribunal and consider whether a substantial question of law arises for consideration in this appeal we need to take note of section 68 of the Act. This provision deals with cash credits. It states that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. The crucial words in the said provision are "assessee offers no explanation". This would mean where the assessee offers no proper, reasonable and acceptable explanation as regard the amount credited in the books maintained by the assessee. No doubt the Income-tax Act places the burden of proof on the tax payer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their conformations, it has been held that the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit so as to be justified in referring to section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee submits the explanation with regard to the cash credit, the Assessing Officer should consider the same objectively before he takes a decision to accept or reject it. In *Sreelekha Banerjee v. CIT* [1963] 49 ITR 112 (SC), it was held that if the explanation given by the assessee shows that the receipt is not of income nature, the department cannot convert good proof into no proof or otherwise unreasonably reject it. On the other hand, if the explanation is unconvincing, the same can be rejected and an inference shows that the amount represents undisclosed income either from a disclosed or an undisclosed source *CIT v. P. Mohanakala* [2007] 161 Taxman 169/291 ITR 278/210 CTR 20 (SC). The explanation given by the assessee cannot be rejected arbitrarily or capriciously, without sufficient ground on suspicion or on imaginary or irrelevant grounds *Lal Mohan Krishna Lal Paul v. CIT* [1944] 12 ITR 441 (Cal.) and *Anil Kumar Singh v. CIT* [1972] 84 ITR 307 (Cal.).*

5. Further to be noted that where the assessee furnishes full details regarding the creditors, it is up to the department to pursue the matter further to locate those creditors and examine their creditworthiness. It has been further held in *A.S. Sivan Pillai v. CIT* [1958] 34 ITR 328 (Mad.) that while drawing the inference, it cannot be assumed in the absence of any material that there has been some illegalities in the assessee's transaction. Thus, more importantly, as held by the Hon'ble Supreme Court in *CIT v. Daulat Ram Rawatmull* [1973] 87 ITR 349 (SC), the onus of proving that the appellant was not the real was on the party who claims it to be so. 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. Paragraphs 5.4 and 5.5 of the assessment order are all personal perception and opinion of the assessing officer which needs to be 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 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.

6. For all the above reasons, we find that no question of law much less, substantial question of law arises for consideration in this appeal.

7. Accordingly, the appeal fails and is dismissed.”

12. Respectfully following the above decisions and on examining the facts of the case we are of the considered view that the assessee on the strength of complete documentary evidences has successfully proved the identity and creditworthiness of the share subscribers and the genuineness of the transaction coupled with the fact that most of the share subscribers had given part of the share application money in the preceding years and which has not been questioned by the Revenue authorities and thus, delete the addition u/s 68 of the Act at Rs. 1,71,37,590/-. Thus, all the effective grounds raised by the assessee on merits of the case are allowed.

13. Other grounds being general and consequential in nature, need no adjudication.

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

Kolkata, the 11th April, 2023

Sd/-

[Sonjoy Sarma]
Judicial Member

Sd/-

[Manish Borad]
Accountant Member

Dated: 11.04.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. M/s. Aroto Trade India Private Limited, 113, N.S. Road, 5th Floor, Kolkata-700 001.**
- 2. ITO, Ward-9(1), Kolkata.**
3. CIT(A)-15, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata