आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 144/RPR/2018
निर्धारण वर्ष / Assessment Year : 2013-14

The Assistant Commissioner of Income Tax-1(1),
Raipur (C.G.)

.....**अपीलार्थी /** Appellant

बनाम / V/s.

M/s. R.R. Industrial Corporation
(India) Pvt. Ltd.,
Station Road, Telghani Naka,
Raipur (C.G.)
PAN : AAECR4291B

.....**प्रत्यर्थी** / Respondent

Assessee by :Shri Amit M. Jain, Advocate,
Revenue by :Smt. Ila M. Parmar, CIT-DR

सुनवाई की तारीख / Date of Hearing :12.04.2023
घोषणा की तारीख / Date of Pronouncement :11.07.2023

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the revenue is directed against the order passed by the CIT(Appeals)-1, Raipur, dated 25.04.2018, which in turn arises from the order passed by the A.O u/s.143(3) of the Income-tax Act, 1961 (for short 'Act') dated 30.03.2016 for A.Y. 2013-14. The revenue has assailed the impugned order on the following grounds of appeal before us:

> "1. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs.10,72,80,000/- made by the AO u/s 68 of the Act?"
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> 2. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs.10,72,80,000/- by ignoring the facts as brought on record by the AO that the assessee company failed to prove the genuineness and creditworthiness of the investor company as per the parameters of the legal provisions u/s 68 of the Act?"
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> 3. Whether on points of law and on points of facts & circumstances of the case, the Ld. CIT(A) having concurrent powers of the AO u/s 250(4) of the Act, was justified in deleting the addition of Rs.10,72,80,000/- made by the AO in the absence of satisfaction of parameters prescribed u/s 68 of the Act?"
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> 4. "Whether on points of law and on points of facts & circumstances of the case, Ld. CIT(A) was justified in giving a finding which is contrary to the ratio of the decision of Hon'ble Supreme Court in the case of M/s Rajmandir Estates Pvt. Ltd. vs PCIT-III, Kolkata (SLP No. 22566-22567 dt. 09.01.2017?"
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> 5. "Whether on points of law and facts & circumstances of the case, the Ld. CIT(A) was justified in giving a finding which is contrary to the ratio of the decisions of ITAT, Kolkata 'B' Bench in the case of M/s Subhlakshmi Vanijya (P) Ltd. Vs CIT-1,

Kolkata in ITA No. 1104/Ko1/2014 and other cases dated 30.07.2015?"

6. "Whether on points of law and facts & circumstances of the case, the Ld. CIT(A) was justified in giving a finding which is contrary to the ratio of the decision of Hon'ble ITAT, Kolkata Bench in the case of M/s Bisakha Sales (P) Ltd. Vs CIT-II, Kolkata [ITA No.1493/Kolkata/2013]?"

7. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) has erred by giving a finding which is contrary to the evidence on record, as the Ld. CIT(A) has accepted the creditworthiness of the entities investing in the share capital and share premiums of the assessee company as genuine, a finding which is factually incorrect, thereby rendering the decision, which is perverse?"

8. "Whether on points of law and facts & circumstances of the case, the Ld. CIT(A) was justified in giving a decision in favour of the assessee and against the revenue though there is no nexus between the conclusion of fact and primary fact upon which conclusion is based?"

9. "The order of is erroneous both in law and on facts".

10. "Any other ground that may be adduced at the time of hearing".

2. Succinctly stated, the assessee company which is engaged in the business of trading of M.S. Angles and other products had filed its return of income (revised) on 30.11.2013, declaring an income of Rs.41,50,290/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s.143(2) of the Act.

3. During the course of assessment proceedings, it was, inter alia, observed by the A.O that the assessee company was in receipt of share application money amounting to Rs.10,72,80,000/- from M/s. Kush Trading & Commerce Pvt. Ltd. The assessee company on being called upon

to substantiate the authenticity of the transaction of receipt of share application money from the aforementioned share applicant company filed with the A.O supporting documentary evidences, viz. (i) share application form; (ii) bank statement of the share applicant company; (iii) copy of PAN; (iv) copy of return of income a/w. audited financial statement of the share applicant company; and (vi) memorandum of association and articles of association of the share applicant company. It was observed by the A.O that the share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd. in turn was in receipt of funds aggregating to Rs.10,72,80,000/- from seven companies, as under:

Sr. No.	Particulars Name	Amount (Rs.)
1.	Swastik Securities & Finance Ltd. Dew Drops Mercantiles Ltd.	4500000
2.	Balsaria Holding Pvt. Ltd.	12450000
3.	JIT Finance Pvt. Ltd.	28600000
4.	Lectrodyer Marketing Pvt. Ltd.	10600000
5.	Sunderm Consultants Pvt. Ltd.	21700000
6.	Admire Vinimay Pvt. Ltd.	19980000
7.	Ginni Vinimay Pvt. Ltd.	9450000
Total		**10,72,80,000**

4. It was further observed by the A.O that out of the aforesaid seven companies, three companies, viz. (i) Balsaria Holding Pvt. Ltd.; (ii) JIT

Finance Pvt. Ltd.; and (iii) Lectrodyer Marketing Pvt. Ltd. were companies which belonged to Shri Abhishek Chokani, an infamous accommodation provider, who had admitted in his statements recorded on oath in course of certain survey proceedings conducted u/s.133A of the Act by the Investigation Wing, Kolkata that he was engaged in providing accommodation entries in the form of bogus bills, bogus share capital, unsecured loans etc. to various business houses through certain paper/jamakharchi companies. The A.O on the basis of the aforesaid fact held the entire amount of share application money of Rs.10,72,80,000/- received by the assessee company from M/s. Kush Trading & Commerce Pvt. Ltd. as unexplained cash credit u/s.68 of the Act. The A.O after, inter alia, making the aforesaid addition of Rs. 10,72,80,000/- u/s.68 of the Act, therein vide his order passed u/s.143(3) of the Act dated 30.03.2016 assessed the income of the assessee company at Rs.11,16,97,490/-, observing as under :

"4. The assessee had received share capital from namely :

Sl. No.	Particulars Name	Amount
1.	M/s. Kush Trading & Commerce Pvt. Ltd.	10,72,80,000/-
	Total	10,72,80,000/-

It is noted and also submitted by the assessee that M/ s Kush Trading & Commerce Pvt. Ltd is a company that has received funds from various other companies. These companies are listed below:-

Sr. No.	Particulars Name	Amount (Rs.)
1.	Swastik Securities & Finance Ltd. Dew Drops Mercantiles Pvt. Ltd.	4500000
2.	Balsaria Holding Pvt. Ltd.	12450000
3.	JIT Finance Pvt. Ltd.	28600000
4.	Lectrodyer Marketing Pvt. Ltd.	10600000
5.	Sunderm Consultants Pvt. Ltd.	21700000
6.	Admire Vinimay Pvt. Ltd.	19980000
7.	Ginni Vinimay Pvt. Ltd.	9450000
Total		**10,72,80,000**

It is observed from the information provided by the assessee that these companies that have infused funds in M/s. Kush Trading & Commerce Pvt. Ltd. which are listed above are all Kolkata based.

Due diligence was done to verify the creditworthiness and genuineness of these funds received in M/s Kush Trading & Commerce Pvt. Ltd. It is noted that out of the 7 companies that have introduced three of them namely Balsaria Holding Pvt Ltd, JIT Finance Pvt Ltd., and Lectrodyer Marketing Pvt. Ltd. belong to Shri Abishek Chokhani group who has admitted on oath that paper companies/Jamakharchi in order to provide accommodation entries in the form of bogus billing, bogus share capital, unsecured loan etc to various business houses. His statement is part of various surveys u/s 133A of the I.T. Act, 1961 conducted by Kolkata Investigation. This information was called by the undersigned from Kolkata and is on record.

Hence, I have reason to believe that these transaction are not genuine and creditworthy. Therefore the same are hereby added back u/s 68 of I.T. Act, 1961 which reads as follows:-

"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:
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> Provided that where the assessee is a company (not being a company in which the 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-
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> 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
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> b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:"
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> Thus, based on the above provisions undisclosed amount of Rs. 10,72,80,000/- is disallowed and added back to the income of the assessee."

5. Aggrieved, the assessee carried the matter in appeal before the CIT(Appeals). During the course of appellate proceedings, it was submitted by the assessee company that it was in receipt of share application money of Rs. 10.50 crore (wrongly mentioned by the AO as Rs. 10,72,80,000/-). It was observed by the CIT(Appeals) that though the assessee company while discharging the primary onus that was cast upon it as regards proving the authenticity of the transaction of receipt of share application money from the aforesaid share applicant company i.e. M/s. Kush Trading & Commerce Pvt. Ltd., had placed on record supporting documentary evidence, viz. (i) share application form; (ii) bank statement of the share applicant company; (iii) copy of PAN; (iv) copy of return of income a/w. audited financial

statement of the share applicant company; and (vi) memorandum of association and articles of association of the share applicant company, but the same were summarily discarded by the A.O without there being any whisper in his order that as to why no weightage was to be given to the said documents. Further, it was observed by the CIT(Appeals) that M/s. Kush Trading & Commerce Pvt. Ltd. was an inhouse company of the assessee with certain common directors. The CIT(Appeals) observed that though the A.O had drawn adverse inferences as regards the authenticity of the transaction of receipt of share application money by the assessee company from M/s. Kush Trading & Commerce Pvt. Ltd., for the reason that the latter was in receipt of funds from seven companies out of which three companies were managed by Shri Abhishek Chokani, an infamous accommodation entry provider, but the said fact was at no stage in the course of the assessment proceedings ever confronted to the assessee company. Referring to the aforesaid lapse of the A.O, the CIT(Appeals) relied on the judgment of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC) a/w other judicial pronouncements; and was of the view that the adverse inferences that were drawn by the AO on the basis of material which was never confronted to the assessee, being in breach of the basic principles of natural justice could not be sustained. Apart from that, it was observed by the CIT(Appeals) that the assessment in the case of share applicant company, viz. M/s. Kush Trading

& Commerce Pvt. Ltd. for the year under consideration i.e. A.Y.2013-14 was framed u/s.143(3) of the Act, wherein no adverse inferences were drawn as regards the genuineness of the receipt of share application money by it from the aforesaid seven share applicant companies. The CIT(Appeals) was of the view that now when department while framing assessment in the case of share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd. had not relied upon the statement of Shri Abhishek Chokani (supra) for drawing any adverse inferences as regards the authenticity of the transaction of receipt of share application money by it from the seven share applicants, thus, there was no justifiable basis for the AO to have taken a view to the contrary on the same issue while framing assessment in the case of the assessee company for the same year. In sum and substance, the CIT(Appeals) was of the view that now when the department while scrutinizing the case of the share applicant, viz. M/s Kush Trading & Commerce Pvt. Ltd. for the year under consideration i.e AY 2013-14 had not drawn any adverse inferences in its hands as regards the receipt of share application money of Rs. 10.72 crore (approx.) from the aforesaid seven investor companies, therefore, there was no justification for the department to have thereafter taken a view to the contrary on the very same issue at the stage of scrutinizing the case of the assessee company. As such, the CIT(Appeals) was of the view, that now when the department while framing scrutiny assessment in case of M/s Kush Trading & Commerce Pvt. Ltd. for

AY 2013-14 had not drawn any adverse inferences as regards the share application money of Rs.10.72 crores (supra) that was received by it from the seven investor companies, therefore, while approaching the same issue but from a different perspective, i.e in the course of looking into the source-of-source of the investment made in the assessee company while framing of the latter's assessment for the said year, the same view could only be adopted and no adverse inferences as regards the genuineness of the investment made by the aforesaid seven investor companies could be drawn. Also, it was observed by the CIT(Appeals) that the assessee company had further received share application money of Rs. 3.23 crore (approx.) from the aforesaid share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd. in the immediately succeeding year i.e. A.Y.2014-15, which was accepted in the scrutiny assessment of the assessee company for the said year u/s. 143(3) of the Act. The CIT(Appeals) held a conviction that now when the assessee company had on the basis of supporting documentary evidence duly discharged the onus that was cast upon it as regards proving the identity, creditworthiness and genuineness of the transaction of receipt of share application money from the aforesaid share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd., as well as substantiated the source-of-source of the said investment, therefore, there was no justification for the A.O to have summarily dislodged the same without placing on record any material proving to the contrary. Accordingly, the CIT(Appeals) holding

a conviction that the assessee company on the basis of supporting documentary evidence had duly established the authenticity of the transaction of receipt of share application money from the aforesaid share subscriber company, viz. M/s. Kush Trading & Commerce Pvt. Ltd., thus vacated the addition of Rs.10,72,80,000/- (*sic)* made by the A.O u/s. 68 of the Act.

6. The revenue being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

7. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

8. Ld. AR of the assessee company had at the very threshold of hearing of the appeal, submitted that the assessee company during the year under consideration was in receipt of an amount of Rs. 10.50 crore (wrongly mentioned by the AO as Rs. 10,72,80,000/-) from M/s. Kush Trading & Commerce Pvt. Ltd., against which 42 lac equity shares of a face value of Rs. 10/- per share were issued at a premium of Rs. 15/- per share. Our attention was drawn by the Ld. AR to the financial statements of the investor company, viz. M/s. Kush Trading & Commerce Pvt. Ltd. in support of his aforesaid claim, Page 57 of APB. It was further averred by the Ld. AR that

the CIT(Appeals) had duly considered the aforesaid factual mistake of the AO and corrected the same in the course of the proceedings before him.

9. As is discernible from the records, it transpires that the assessee company on being called upon to substantiate the authenticity of the transaction of receipt of share application money of Rs.10.50 crore (supra) from M/s. Kush Trading & Commerce Pvt. Ltd., had vide its letter dated 26.02.2016, Page 37-88 of APB a/w. letter dated 21.03.2016, Page 93 of APB and letter dated 30.03.2016, Page 94 of APB filed with the A.O supporting documentary evidences, viz. share application form, copy of bank statement of the share applicant company, copy of return of income a/w. copy of PAN card of the share applicant company, copy of memorandum of association and articles of association and copy of audit report of the share applicant company. Also, the nature and source of the investment of Rs.10.50 crore(supra) made by the share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd. was explained by furnishing details with the A.O during the course of the assessment proceedings, Page 89-92 of APB. The CIT(Appeals) on the basis of the aforesaid facts held a conviction that the assessee company by placing on record supporting documentary evidence had duly discharged the primary onus that was cast upon it as regards proving the nature and source of credit of Rs. 10.50 crore (supra) in its books of account. Also, the CIT(Appeals) was of the view that

as complete details about the nature and source of the amounts which in turn were received by the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. and were utilized for sourcing the investment made with the assessee company were filed during the course of the assessment proceedings with the AO, therefore, the onus that was cast upon the assessee company as regards proving the authenticity of the transaction of receipt of share application was fully discharged by it under Sec. 68 of the Act. Further, the CIT(Appeals) observed that now when the AO while framing assessment in the case of the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. had not drawn any adverse inferences and accepted the share application money that was received by it during the year from seven share applicants, thereafter, a view to the contrary as regards the veracity of the investment made by the said seven investors with the share applicant company could not be drawn while framing assessment in the case of the assessee company. Also, the CIT(Appeals) observed that the fact that a further investment of Rs. 3.23 crores (approx.) made by the same share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. with the assessee company in the immediately succeeding year i.e AY 2014-15, which had been accepted by the AO while framing scrutiny assessment in the case of the assessee company for the said succeeding year, further fortified the genuineness of the transaction of receipt by the assessee company of share application money of Rs. 10.50 crore (supra) from the said

share applicant company during the year under consideration. Accordingly, the CIT(Appeals) on the basis of his aforesaid deliberations vacated the addition of Rs. 10.50 crore (supra) that was made by the A.O u/s.68 of the Act, observing as under:

> "3.3 Facts being as above, the appellant has received share application money from M/s Kush Trading and Commerce Pvt Ltd. (AO has erringly taken the figure as Rs.10,72,80,000/- where as the assessee has received Rs.10,50,00,000/-). This is an in-house company and directors are common in this company and the assessee company. AO has held the credit to be non-genuine and has added the whole amount as assessee's income. AO has based his decision on fact that M/s Kush trading has received' funds from seven companies out of which three companies belong to a person Shri Abhishek Choukshe and who has admitted in his statement that he manages paper companies to provide accommodation entries to various business concerns. From the assessment order it does not reveal that these findings were confronted to the assessee and the assessee company was allowed opportunity to rebut the findings of statement of Shri Choukse. Moreover, there is no direct link ofassessee's unaccounted money being routed through paper companies. On its part the assessee company has furnished all papers and documents regarding the share application money. Share application form, bank statement of applicant company, Permanent Account Numbers, return of income, audited accounts, MOA and AOA were furnished to establish identity, genuineness and creditworthiness of share capital. AO has not made any enquiry to disprove the veracity of these documents. On similar facts it has been held by Hon'ble Chhattisgarh High Court in the case of Pawan Kumar Agrawal Vs ITO Ward 2(2), Bilaspur that once the assessee has discharged its onus by furnishing requisitioned documents the AO is bound to issue notice u/s 133(6) or 131, otherwise no addition can be made the relevant part of the decision of the Hon'ble High Court are as under
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> "Sec. 68 of the Act provides a process by which the assessing authority has to reach at transactions of those persons with whom the assessee had entered into transactions in which the particular assessee is involved to conclude he assessment on the basis of the transactions referable to those persons. Such concluded assessments will have a bearing on the acceptability or otherwise the peas set up the assessee in the course of proceedings u/s. 68 of the Act. So much so, notwithstanding, the finality attained by the assessment

proceedings in relation to the lender, the borrower is entitled to say that the contents of the return of the lender and the matters emanating therefrom have to be looked into. In that view of the matter the First Appellate Authority was justified, also on the basis of the judicial precedents referred by it, in entering the finding that the assessee had discharged his primary onus u/s 68 of the Act. That having been done, the First Appellate Authority was fully justified in taking the view that it was open to the department to take recourse of Sec. 131 or Sec. 133(6) of the Act if they were to further proceed. That not having done so, the First Appellate Authority was within the jurisdiction to conclude on facts and law, in favour of the assessee. The Appellate Tribunal in the aal at the instance of the Revenue, has not rendered the decision holding the finding of the First Appellate Authority regardingapplicability of Sec. 131 and 133(6) of the Act, as the case may be, is erroneous in laws. So much so, the impugned decision of the Tribunal' sands faulted on a substantial question of law relatable to the contents of Sec. 68 of the Act and the failure of the revenue to take recourse of Sec. 131 and 133(6) of the Act, in the case of the assessee, where the primary onus u/s 68 of the Act stood discharged by the assessee.

For the forgoing reasons, we are of the view that the impugned order of the Tribunal has to be set aside answering the question of law, farmed and quoted above, in favour of the assessee. We do so."

If no proper opportunity is given to the assessee to controvert the documents/information in possession of AO, the resulting assessment order is void ab initio as has been held by the Hon'ble Supreme Court in the case of M/s Andaman Timber 281 CTR 241 SC 2015. As per the Apex Court " Not allowing assessee to cross examine witnesses by Adjudicating Authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which make impugned order nullity as it amounted to violation of principles of natural justice."

The amount of share application money was received by the assessee from M/s Kush Trading during the AY 2013-14. Assessment of M/s Kush Trading for the AY 2013-14 was completed u/s 143(3). In the assessment order dated 30/12/2015 passed by ITO 14(2), Kolkata no addition has been made on account of share application money. It shows that there is no adverse effect of the statement of Shri Abhishek Chokse on the assessment of M/s Kush Trading. If source of funds in the hands of M/s Kush Trading has been accepted by the Department as proper, there is no basis for taking adverse view in the case of the assessee which has received funds from M/s. Kush Trading. Further the assessee company which has received further share application money in the previous to the next A.Y.2014-15.

Assessment of the assessee company for A.Y.2014-15 has been completed u/s 143(3).

Where there is no material to dispute genuineness or creditworthiness of investors and source of money received by assessee, the addition on account of share application money not justified. (CIT vs. Five Vision Promoters Pvt. Ltd., (2016) 380 ITR 289 Del). In the present case the statement relied upon in the assessment was in the case of Kush Trading and the statement was not resulted in adverse finding in Kush Trading. case of Principal CIT vs. Soft Creations Pvt. Ltd., (2016) 387 ITR 636 (Delhi High Court) on an appeal filed by the department has held that if assessee has provided Permanent Accountant Numbers, bank details of share applicant and affidavits of Directors then the share application money cannot be considered as unexplained cash credits in the hands of assessee, concurrent findings a fact. The appeal was dismissed.

Further, out of seven companies providing capital to M/s. Kush Trading, AO has noted that names of three companies appear in the statement of Mr.Choukse. Regarding remaining four companies, there is no finding, even then the entire capital has been treated as unexplained cash credit.

Once the assessee has discharged its onus, the onus shifts on the AO to make enquires/investigation to establish that either or all of the identity, creditworthiness and genuineness of shareholders has not been established in-spite of the existence of documents. Since documents were submitted before the AO it shows that the companies do exist. Also these companies are duly registered with ROC and having registered offices and registration numbers. As per bank statements payments have received by the assessee from shareholder's accounts to assessee's account. Therefore, genuinenessof the transaction cannot be doubted without making an inquiry and bringing on record any adverse finding. Coming to the source of source, M/s Kush Trading has advanced money to the assessee out of its source. As per explanation, M/s Kush Trading has advanced funds to the assessee out of the money received from seven other companies as listed in the assessment order. In the hands of M/s Kush Trading its capital has already been accepted in scrutiny assessment. When the capital of investor has been accepted by its AO and it has confirmed having paid share application money to the assessee and both the companies are run by common directors, there is no scope to doubt the genuineness of capital without bringing any adverse facts on record. For genuineness of the transaction, the same is verifiable from the bank statement of the appellant, copies of share application and share certificates, thus, without pointing out infirmities in the evidences furnished by the appellant, addition cannot be made.

Without finding any fault in the documents no adverse finding can be made by the AO. It is further observed that the AO has failed to take note of the decisions rendered by the Hon'ble Apex Court in the case of CIT Vs Lovely Exports (P) Ltd, reported, in 216 CTR 195 and the jurisdictional High Court viz. Chhattisgarh High Court in the case of ACIT Vs Venkateshwar Ispat (P) Ltd reported in 319 ITR 393 nor it is the case of the AO that the facts in said cases are entirely different from the facts in the instant case. Hence no such differentiation could be effectively demonstrated and brought on the record by the AO. I find that the investments made by the share applicants were duly reflected in the audited financial statements of the corporateinvestors. It is a settled principle of law that reason for suspicion, however; grave it may be, cannot be a basis for holding adversity- against appellant. In my considered opinion, the ratio of the foresaid judgments are-certainly binding in nature on all the revenue authorities and courts etc. and further; the judgment of the jurisdictional High Court has been rendered on identical facts. Hence, it is impermissible to deviate from the ratio laid down therein and against the law of judicial precedents. Latest decision on the issue of share capital is of the jurisdictional ITAT. Recently vide order dated 18.1.2018 the ITAT has ox the basis of similar facts in the case of ITA Nos.225 to 231/RPR/2014 DCIT, Central Circle Raipur vs R.R Energy Ltd. (Assessment Years :2006-2007 to 2012-2013) has ruled as below-

> "14. It is an undisputed fact that the names, addresses and assessment particulars of the investors, certificate of registration from the ROC and bank statement of the applicants had been furnished by the appellant before the AO. It is further observed that the share application/capital money has been received by way of account payee cheques from the investors most of whom are companies and is duly reflected in the bank account of the appellant. I have perused the bank statements of the investors, their audited financial statements and confirmation for making such investments, which clearly establishes the factum of making investments. These facts are clearly establishing the identity of the investors and the genuineness of the impugned transactions.
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> 15. It is observed from the records and assessment order that for the purpose of making addition as unexplained cash credits, the AO has heavily relied upon the judicial pronouncements, however, the appellant has made elaborate submissions distinguishing the facts, I am convinced with the explanation of the appellant that the decisions relied upon by the A.0 are not applicable in the facts of the present case as there is nothing on record which can indicate that the receipt of share application money was by way of accommodation

entries only. It is also not the case of the A.O that the investors have accepted by way of statement that the sums paid to the appellant was in fact received from the appellant and investors merely routed the undisclosed income of the appellant through money laundering process in the form of share application money. On the contrary, the A.O himself has stated in the assessment order that the investors have sent confirmatory letters. In the backdrop of these facts and documentary evidences, in myconsidered opinion, the identity and creditworthiness of the subscribers has been established and cannot be doubted, it is not justified on the part of the A.O to simply reject the documentary evidences on record and take an adverse view and clothing the case of the appellant with the judicial pronouncements which have beenrendered on absolutely different facts and circumstances. 16. The appellant has relied upon various judicial pronouncements and correlated the facts in those decisions with the facts in the case of the appellant. I am convinced that the decisions relied upon by the appellant are certainly applicable in the case of theappellant as the facts are not only similar but identical. The appellant has also relied upon the decision of the Hon'ble Supreme Court and jurisdictional High Court which cannot be ignored. The A.O has referred to the notices issued under section 133(6) which have been returned un-served in some of the cases. I have carefullyperused the explanation submitted by the appellant in respect of cases where the notices remained unserved, the submissions of the appellant are found to be convincing. It is further observed that no further enquiry or investigation has been conducted by the AO to corroborate or support the conclusions drawn in the assessment orderso as to assess the share capital money as the undisclosed income of the appellant company. In my considered opinion, apart from drawing presumptions, the AO has not brought any clinching material or evidence on record to prove that the said share capital money belongs to the appellant since no nexus has been established that the money for augmenting the investment in the business has flown from appellant's own money which is an essential pre-requisite for making addition in such cases. I am convinced that the case of the appellant is squarely covered by the decisions rendered by the Hon'ble Apex Court in the case of the CIT vs. Lovely Exports (P) Ltd. reported in 216 CTR 195 and the jurisdictional High Court viz. the Chhattisgarh High Court in the case of the ACIT vs. Venkateshwar Ispat (P) Ltd. reported in 319 ITR 393 for the reason that the facts in such cases are entirely same, particularly, when no differentiation could be effectively demonstrated and brought on to the record by the A.O. The

submissions of the AO that the decision of the Hon'ble Supreme Court in the case of Lovely Exports (P) Limited was rendered in the light of different facts inasmuch as the said judgement was rendered by the Hon'ble Supreme Court in the context of public issue, is devoid of merit because the decision was rendered by the Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. which is a Private Limited Company and which cannot bring public issue of shares. I find that the investments made by the share applicants were duly reflected in the audited financial statements of the corporate investors. It is a settled principle of law that reason for suspicion, however grave it may be, cannot be a basis for holding adversity against appellant.

17. The Assessing Officer has disregarded the documentary evidences adduced by the appellant such as confirmation from the share applicants, their PAN, certificate of incorporation of subscriber companies. The subscription for the shares was received through cheques. The Investor-companies are duly registered with ROC. Those companies were also having their income tax PAN numbers and regularly filed returns of income. No material was brought on record by the A.O independently of the information received, if any, from the investigation wing of the Income Tax Department to show that the monies represented the appellant's undisclosed income.

18. The Hon'ble Supreme Court in CIT vs. Lovely Export, 216 ITR 198 SC find the Delhi High Court in Divine Leasing and Finance Limited, (2008) 299 ITR 268 have held that in the case of money received towards share capital only the identity of the share holders needs to be proved and once that is established and it is also shown that the money did in fact come from them, it is not for the assessee to prove as to how the share applicants came to be in possession of the money. In the light of the above discussion, I am inclined to agree with the arguments and evidences provided by the appellant to substantiate that the transaction regarding Share Application Money received by it were genuine transactions and the same were not accommodation entries. I also do not find any evidence collected by the A.O which could proveotherwise. Accordingly, the AO was not justified in treating amount of share application money received by the appellant as its undisclosed income..... ....

.....I am convinced that the appellant has been able to establish the identity and creditworthiness of the subscribers as also the genuineness of the transactions. In my considered opinion, the ratio of the aforesaid judgements of the Hon'ble

> Supreme Court in Lovely Exports and that of jurisdictional High Court are certainly binding in nature on all the revenue authority and courts etc. and further, the judgement of the jurisdictional High Court as well as that of the Hon'ble Supreme Court in Lovely Exports has been rendered on identical facts. Hence it is Impermissible to deviate from the ratio laid down therein and against the law of judicial precedents. In view of the above and respectfully following the ratio of the binding judgements, the addition of share application/capital money of Rs.12,71,00,000/- in A.Y 2006-07 and Rs.6,51,50,000/- in AN 2007-08 as unexplained cash credits under section 68 are uncalled for and hence, deleted.
>
> In fine, after necessary documents were filed in respect of the subscriber company to establish the genuineness of capital and creditworthiness of subscriber and since there is nothing on record to reject the genuineness of capital the same has be accepted. In view of the above and respectfully following the ratio of the binding judgments of jurisdictional tribunal and high-court on similar facts, I find that the addition of share capital money of Rs.10,72,80,000/- as unexplained cash credits u/s 68 is uncalled for and hence deleted. The appeal is allowed."

10. We have given a thoughtful consideration and find that the onus that was cast upon the assessee company to prove the authenticity of the transaction of receipt of share application money during the year under consideration i.e AY 2013-14 has two facets, viz. (i) an explanation about the nature and source of the sum so credited in its books of accounts; and (ii) an explanation of the share applicant company as regards the nature and source of its investment i.e share application money credited in the books of account of the assessee company.

11. As observed by us hereinabove, the assessee company had discharged the primary onus that was cast upon it as regards explaining the nature and

source of the sum credited in its books of accounts by placing on record supporting documentary evidences, viz. (i) share application form; (ii) bank statement of the share applicant company; (iii) copy of PAN; (iv) copy of return of income a/w. audited financial statements of the share applicant company; and (vi) memorandum of association and articles of association of the aforementioned share applicant company which, however, had not been dislodged or disproved by the A.O. In fact, we would not hesitate in observing that the A.O had summarily; or in fact, most casually discarded the explanation of the assessee company as regards the nature and source of the sum credited in its books of accounts, which in turn was supported by the aforesaid documentary evidences that were filed with him in the course of the assessment proceedings. We do not find any whisper in the assessment order as to why the explanation of the assessee as regards the nature and source of the amount of Rs.10.50 crore (supra) that was credited in its books of account and the documentary evidence filed in support thereof were not accepted by the A.O. At this stage, we may herein observe that though the assessee company had duly discharged the primary onus that was cast upon it as regards proving the identity and creditworthiness of the investor company, viz. M/s Kush Trading & Commerce Pvt. Ltd., as well as the genuineness of the transaction of receipt of share application money, but the AO had without conducting any enquiries and dislodging the veracity of the aforesaid claim of the assessee, had only on the basis of

surmises held the amount of share application money received by the assessee company as an unexplained cash credit u/s 68 of the Act. Involving identical facts, the **Hon'ble Supreme Court** in the case of **PCIT Vs. Himachal Fibers Ltd (2018) 259 Taxman 3 (SC)**, had observed, that as in the case before them, though the identity of the share applicants was clearly revealed, but the AO had without conducting any enquiry and resting his conclusions on surmises had made an addition of the share application money u/s 68 of the Act, therefore, the same was rightly vacated by the High Court. Our aforesaid view that in a case where the assessee had discharged the primary onus that was cast upon it as regards proving the identity and creditworthiness of the share applicants; and also the genuineness of the transaction by placing on record adequate material/evidence, thereafter in case such evidence is to be discarded or is claimed to be a 'created' evidence, then the revenue is supposed to make thorough investigation before it could fasten the assessee with a liability u/s 68 of the Act is supported by the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT-II Vs. Kamdhenu Steel & Alloys Ltd. (2014) 361 ITR 220 (Del)**. Also a similar view had been taken by the **Hon'ble High Court of Delhi** in the case of **PCIT Vs. N.C Cables Ltd. (2017) 391 ITR 11 (Delhi)**. It was observed by the Hon'ble High Court that now when the assessee had furnished documents to evidence genuineness of transaction and identity and creditworthiness of parties, then in case of failure by the AO to conduct adequate and proper

enquiry no addition could be made u/s 68 of the Act. The Hon'ble High Court further observed that though the Investigation wing had leveled several allegations as regards the receipt of share application money by the assessee company, and also the AO was in possession of certain bank accounts of the share applicants which disclosed facially that the amounts were infused in cash at the relevant time before shares were subscribed, the AO ought to have carried out a more intensive investigation into the income-tax records to actually discern the volume of trade or commerce of the share applicants and their inability, if any, to invest the amounts in issue, as suspicious circumstances on a standalone basis could not form a conclusive factor for drawing adverse inferences as regards the veracity of the said transactions. Further reliance is placed on the judgment of the **Hon'ble High Court of Calcutta** in the case of **PCIT Vs. Sreeleathers (2022) 114 CCH 180 (Cal)**. The Hon'ble High Court had observed that it was not enough for the AO to brush aside the explanation offered by the assessee, but he should record reasons in writing as to why the documents which were filed by the assessee along with the reply does not go to establish the identity of the lender or prove the genuineness of the transaction or establish the creditworthiness of the lender. Ostensibly, as can be gathered from the assessment order, the AO in the present case before us had not even tried to put up an attempt to dislodge the documents/material that were filed by the assessee company to support its claim of having received genuine application money from the

investor company, viz. M/s Kush Trading & Commerce Pvt. Ltd. a/w the latters source thereof. Also a similar view had been taken by the **Hon'ble High Court of Bombay** in the case of **The PCIT Vs. Parth Enterprises (2018) 103 CCH 398 (Bom)**. Approving the view taken by the Tribunal, it was observed by the Hon'ble High Court that no addition can be made u/s 68 of the Act without making an enquiry in respect of creditors whose confirmations were filed by the assessee. Also we find that the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Nova Promoters & Finlease (P) Ltd.**, had while approving the addition made by the AO by treating the share application received by the assessee company as unexplained cash credit u/s 68 of the Act, had however as a word of caution by relying on its earlier orders, observed that the burden of proof can seldom be discharged to the hilt by the assessed; and if the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty bound, to carry out thorough investigations. It was further observed that if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the assessee company. Alternatively, we may herein observe that the standalone reliance placed by the AO on the information purportedly obtained by him from the Investigation wing, Kolkata, which as per him revealed that three companies (out of seven companies) from whom the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. had received share application money

belonged to Shri. Abhishek Chokani, an infamous accommodation entry provider, in our considered view in absence of any corroborating material could not have justifiably formed a sole basis for dubbing the transaction of receipt of share application money by the assessee company as bogus. Our aforesaid observation is supported by the order of the **Hon'ble High Court of Delhi** in the case of **PCIT Vs. Krishna Devi & Ors. (2021) 431 ITR 361 (Del)**. It was observed by the Hon'ble High Court that reliance placed on the report of investigation wing without further corroboration on the basis of cogent material, does not justify AOs conclusion that the transaction is bogus, sham and nothing other than a part of the racket of accommodation entries. Considering the aforesaid judicial pronouncements, we are of the considered view that now when the assessee company had discharged the primary onus that was cast upon it as regards proving the identity and creditworthiness of the share applicants, as well as the genuineness of the transaction of receipt of share application money from the aforesaid investor company, viz. M/s Kush Trading & Commerce Pvt. Ltd., then the onus was shifted to the AO to dislodge the explanation of the assessee and prove to the contrary on the basis of documentary evidence. As the AO in the case before us had chosen to take recourse to surmises, and had failed to give any cogent reason as to why the explanation of the assessee company of having received genuine amount of share application money from the aforesaid investor, viz. M/s Kush Trading & Commerce Pvt. Ltd. was not to

be accepted, therefore, he had failed to disprove the authenticity of the claim of the assessee. Apropos the reliance placed by the ld. AR on the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Lovely Exports P. Ltd. (2009) 319 ITR (St.) 5 (SC)** and that of the **Hon'ble High Court of Chhattisgarh** in the case of **CIT Vs. Venkateshwar Ispat P. Ltd. (2009) 319 ITR 393 (Chhattisgarh)**, both having been rendered in context of pre-amended Sec. 68 of the Act, i.e prior to amendment vide the Finance Act, 2012 w.e.f 01.04.2013, to support his alternative plea that that if the share application money received by the assessee company was to be held as bogus, then the department was free to proceed with and reopen in accordance with law the case of the investor company from whom the share application money was so received, and it could not be regarded as the undisclosed income of the assessee company, we are afraid that said contention of his would not assist the case of the assessee company for the year under consideration i.e AY 2013-14, which falls within the regime of post-amended Sec. 68 of the Act. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Gagandeep Infrastructure (P) Ltd. (2017) 394 ITR 680 (Bom)**. It was observed by the Hon'ble High Court that the Hon'ble Apex Court in the case of Lovely Exports (P) Ltd. (supra) had in context to the pre-amended Section 68 of the Act held that where the revenue urges that the amount of share application money has been received from bogus shareholders, then it is for

the Income Tax Officer to proceed by reopening the assessment of such shareholders and assess them to tax in accordance with law, and the revenue was not entitled to add the same to the assessee's income as unexplained cash credit. Accordingly, the aforesaid claim of the ld. AR subsequent to the insertion of the "1st proviso" to Sec. 68 of the Act vide the Finance Act, 2012 w.e.f AY 2013-14 cannot be accepted.

12. Fact that the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. was an in-house company of the assessee with certain common directors, holding PAN and filing its returns of income; coupled with the fact that assessment in its case for the year under consideration i.e AY 2013-14 was framed by the ITO, Ward-14(2), Kolkata, wherein after, inter alia, carrying out necessary verifications and recording the statement of its director u/s 131 of the Act the returned income was accepted as such vide order passed u/s 143(3) of the Act, dated 30.12.2015, Page 95-96 of APB, therein conclusively proves the identity of the investor company. Further, as the assessee company was in receipt of the entire amount of investment from the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd., in tranches, through banking channel i.e remittances through RTGS/transfers from bank A/c No. 01522320008170 with HDFC Bank Ltd, Branch: Devendra Nagar Road of the said share applicant company, Page 40-43 of APB; and 42 lac shares (distinctive nos. 2490001 – 6690000) of a face value of Rs. 10/- per share a/w premium of Rs. 15/- per share were

issued to the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. on 30.03.2013, Page 39 of APB, which vested with it 62.78% of the shareholding of the assessee company on 31.03.2013, Page 26 of APB, fortifies the genuineness of the transaction of receipt of share application money by the assessee company from M/s Kush Trading & Commerce Pvt. Ltd. As regards the investment that was made by the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. with the assessee company, the same as observed by us hereinabove was admittedly sourced from the amount of share application money which in turn it had received from seven investor companies. As observed by us hereinabove, the AO i.e ITO, Ward-14(2), Kolkata while framing assessment in the case of the share applicant company, i.e M/s Kush Trading & Commerce Pvt. Ltd. for the year under consideration i.e AY 2013-14, had vide his order passed u/s 143(3) of the Act, dated 30.12.2015, Page 95-96 of APB not drawn any adverse inferences as regards the share application money that was received by it from the aforesaid seven investor companies. Further, a perusal of the bank account of the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd., Page 40-41 fortifies the fact that the investment under consideration was in turn sourced out of the share application money that was over the year received by the share applicant company from the seven investor companies. We are persuaded to subscribe to the observation of the ld. CIT(Appeals), that now when the department while framing assessment

in the case of the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd., had vide order passed u/s 143(3) of the Act, dated 30.12.2015 neither drawn any adverse inferences as regards the investment made by the said share applicant company with the assessee company; nor doubted the amount of share application money that was received by it from the aforesaid seven investor companies, which thereafter was utilized for making investment towards share application money with the assessee company, then it was not permissible for the AO to have discarded the said material fact and take a view to the contrary on either of the aforesaid facets of the transaction while framing assessment in the case of the assessee company for the year under consideration i.e AY 2013-14. Our aforesaid view that where assessment of the share applicant company which had invested in the share capital of the assessee company is completed u/s 143(3) of the Act, then no addition of such share application money can be made in the hands of the assessee company u/s 68 of the Act is supported by the order of the **ITAT, Bench "A", Kolkata** in the case of **Ninestar Merchants Pvt. Ltd. Vs. ITO (2021) 61 CCH 201 (Kolkata)**. Also, support is drawn from the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT-II Vs. Kansal Fincap Ltd. (2014) 42 taxmann.com 147 (Delhi)**. It was observed by the Hon'ble High Court that where the transactions relating to receipt of share application money are genuine, and are fully recorded in the books of accounts of the share applicants, then, no addition would be

called for in the hands of the assessee company. As in the case of the present assessee company before us, the AO i.e ITO, Ward-14(2), Kolkata while framing assessment in the case of the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd., vide his order passed u/s 143(3) of the Act, dated 30.12.2015 had neither drawn any adverse inferences as regards the investments in the share application of the assessee company that were fully recorded in its books of accounts; nor doubted the amounts which were received by it from seven investor companies and was utilized for making investment with the assessee company during the year itself, therefore, drawing support from the aforesaid judgment of the Hon'ble High Court of Delhi, we are considered view that the share application money received by the assessee company could not have been brought to tax in its hands as an unexplained cash credit u/s 68 of the Act. Apart from the fact that the investment made by the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. with the assessee company had not been adversely commented upon by the AO i.e ITO, Ward-14(2), Kolkata while framing assessment in its case for the year under consideration itself i.e AY 2013-14, Page 95-96 of APB, we find that the very fact that the said share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. had in the immediately succeeding year i.e AY 2014-15 made a further investment of Rs. 3.23 crore (approx.) against purchase of 1293600 fresh equity shares of the assessee company of a face value of Rs. 10/- per share at a premium of

Rs. 15/- per share, which too had not been adversely commented upon by the AO while framing assessment in the case of the assessee company for the said succeeding year i.e AY 2014-15, vide his order passed u/s 143(3) of the Act, dated 23.12.2016, further fortifies the creditworthiness of the share applicant company, viz. M/s Kush Trading & Commerce Pvt. Ltd. for making investment with the assessee company during the year under consideration.

13. We shall now deal with the case laws that have been pressed into service by the ld. DR, as under:

(**A).<u>Rajmandir Estates (P) Ltd. Vs. PCIT (2017) 77 taxmann.com 285(SC)</u>**

(i). The aforesaid judgment of the Hon'ble Apex Court being distinguishable on facts would not assist the case of the revenue. As in the aforesaid case the assessee company with a small amount of authorized share capital had raised huge sum on account of premium, i.e increased its share capital by issuing 7.93 lakh shares of Rs. 10/- per share at a premium of Rs. 390/- per share, therefore, the CIT observing that as it could be a case of money laundering that had gone undetected due to lack of requisite enquiry into increase of share capital (including premium) received by the assessee company, therefore, revised the order u/s 263 of the Act. On appeal, the High Court observed that as the assessee company with an authorized share capital of Rs. 1.36 crores had raised nearly a sum of Rs. 32 crores on account of premium and had chosen not to go in for increase

of authorised share capital to avoid payment of statutory fees, thus the same was an important pointer necessitating investigation and thus, the CIT had rightly exercised the powers vested with him u/s 263 of the Act. On further appeal, the Hon'ble Apex Court dismissed the Special Leave Petition (SLP) filed by the assessee.

(ii). As the facts involved in the present case before us are clearly distinguishable as against those involved in the case before the Hon'ble Apex Court, therefore, reliance placed on the same in our considered view would not carry the case of the department any further.

(B). Navodaya Castle (P) Ltd. Vs. CIT (2015) 56 taxmann.com 18 (SC)

(i). As in the aforesaid case there was material to show that the subscriber company was not a genuine investor, therefore, the Hon'ble Apex Court while approving the order of the High Court, had observed, that considering the aforesaid material fact the certificate of incorporation, PAN etc. would not be sufficient for proving the identity of the subscriber company.

(ii). In contradiction of the facts involved in the aforesaid case before the Hon'ble Apex Court, as in the present case the assessee company in discharge of the initial onus that was cast upon it as regards proving the identity, creditworthiness and genuineness of the transaction of receipt of share application money had filed with the AO supporting documentary

evidences; as well as had proved the source of source, therefore, the facts herein involved being distinguishable on facts would not assist the case of the revenue.

(C). Bisakha Sales (P) Ltd. Vs. CIT (Kol)-II, (2015) 152 ITD 750 (Kol)

(i). In the aforesaid case, it was observed by the Tribunal that as the assesseee company before them had received share application money with huge and unjustified share premium from corporate entities, then merely because the amount was received through banking channel would not justify the AO to accept the said transactions as genuine without making proper enquiries.

(ii). As the facts involved in the present case of the assessee company does not pertain to receipt of any substantial amount of premium, which is being claimed by it to be genuine for the reason that the same had been received through banking channel, therefore, the same too being absolutely distinguishable on facts would by no means assist the case of the revenue.

(**D). Subhlakshmi Vanijya (P) Ltd. Vs. CIT-1, Kolkata (2015) 60 taxmann.co 60 (Kol) :**

(i). Facts involved in the aforesaid case were that the assessee company which had returned a meager income, had issued share capital at huge premium while making large investments in new companies at much higher

price than their real worth. As the AO did not make any addition u/s 68 of the Act, therefore, the CIT exercised his revisional jurisdiction u/s 263 of the Act, and directed the AO to frame fresh assessment after carrying out detailed enquiry as regards the genuineness of the transaction. On appeal, the Tribunal observing that since the inadequate enquiry conducted by the AO was as good as no enquiry, therefore, the CIT had rightly exercised his jurisdiction under Sec. 263 of the Act.

(ii). Once again, as the facts involved in the case of the present assessee company before us are factually distinguishable as against those involved in the aforesaid case, therefore, the same would be of no assistance to the revenue.

14. Apropos the obligation that was fastened upon the assessee company as per the "1st proviso" to Sec. 68 of the Act (as was made available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013), which mandates an explanation from the share applicant company about the nature and source of the sum credited in the books of account of the assessee company, it transpires that in discharge of the said statutory obligation, it was in the course of the assessment proceedings submitted before the AO that the investment made by the share applicant company was in turn sourced out of the share application money which the latter had received from seven investor companies. However, we find that the only reason which had

weighed in the mind of the A.O for treating the entire amount of share application money of Rs.10.50 crore (supra) as unexplained cash credit u/s.68 of the Act was that three share applicant companies (out of seven companies), i.e. (i) Balsaria Holding Pvt. Ltd.; (ii) JIT Finance Pvt. Ltd.; and (iii) Lectrodyer Marketing Pvt. Ltd. belonged to Shri Abhishek Chokani, an infamous accommodation entry provider, who in his statements recorded on oath in the course of certain survey proceedings conducted u/s.133A of the Act by the Investigation Wing, Kolkata had admitted that he was providing accommodation entries through certain paper/*jamakharchi* companies. At this stage, we may herein observe, that neither the AO had in the assessment order placed on record any material which would support his observation that the aforesaid three companies mentioned by him were paper/shell/jamakharchi companies managed and controlled by Shri. Abhishek Chokani(supra); nor as observed by the CIT(Appeals) the AO had prior to drawing of adverse inferences on the basis of his said observation confronted the said fact to the assessee company. As observed by the CIT(Appeals) and, rightly so, the adverse inferences drawn on the basis of any material or statement of a third party without confronting the same to the assessee, being in breach of principle of natural justice, cannot be sustained and are liable to be vacated on the threshold on the said count itself. Our aforesaid observation is duly supported by the judgment of the **Hon'ble Supreme Court** in the case of **Andaman Timber Industries Vs.**

Commissioner of Central Excise (2015) 281 CTR 241 (SC) and that of the **Hon'ble High Court of Bombay** in the case of **Vodafone India Ltd. Vs. UOI (2014) 265 CTR 42 (Bom)**. Also, a similar view had been taken by the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Ashwani Gupta (2010) 322 ITR 396 (Del)**. Further, the **Hon'ble High Court of Rajasthan** in the case of **CIT Vs. Supertech Diamond Tools (P) Ltd. (2015) Taxman 62 (Rajasthan)**, had observed that where investing companies were genuinely existing, then no addition could be made under Sec. 68 on account of share application money only on basis of any third party statement. It was observed that the statements made by some persons related with the investing companies was of no effect because such statements could not have been utilized against the assessee-company when the assessee company had not been afforded an opportunity of confronting and cross-examining the persons concerned. Taking a similar view, the **Hon'ble High Court of Delhi** in the case of **PCIT Vs. Best Infrastructure (India) Pvt. Ltd. (2017) 397 ITR 82 (Del)**, had observed, that as the department had relied upon the statement of an accommodation entry provider that was recorded u/s 132(4) of the Act for drawing adverse inferences in the hands of the assesseee company, therefore, onus was cast upon the department to facilitate to the assessee company a cross-examination of the said person, and a failure to do so would be sufficient to discard the said statement. On the basis of the aforesaid facts r.w the settled position of law, we are of the

considered view that as observed by the CIT(Appeals) and, rightly so, no adverse inferences could have validly been drawn by giving any weightage to the aforesaid unsubstantiated observation of the AO, that he had arrived at by referring to some statements of Shri. Abhishek Chokani (supra) which were never confronted to the assessee company in the course of the assessment proceedings. At the same time, we may further observe, that even if the aforesaid observation of the A.O was found to be in order and was to be acted upon, then, the same having been rendered in context of only three companies (out of seven companies) which had made investment towards share application money with M/s. Kush Trading & Commerce Pvt. Ltd., thus would by no means justify drawing of adverse inferences as regards the authenticity of receipt of share application money by M/s. Kush Trading & Commerce Pvt. Ltd. from the remaining companies. At this stage, it would be pertinent to point out that the AO had not uttered a word as to why the investment made by the remaining four companies (out of seven companies) with the share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd. was not to be accepted. Be that as it may, we concur with the CIT(appeals) that as the aforesaid unsubstantiated observation of the AO, which was pressed into service by him for drawing adverse inferences in the hands of the assessee company was never confronted to the assessee company in the course of the assessment proceedings, therefore, as per the settled position of law, the same being in breach of the

principles of natural justice, could not have been acted upon by him for drawing adverse inferences in the hands of the assessee company. We may further observe that though the assessee company in the course of the assessment proceedings had filed with the AO financial statements a/w the bank accounts of the seven investor companies which had made investment towards share application of the share subscriber company, viz. M/s. Kush Trading & Commerce Pvt. Ltd., but the AO had not even referred about the same in his assessment order; much the less recorded any adverse observations as regards the creditworthiness of the said investor companies in the backdrop of supporting documents, i.e financial statements, bank accounts etc. Although, as observed by the **Hon'ble High Court of Delhi** in case of **CIT Vs. Kamdhenu Steel & Alloys Ltd. (2014) 361 ITR 220 (Delhi)** that it is not for the Tribunal to start investigation, as it is only to see as to whether the additions are sustainable and there is adequate material to support the same; and if not the addition is to be deleted, but for the sake of completeness, we may herein observe that a perusal of the financial statements, bank accounts of the aforesaid seven investor companies reveals that the respective investments made by them were sourced out of funds that were available with them and were invested from their respective bank accounts. Also in neither of the case of the said seven investors the respective investments made by them is found to have been sourced out of any cash deposits made in their bank accounts prior to their making of

investment with the share applicant company, viz. M/s. Kush Trading & Commerce Pvt. Ltd.

15. Apropos the alternative claim of the ld. DR that in case it was to be held that the AO had not carried out proper verifications for dislodging the authenticity of the transaction of receipt of share application money by the assessee company, as well as the source-of-source of the said investment, then the matter in all fairness be restored to his file with a direction to re-adjudicate the same, we are unable to persuade ourselves to accept the same. As the assessee company in discharge of the primary onus that was cast upon it as regards proving the authenticity of the transaction of receipt of share application money from the aforesaid investor company; as well as an explanation as regards the source-of-source as mandated by the "Explanation" to Sec. 68 of the Act, vide the Finance Act, 2012 w.e.f AY 2013-14, had placed on record supporting documentary evidences as had been referred by us hereinabove; thereafter the onus got shifted upon the AO to disprove the veracity of the claim of the assessee on the basis of supporting material. As the AO due to his negligent conduct had failed to discharge the onus that was cast upon him, he cannot be provided with a fresh inning for doing the same. Our aforesaid view is supported by the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Kamdhenu Steel & Alloys Ltd. (2012) 19 taxmann.com 26 (Delhi)**. The Hon'ble High Court had observed that if the AO did not care to discharge the

onus that was cast upon him, then for his said negligence he cannot be provided with fresh innings. Further, the Hon'ble High Court had observed that as the Tribunal acts purely as an appellate authority, therefore, in its said capacity it has to see whether the assessment framed by the AO, all for that matter, orders of the CIT(Appeals) were according to law and purportedly framed on facts and whether there was subject matter to support it. It was observed by the Hon'ble High Court that the Tribunal is only to see as to whether the additions are sustainable and there is adequate material to support the same; if not to delete the same. It was further observed that it is not for the Tribunal to start investigation – it would not order further inquiry. For the sake of clarity, the multi-facet reasons given by the Hon'ble High Court while declining the request of the department to remit the matter to the file of the AO to enable him to make further investigation are culled out as under :

> "20. During the arguments, we had posed these queries. Learned counsel appearing for the Revenue understood the limitation of their case. For this reason, a fervent plea was made that this case be remitted back to the AOs to enable him to make further investigation.
>
> 21. However, in the facts and circumstances of these cases, it would be difficult to give such an opportunity to the Revenue. There are number of reasons for denying this course of action which are mentioned below:
>
> (i) It is not a case where some procedural defect or irregularity had crept in the order of the AO. Had that been the situation, and the additions made by the AO were deleted because of such infirmity, viz., violation of principle of natural justice, the Court could have given a chance to the AO to proceed afresh curing such procedural irregularity. One example of such a case would be when statement of a witness is relied upon, but opportunity to cross-examine is not afforded to the assessee.

> (ii) On the contrary, it is a case where the AO(s) did not collect the required evidence which they were supposed to do. To put it otherwise, once the assessee had discharged their onus and the burden shifted on the AO(s), they could not come out with any cogent evidence to make the additions. No doubt, as indicate by us above, the AO(s) could have embark upon further inquiry. If that is not done and the AO(s) did not care to discharge the onus which was laid down, for this "negligence" on the part of the AO(s), he cannot be provided with "fresh innings".
>
> (iii) The order of the AO(s) had merged in the order of the CIT(A) and in some of the cases before us and before the CIT(A), the assessees had succeeded.
>
> (iv) This Court is acting as appellate Court and has to act within the limitations provided under Section 26A of the Act. The appeals can be entertained only on substantial questions of law. In the process, this Court is to examine as to whether the order of the Tribunal is correct and any substantial question of law arises therefrom. The Tribunal has passed the impugned orders, sitting as appellate authority, on the basis of available record. When the matter is to be examined from this angle, there is no reason or scope to remit the case back to the AO(s) once it is found that on the basis of material on record, the order of the Tribunal is justified. Even the Tribunal acts purely as an appellate authority. In that capacity, the Tribunal has to see whether the assessment framed by the AO, all for that matter, orders of the CIT(A) were according to law and purportedly framed on facts and whether there was sufficient material to support it. It is not for the Tribunal to start investigation. The Tribunal is only to see as to whether the additions are sustainable and there is adequate material to support the same if not the addition has to be deleted. At that stage, the tribunal would not order further inquiry. It is to be kept in mind that the AO is prosecutor as well as adjudicator and it is for the AO to collect sufficient material to make addition. There may be exceptional circumstances in which such an inquiry can be ordered, but normally this course is not resorted to."

Also, we find that the Hon'ble Supreme Court in the case of Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi(178) AIR 851, had observed that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. It was further observed by the Hon'ble Court that in case the order is supplemented by fresh reasons or otherwise, then an order bad in the beginning may, by the time it comes to court on account of a challenge, would get validated by additional grounds later brought out. The aforesaid

order of the Hon'ble Apex Court in the case of Mohinder Singh Gill (supra) had thereafter been followed by the **Hon'ble High Court of Madhya Pradesh** in the case of **Bardoli Jan Kalyan Avam Vikas Samiti Vs. CBDT & Ors. (2022) 114 CCH 157 (MP)**. It was observed by the Hon'ble High Court that it was trite law that validity of an order of a statutory authority must be seen on the basis of grounds mentioned therein and not for any other reason. Further, a similar view had been taken by the **Hon'ble High Court of Madhya Pradesh** in the case of **M/s Satyam Cineplexes Ltd. Vs. State of M.P and Others, W.P No. 4694/2014; dated 09.02.2021**. Relying on the judgment of the Hon'ble Apex Court in the case of Mohinder Singh Gill (supra), the High Court had observed that it is a trite law that validity of an order of a statutory authority must be judged on the basis of grounds mentioned therein and it cannot be supported by assigning different reasons in the court by filing counter affidavits. It was further observed that orders made by public authorities must be construed objectively with reference to the language used in the order itself. Considering the facts as can safely; or in fact inescapably be gathered on a perusal of the assessment order, viz. (i) the AO had blatantly failed to discharge the onus that was shifted on him for disproving the explanation and the documentary evidences which were filed by the assessee company to prove the authenticity of the transaction of receipt of share application money; and (ii). the observation of the AO that three companies (out of seven companies) which had invested in the share

applicant company, M/s. Kush Trading & Commerce Pvt. Ltd. belonged to Shri. Abhishek Chokhani, an infamous accommodation entry provider, not having been confronted to the assessee company during the course of the assessment proceedings, thus could not have been pressed into service for drawing adverse inferences as regards the authenticity of the transaction of receipt of share application money by the assessee company; therefore, we are of the view that the AO had miserably failed in bringing on record any material which would dislodge the authenticity of the assessee's claim of having raised genuine share application money during the year under consideration.

16. Although we are not inspired at all by the aforesaid unsubstantiated observation of the AO w.r.t three investor companies, all the more for the reason that the same was never confronted to the assessee company prior to drawing of adverse inferences in its hands, but at the same time find substance in the claim of the ld. AR wherein, he had by referring to the extract of a statement of Shri. Rajesh Kumar Kedia S/o Bishwambhar Lal Kedia R/o 8/1, Hardutta Roy, Chamaria Road, Howrah – 711 101, an infamous accommodation entry provider, who in his statement recorded on oath u/s 131 of the Act during the course of survey proceedings conducted at his office, had admitted that he was, inter alia, engaged in providing accommodation entries in the form of bogus billing, share capital, unsecured loans to some of the companies, in lieu of commission. On a

perusal of the aforesaid statement (extract), it transpires that Shri. Rajesh Kumar Kedia (supra) in reply to Q.no. 6 of his statement on being queried about the concerns which he was managing from his office, had in his reply stated that he was, inter alia, managing two companies from his office, viz. (i). Lectrodryer Marketing Pvt. Ltd; and (ii). Balsasaria Holdings Pvt. Ltd. On further being queried vide Q.no 7 about the nature of business carried out by the aforesaid concerns, it was stated by him that the said concerns were not carrying out any work. For the sake of clarity the relevant extract of the statement of Shri. Rajesh Kumar Kedia (as had been culled out by the department in the statement of facts filed before us) is reproduced as under:

Statement of Shri RAJESH KUMAR KEDIA S/o BISHWAMBHAR LAL KEDIA, aged about 44yeats, residing at 8/1, HARADUTTA ROY CHAMARIA ROAD, HOWRAH, 711101, West Bengal, INDIA, recorded on oath u/s.131 of the Income Tax Act, 1961 on 13.06.2014 , at Office of Mr Rajesh Kumar Kedia, at 10/4, Hungerford Street, Kol-17, during Survey proceedings U/S 133A.

"Oath administered"

"I swear in the name of God that I will speak the truth, the whole truth and nothing but the truth. I further confirm that I have been made aware of the consequences of giving a false statement".

(Before Me)

13/06/2014

(SUBHASH KUMAR)
ACIT Circle-39, Kolkata

(RAJESH KUMAR KEDIA)
Deponent

Q.5 Please explain the nature of business done by you?

Ans: Am Director in some companies which are mainly engaged in Share trading, Commodity trading, I also facilitate accommodation in the form providing bogus billing , share capital, unsecured loan to some of the companies, in liu of commission.

Q.6 Please name the concerns which you used to manage from your office address.

Ans : I used to manage following concerns from my office.

S.No.	CIN/LLPIN	Name of the Company/ LLP
1	U51109WB2005PTC104254	BABA BHOOTHNATH EXIM PRIVATE LIMITED
2	U51909WB1995PTC071582	LECTRODRYER MARKETING PVT.LTD.
3	U67120WB1995PTC074216	BALASARIA HOLDINGS PVT LTD

QUES-7.Please explain the Nature of business done by your companies ?

Ans:

Name of the Company/ LLP	Nature of work
BABA BHOOTHNATH EXIM PRIVATE LIMITED	No work
LECTRODRYER MARKETING PVT.LTD.	No work
BALASARIA HOLDINGS PVT LTD	No work

Although the aforesaid statement of Sh. Rajesh Kumar Kedia (supra) had not been referred to by the AO, but considering the fact that the same would have a strong bearing on the adjudication of the present appeal we cannot remain oblivion of the contents of the same. Considering the aforesaid statement of Shri. Rajesh Kumar Kedia (supra) as had been brought to our notice, which raises serious doubts about the credibility of the aforesaid two companies, viz. (i). Lectrodryer Marketing Pvt. Ltd; and (ii). Balsaria Holdings Pvt. Ltd., we in all fairness and interest of justice restore to the file of the AO the issue pertaining to the explanation of the assessee company as regards the source-of-source, i.e share application money received by the assessee company from the share applicant company i.e M/s. Kush Trading &

Commerce Pvt. Ltd., to the extent the same was sourced from the funds which the latter had received from the said two companies, with a direction to the AO to adjudicate the same afresh. Needless to say, the AO shall in the course of the set-aside proceedings re-adjudicate the aforesaid issue after confronting the requisite material to the assessee company and affording it a reasonable opportunity of being heard.

17. We, thus, in terms of our aforesaid observations set-aside the order of the CIT(Appeals) only to the limited extent he had accepted the claim of the assessee company of having received share application money from M/s. Kush Trading & Commerce Pvt. Ltd., i.e to the extent the same was sourced from the share application money received by the latter investor company from the aforementioned two concerns, viz. (i). Lectrodryer Marketing Pvt. Ltd; and (ii). Balsasaria Holdings Pvt. Ltd., with a direction to him to re-adjudicate the same after confronting the requisite material and affording a reasonable opportunity of being heard to the assessee company.

18. Resultantly, the appeal filed by the revenue is partly allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in open court 11th day of July, 2023.

Sd/-	Sd/-
ARUN KHODPIA	**RAVISH SOOD**
(ACCOUNTANT MEMBER)	**(JUDICIAL MEMBER)**

रायपुर/ RAIPUR ; **दिनांक** / Dated : 11th July, 2023

***SB

<u>आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :</u>

1. **अपीलार्थी** / The Appellant.
2. **प्रत्यर्थी** / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G)
4. The Pr. CIT-1, Raipur (C.G.)
5. **विभागीय प्रतिनिधि**, **आयकर अपीलीय अधिकरण**, **रायपुर बेंच**, **रायपुर** / DR, ITAT, Raipur Bench, Raipur.
6. **गार्ड फ़ाइल** / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, **रायपुर** / ITAT, Raipur.