

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 255/Kol/2023
Assessment Year: 2012-13

DCIT, Central Circle-2(4), Kolkata	Vs	Narsingh Ispat Limited 15 th Floor, Room No. 1512 Diamond Heritage 16, Strand Road Fairley Place Kolkata - 700001 [PAN: AACCN0208J]
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri S.K. Tulsian, Advocate & Ms. Puja Somani, A/R.
Revenue by :	Shri P.P. Barman, Addl. CIT Sr. D/R

सुनवाई की तारीख/Date of Hearing : 07/06/2023
घोषणा की तारीख /Date of Pronouncement: 26/07/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

This is an appeal preferred by the revenue against the order of the Learned Commissioner of Income Tax (Appeals) - 20, Kolkata (hereinafter referred to as the Id. CIT(A)"], passed u/s 250 of the Income-tax Act, 1961 (hereinafter the 'Act'), dated 25/01/2023 for the Assessment Year 2012-13, on the following grounds:-

"1. Whether on the facts and circumstances of the case, Ld. CIT (A) is justified without going into merits of the case and deleting the addition u/s. 68 of the I.T. Act, 1961 of Rs. 19,14,50,500/- ignoring the facts that genuineness of shares capital receipt could not be established as one of the major applicants M/s.Honesty Dealers Pvt. Ltd. has subscribed to shares of the assessee the source being receipt of share capital from other companies, which was already held as bogus receipt and added in the hands of M/s. Honesty Dealers Pvt. Ltd.

2. *Whether on the facts and circumstances of the case, Ld. CIT (A) is justified without going into merits of the case and deleting the addition u/s. 68 of the I.T. Act, 1961 of Rs. 19,14,50,500/- ignoring the facts that creditworthiness of both the applicants companies M/s. Honesty Dealers Pvt. Ltd. and M/s. Seaview Agencies Pvt. Ltd. could not be proven as both the companies without having any business activities have received share premium from other companies and in turn subscribed to shares of the assessee company at a premium who is the ultimate beneficiary.*

3. *Whether on the facts and circumstances of the case, the CIT (A) erred in law in ignoring the observations of the Hon'ble Apex Court in case of NRA Iron & Steel P Ltd 103 Taxmann.com 48, as the of inquiry and analysis made by the AO established that assessee has failed to prove identity, creditworthiness and genuineness of the transaction.*

4. *Whether on facts of the case and in law Ld. CIT (A) erred in holding the transaction to be genuine on the basis a the facts that transaction were through banking Channel without appreciating the ratio of judgment of jurisdictional High Court in the case of CIT vs. Precision Finance Pvt. Ltd. (1993) wherein it is held that mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine.*

5. *The appellant craves leave to make any addition, alteration and modification, abrogation etc. of ground or grounds on or before or during the course of hearing of the appeal."*

2. Brief facts of the case are that the assessee is a company engaged in the business of manufacturing and trading in iron and steel. It filed its return of income on 26/09/2021 declaring total income of Rs.1,74,09,340/-. Case selected for scrutiny following by issuance and service of notice u/s 143(2) & 142(1) of the Act, upon the assessee. In response to the notices issued, the assessee filed the requisite documents such as audited accounts, copy of the return of income, complete details of share capital raised during the year and Bank Statement for the year. On perusal of the details of share capital raised during the year, the learned AO noted that the assessee has raised

fresh share capital of Rs.19,14,50,000/- from the following two share applicants.

Honesty Dealers Pvt Ltd. 10,52,00,000

*Seaview Agencies Pvt Ltd. 8,62,50,000 **19,14,50,000***

2.1. The ld. AO Vide letter dated 20.01.2015, asked the assessee to produce the shareholders as well as directors along with the relevant documents of the share applicant companies. Accordingly, the assessee wrote a letter dated 21-01-2015 to the share applicant companies requesting them to submit their bank statements for FY 2011-12, audited accounts for FY 2011-12 and computation of income for AY 2012-13. The assessee also requested the share applicants to appear before the AO within 15 days. (copy of the letter is enclosed at page 39-41 of the paper book). Subsequently, summons u/s 131 of the Act dated 27-01-2015 was issued and served on both the share applicant companies wherein these companies were requisitioned to submit their bank statements, audited accounts, computation of income for AY 2012-13 and the contact number. Accordingly, M/s Honesty Dealers Pvt Ltd on 02-02-2015 filed the ledger A/c of the assessee in its books, bank statement, copy of ITR, details of jurisdictional AO and its contact no. M/s Seaview Agencies Pvt Ltd also submitted the requisitioned details on 09-02-2015. The learned AO duly acknowledged the replies filed by these share applicant companies. However, since the directors of these companies could not comply with the summons, the learned AO totally ignored the replies filed by these share applicant companies. He added the entire share

capital raised by the assessee of Rs.19.14 cr u/s 68 of the Act holding as under:-

"Under this circumstances following conclusion is being drawn in respect of the share allotment.

1. The assessee company entered into a sham transaction with the investor to introduce the unaccounted income in form of share application/allotment.

2. The assessee company did not have any regular business transaction or regular acquaintance with the investor.

3. The investor has no reason to invest such huge amount in the business of the assessee.

4. The investor has no business transaction with the assessee company in past or future except this one time entry.

5. Assessee cannot withstand the cross examination before A.O., if the above questions arise.

6. Entire transactions were done to beat the new provision of Income Tax Act."

3. Aggrieved, the assessee preferred appeal before the learned CIT(A). During the course of appellate proceedings, it was submitted that replies were duly filed before the learned AO by the share applicant companies in response to the summons. Hence, their identity is duly proven. W.r.t the share capital received of Rs.10.52 crores from M/s Honesty Dealers Pvt Ltd, the assessee submitted that Share Capital of Rs.14,80,00,000/- was raised by Honesty Dealers Pvt Ltd during FY 2008-09. The said sum of Rs.14.80 cr. had already been added in the assessment order of Honesty Dealers Pvt Ltd for AY 2009-10 dated 12-03-2015 passed u/s 144/263/143(3)/147 of the Act. This share application money received by the party was re-invested in share capital of the assessee company in the relevant year. Since the source of share capital raised by the assessee during the year has already been taxed, adding the same again will tantamount to double

addition. So far as the share capital received of Rs.8.62 cr received from M/s Seaview Agencies Pvt Ltd, it was submitted that this company has raised share capital in FY 2008-09. This share capital was reinvested in the share capital of the assessee in the relevant assessment year. The company been assessed u/s. 143(3)/147 of the I.T. Act for assessment years 2011-12, 2012-13 and 2014-15. It was submitted that for assessment year 2012-13, there was information from Investigation Wing regarding unaccounted income of Rs.20,00,000/- and accordingly this amount was added to the total income. Perusal of the assessment orders for this year clearly shows that AO has not made any adverse comments on the entries in the Balance-sheet. The investment in the share capital of the assessee was duly recorded in the Balance Sheet of this share applicant. Even the Investigation Wing has not found any adverse evidence w.r.t the investment made in the share capital of the assessee. As per the reasons recorded and cash trail prepared by the Investigation Wing, only a sum of Rs.20,00,000/- received from Sapphire Suppliers Pvt Ltd was found to be income escaping assessment and only that sum was added in the assessment order passed u/s 147/143(3) of the Act dated 11-12-2018. Had there been any irregularity in the transactions between the assessee and this share applicant, the same could have been added by the Department in the hands of this party. Under the circumstances, investments made in the shares of the assessee company in assessment year 2012-13 (current year) cannot be questioned, as the creditworthiness of M/s. Seaview Agencies Pvt.

Ltd. has been established. Based on these statements and findings, the Id. CIT(A) was satisfied that the alleged share capital and share premium having been given through banking channels and the identity and creditworthiness are not in doubt and the transactions are genuine. Since the Id. CIT(A) was satisfied with all the ingredients of Section 68 of the Act, i.e., identity, creditworthiness and genuineness of the transactions, therefore, no addition was required to be made u/s 68 of the Act.

4. Aggrieved the revenue is now in appeal before the Tribunal with regard to the impugned addition of Rs. 19,14,50,000/-, made under section 68 of the Act.

5. The Id. D/R, submitted that the assessee company had entered into a sham transaction with the investor to introduce the unaccounted income in form of share application/allotment. He further submitted that, the assessee company did not have any regular business transaction or regular acquaintance with the investor and such huge amount of investments were unreasonable. The Id. D/R further submitted that except for this entry, the investor had not entered into any other business transactions with the assessee company.

6. On the other hand, the Id. Counsel for the assessee submitted that, there is no whisper in the assessment order as to how the assessee company had introduced unaccounted money in the form of share capital nor has any cash trail/fund flow been prepared by the Assessing Officer to substantiate the same and the addition u/s 68 of the Act was made purely on the basis of surmises and conjectures. He

further submitted that both the share applicant companies, are group companies which is evident from the audited books of accounts and in subsequent years also, these companies had made investments in the share capital of the assessee company. It was further submitted that the assessee had declared revenue of Rs.1,36,14,94,727/- during the relevant year in its audited accounts and reported income of Rs.1,74,09,338/- in the ITR filed, exhibiting its credibility. Referring to the submissions filed before the Id. CIT(A) as well as the finding of the Id. CIT(A), it was submitted that the alleged investors are being assessed to tax and have also passed scrutiny proceedings and the alleged investors have received share capital and share premium in the preceding years and that fund was available with them and the same was utilised for reinvestment to the equity capital of the assessee company. It was also submitted that merely for non-appearance against the summons issued by the assessing officer, no adverse inference can be drawn, unless and until any mistake or fault is found in the details filed by the assessee. Reliance was placed the following decisions:-

- *CIT vs. M/s. Gagandeep Infrastructure Pvt. Ltd. (Bombay HC)*
- *CIT vs. Orissa Corporation Pvt. Ltd. (SC)*
- *ITO vs. Axisline Investment Consultants (P.) Ltd. (ITAT Kolkata)*
- *CIT vs. M/s. Dataware Pvt. Ltd. (Calcutta HC)*
- *ITO vs. Dharmvir Merchandise (P.) Ltd. (ITAT Kolkata)*

7. We have heard rival contentions and perused the material available on record. The revenue is aggrieved with the deletion of addition of Rs.19,14,50,000/- made by the assessing officer u/s 68 of the Act. We notice that the assessing officer when called for the details from the respective share applicants, namely, M/s. Honesty Dealers Pvt. Ltd. and M/s Seaview Agencies Pvt. Ltd., for the sum of Rs.10,52,00,000/- and Rs.8,62,50,000/-, received against the issue of equity capital during the year, both the share applicants of replied to the notice under section 133(6) of the Act and have filed complete details including bank statements, income tax returns, audited balance sheets, confirmation of accounts etc.. It was also submitted that the alleged share applicants are part of the assessee's group. However, when the summons under section 131 of the Act were not complied by the directors of the assessee company, the impugned additions were made under section 68 of the Act. Thereafter when the assessee preferred appeal before the Id. CIT(A), filing complete details and also stating that the source of source of the alleged sum is duly proved with the fact that both the alleged share applicants have received equity share capital and share premium in the preceding years and those years have been assessed to tax and even addition has been made in the hands of M/s. Honesty Dealers Pvt. Ltd., towards unexplained share capital at Rs.14,80,00,000/- in AY 2009-10. Based on these submissions, the Id. CIT(A), deleted the impugned addition by observing as follows:-

“3.1 I have carefully considered the facts of the case and submission of the appellant. I have also gone through the copies of the documents (order sheet etc.) submitted by the appellant. Perusal of the certified copy of the order sheet shows that the authorised representative of the assessee has attended before the AO on 25.07.2014, 05.12.2014, 06.02.2015, 17.02.2015, 25.02.2015 and 03.03.2015. Thus, AO's observation that appellant has not fully cooperated in the assessment proceedings is not correct. Further, appellant has also submitted the certified copy of the details submitted by M/s. Honesty Dealers Pvt. Ltd. and M/s. Seaview Agencies Pvt. Ltd. in the office of the Ld. Assessing Officer. Thus, it is apparent that the appellant and the said two shareholders had filed all the details during the assessment proceedings. AO's allegation that the said shareholders did not attend personally may be a matter of debate. Appellant submits that the Directors of the two investing companies had attended during assessment proceedings and as per AO's directions, details were filed in DAK. In any case, AO has not raised issue relating to non attendance of the Directors in the note sheet. Another crucial observation of the Assessing Officer that share capital has been received from outsiders is contrary to the facts. M/s. Honesty Dealers Pvt. Ltd., and M/s. Seaview Agencies Pvt. Ltd. are Group companies and the sister concerns of the assessee company. While questioning the motive of investments made by the said two companies, AO has observed that investment made by them were not justified on the basis of the performance of the assessee company. However, AO has overlooked the fact that assessee company had a genuine running business of manufacturing and trading of iron and steel and for the current year it had filed return showing total income of Rs. 1,74,09,340/-. Thus, the assessee company appears to have good performance record. In any case, investment decisions within the group concerns are not purely guided by the performance of the investee company. Rather, these are based on holistic and strategic view for the betterment of all the group concerns. Now coming to the identity and creditworthiness of the two shareholders, it is observed that their identities are not in doubt. These two concerns are companies having common Directors with the assessee company and they have been regularly filing their returns of income. Appellant has submitted assessment order for M/s. Honesty Dealers Pvt. Ltd. for assessment year 2009-10. Similarly, appellant has also submitted the assessment orders in the case of M/s. Seaview

Agencies Pvt. Ltd. for AY: 2011-12 and 2012-13. This shows that both these companies have their separate existence and these have been verified independently by their respective AOS Regarding creditworthiness of the two parties, it is notice that M/s. Honesty Dealers Pvt. Ltd. had received share capital of Rs. 1,4,80,00,000/- in AY: 2009-10 and in scrutiny order u/s 144/263/143(3)/147 dated 12.03.2015, entire receipt of share capital has been added in the hands of M/s. Honesty Dealers Pvt Ltd. Further, perusal of the Balance-sheet of M/s. Honesty Dealers Pvt. Ltd. as on 31.03.2012 shows that major chunk of the share capital received in AY: 2009-10 has been invested in the shares of the assessee company in AY: 2012-13. Thus, the investments in the shares of assessee company, amounting to Rs.10,52,00,000/- has been out of the share capital raised in AY: 2009-10 and in AY: 2009-10, entire share capital raised by M/s. Honesty Dealers Pvt. Ltd. has been added in the hands of the party. Thus, the creditworthiness of M/s. Honesty Dealers Pvt. Ltd. vis- à-vis the investments in the shares of the assessee company gets established. There is a clear link between raising of share capital in AY: 2009-10 by M/s. Honesty Dealers Pvt. Ltd. and investing a major part of that share capital into the shares of assessee company in AY: 2012-13. As addition has already been made in the hands of M/s. Honesty Dealers Pvt. Ltd. for the amount received as share capital, another addition for the same amount cannot be sustained in the hands of the assessee company when the linkages between the two are apparent from records. Now coming to the M/s. Seaview Agencies Pvt. Ltd., it is noticed that this company had also raised huge share capital in AY: 2009-10 and the source of investments in the shares of the assessee company in the current year is the share capital raised by M/s. Seaview Agencies Pvt. Ltd. in AY: 2009-10. Although, there was no scrutiny in its case for AY:

2009-10 but in the subsequent years, i.e., AY: 2011-12 and AY: 2012-13, assessment proceedings were reopened on the basis of information received from the Investigation Wing and orders w/s. 147 read with section 143(3) have been passed on 21.12.2018 and 11.12.2018 respectively for assessment year 2011-12 and assessment year 2012-13. In the assessment year 2011-12 information was received from the Investigation Wing regarding unaccounted income of Rs. 3,00,000/- received by M/s. Seaview Agencies Pvt. Ltd. and accordingly addition of this amount was made by treating the same as unexplained cash

credit u/s 68 of the Act. Similarly, for assessment year 2012-13, there was information from Investigation Wing regarding unaccounted income of Rs 20,00,000/- and accordingly this amount was added to the total income. Perusal of the assessment orders for these two years shows that AO has not made any adverse comments on the entries in the Balance-sheet. It also appears that even the Investigation Wing has not found any adverse evidence against share capital raised by M/s. Seaview Agencies Pvt. Ltd. in assessment year 2009-10. Otherwise, it would have informed the AO for necessary remedial measures, as has been done in assessment year 2011-12 and assessment year 2012-13. Thus, the Balance-sheet of M/s. Seaview Agencies Pvt Ltd. cannot be questioned without any adverse evidence. There is nothing on record to suggest that the share capital raised by M/s. Seaview Agencies Pvt. Ltd. in assessment year 2009- 10 was not genuine. Under the circumstances, investments made in the shares of the assessee company in assessment year 2012-13 (current year) cannot be questioned, as the creditworthiness of M/s. Seaview Agencies Pvt. Ltd. has been established.

All the investments in the share capital of the assessee company have come through banking channels. The identities and creditworthiness of the investors are not in any doubt and the transactions are genuine. Thus, all the three ingredients of section 68, they are identity, creditworthiness and genuineness of transactions, gets established. Under the circumstances, there is no case for any addition u/s.68 of the Act. Hence, in view of the above discussion, AO is directed to delete the addition of Rs.19,14,50,000/-."

8. On going through the above findings as well as the available records so far as the alleged sum of Rs.10,52,00,000/- received from Honesty Dealers Pvt. Ltd., is concerned, we find that the sum of Rs.14,80,00,000/- was raised by Honesty Dealers Pvt. Ltd., during the financial year 2008-09 towards share capital and share premium. Thereafter, Honesty Dealers Pvt. Ltd., was subjected to scrutiny proceedings and vide order dt. 12/03/2015, passed under section 144/263/143 (3)/147 of the Act, the said sum of Rs.14,80,00,000/- was

added. Since the alleged sum has been added in the case of Honesty Dealers Pvt. Ltd., and the sum received by it was invested in the form of loans and advances and investments, during the year under consideration some of the funds have been received backed by Honesty Dealers Pvt. Ltd., and has been utilised for investing in the equity share capital of the assessee company. These details have gone uncontroverted at the end of the revenue authorities and it remains an admitted fact that the source of the source stands proved with the details filed before us and, therefore, making an addition again in the hands of the assessee would tantamount to double addition and, therefore, the addition in the year under consideration is not warranted and the ld. CIT(A) has rightly deleted the same.

9. We find support from the decisions of the ITAT, Kolkata in the case of *M/s Happy Structure Pvt Ltd (ITA 1977/Kol/2016)* wherein on similar facts it was held that:-

"Applying the proposition of law laid down in the above referred cases to the facts of this case and keeping in view the fact for the share applicant company have been assessed to tax u/s 143 (3) of the Act and the source of money in question was brought to tax in their hands, we uphold the order of the ld. CIT(A) that no additions can be made in the case of the assessee company"

10. The ld. CIT(A) duly perused the submissions of the assessee and noted that source of share application money received by the assessee from M/s Honesty Dealers Pvt Ltd has already been added in the hands of the share applicant. Hence, in view of the settled legal position, as the source has already been added, we uphold the action of the ld. CIT(A) in deleting the addition.

11. So far as the remaining addition towards alleged share capital of Rs.8.62 cr received from M/s Seaview Agencies Pvt Ltd, is concerned, we find that this company also raised equity share capital during the financial year 2008-09 and it has been assessed to tax u/s 143(3)/147 of the Act for AYs 2011-12, 2012-13 and 2014-15. Even for AY 2012-13, though the case of M/s Seaview Agencies Pvt Ltd., was selected for the limited scrutiny for examining the unaccounted income of Rs.20,00,000/- and for this purpose all the details of M/s Seaview Agencies Pvt Ltd. including audited balance sheet and details of share capital were filed before the AO but except for the addition of Rs.20,00,000/- which was found to be income escaped from assessment, no other addition was made in the assessment order dated 11/12/2018. This proves that the source of funds utilised for making the alleged investment in equity capital of the assessee company was available with M/s Seaview Agencies Pvt Ltd., from AY 2009-10 onwards and that fund has been rotated but it was always available for investment and during the year under consideration part of that fund has been utilised for making investment in the equity capital.

11.1. At this juncture we also notice that the assessee company is having a huge turnover and for financial year 2012-13, the same is amounting to Rs.145.38 Crores and net profit from continuing operations is Rs.1.45 Crores (approx.). In the return of income, total income has been declared at Rs.1.74 Crores. We find that the genuineness of the transactions is proved since the investment which has been made by the alleged share applicants is in a profit making

company and, therefore, since the future prospect of investments are good, this decision of the share applicant company to invest in the equity of the assessee company is prudent one and, therefore, the genuineness of the transactions is established.

11.2. So far as the identity and creditworthiness of both the share applicant companies are concerned, as discussed in the preceding paragraphs, it has been established again and again that identity and creditworthiness of both the share applicant companies have been established beyond doubt.

12. Our view is fortified by the decision of this Bench of the Tribunal in the case of *ITO vs. Dharmvir Merchandise (P.) Ltd.* reported in [2023] 149 taxmann.com 221 (Kolkata- Trib.), wherein dealing with the similar issue, this Tribunal considering the facts of the case and judicial precedents deleted the addition u/s 68 of the Act on similar grounds observing as follows:-

“9. We have heard rival contentions and perused the records placed before us. Addition u/s 68 of the Act for unexplained share capital and share premium of Rs. 1.40 Cr is in challenge before us. We notice that the assessee company issued fresh share capital during the year of face value of Rs. 10/- and premium of Rs. 240/- per share and received 1.40 Cr from following three companies:

Sr No.	Name of the Share Applicant	Amount Received
1	Everlike Projects Pvt Ltd	50,00,000/-
2	Mahashakti Vintrade Pvt Ltd	50,00,000/-
3	Satyam Plywood Merchandise Pvt Ltd	40,00,000/-
	TOTAL	1,40,00,000/-

10. After the case being selected for scrutiny, ld. AO asked the assessee to explain the source of above referred sum of share capital and share application money. In response, the assessee submitted the following documents:

- i. Party Wise details of share capital raised during the year,
- ii. Form 2, Form 5 filed with ROC,

- iii. Memorandum and Article of Association,
- iv. Bank Statement for the year,
- v. Share Application Form,
- vi. Form 18 in support of registered office address of the company,
- vii. Audited accounts for the year,
- viii. Relevant Bank Statement for the year,
- ix. Form 18 in support of registered office address of these companies.

11. Thereafter, summons were issued to the Directors of the share subscriber companies as well as the Directors of the assessee company which were duly served upon the respective persons and the details as called for were filed which included the following:

- i. Photo Identity and Address Proof,
- ii. Narration of all debit and credit entries in relevant Bank statements,
- iii. Copies of all relevant ROC returns,
- iv. Sources of funds and utilisation of funds,
- v. Evidence of creditworthiness along with Income Tax Returns filed and
- vi. Copies of Audited Accounts and Tax Audit Report for the relevant AY.

12. We further, notice that ld. AO has not pointed out any defect and not questioned the correctness of any of the documents filed by the assessee company, share subscriber companies as well as the Directors. The only ground for making the addition is that the Directors of the assessee company as well as the investor companies have not appeared personally before ld. AO in compliance to the summons issued u/s 131 of the Act and applying the decision of this Tribunal in the case of Bisakha Sales Pvt. Ltd. (supra).

13. So far as reliance placed by ld. AO on the decision of this Tribunal in the case of Bisakha Sales Pvt. Ltd. (supra) is concerned, we fail to find any merit as the facts of Bisakha Sales Pvt. Ltd. (supra) are distinguishable from the facts of the present case. Firstly for the reason that the case of Bisakha Sales Pvt. Ltd. (supra) was in connection of the revisionary order passed by ld. CIT(A) u/s 263 of the Act where it was alleged that ld. AO has not made proper enquiries with regard to the transaction of share application money received by the company, which however, is not the fact of the instant case where the issue relates to assessment proceedings carried out u/s 143(3) of the Act and complete and detailed enquiry has been

conducted by ld. AO. In the assessment order, ld. AO has not brought any adverse material which could have remotely suggested that the unaccounted income of the assessee was brought in disguise of the share capital. Therefore, the decision of Bisakha Sales Pvt. Ltd. (supra) is not applicable on the present case.

14. So far as merits of the case are concerned, we find that the assessee has successfully discharged its onus by filing complete details of the share subscriber companies including their bank statement, audited financial statements, Form no. 18 in support of registered office address, source and utilization of funds, copies of ITRs, copies of all relevant company returns. Even the photo identity, address proof of the Directors of the assessee company and the subscriber companies have been filed directly by these Directors to ld. AO. On the basis of these facts undoubtedly the assessee has successfully discharged the onus which lay upon it by producing all the evidences for proving the identity and creditworthiness of the investors and the genuineness of the transaction. Merely non-appearance of the Directors cannot be a basis for treating the share application money as unexplained or non-genuine. We find support from the judgment of Hon'ble Gujarat High Court in the case of Rohini Builders (supra) relying on the judgment of Hon'ble Apex Court in the case of Orissa Corporation Pvt. Ltd. (supra) (relevant extract:

“Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation (1986) 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.”

15. Our view is supported by Tradelink Carrying (P.) Ltd. vs ITO pronounced on 20.12.2019 reported in [2020] 113 taxmann.com 520 (Kolkata-Trib.), wherein the Hon'ble jurisdictional ITAT held that:

“34. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the, Assessing Officer, we hold that an addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to allow the appeal of the assessee.

35. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore we delete the addition of Rs 5,60,000/- and consequently the appeal of assessee is allowed.

36. In the result, the appeal of the assessee is allowed.”

16. Similar view also taken in the case of *Satyam Smertex (P.) Ltd vs DCIT* reported in [2020] 117 taxmann.com (Kolkata - Trib.) pronounced on 29-05-2020 where the Hon'ble jurisdictional ITAT held that:

“30. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source, it shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. the PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record, including that of the directors and share holders of share subscribing entities as discussed supra. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the

transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO and confirmed by Ld. CIT(A) are based on conjectures and surmises, so their impugned action cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do allow the appeal of assessee and direct deletion of addition of Rs 16 cr under section 68 of the Act."

17. *From the above decision, we note that it has been held again and again by the jurisdictional ITAT, Kolkata that in a case, where the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, the onus shifts on ld. AO to disprove the documents furnished by assessee so as to draw adverse view and in the absence of any investigation, much less gathering of evidence by ld. AO, additions cannot be sustained merely based on inferences drawn by circumstance or made on surmises and conjectures.*

18. *Therefore, after going through the various details and documents placed before us, we find that assessee has successfully discharged primary onus casted upon it to explain the source of alleged share capital and share premium. Ld. AO did not find any fault or any shortcoming in the compliances made by the appellant company. It is also an evident fact that the only basis for making the alleged addition by ld. AO was non-appearance of the Directors of the share allotted company but as claimed by ld. Counsel for the assessee, the time allowed for compliance was too short and the assessee filed all the confirmations in respect of such share subscribers which were not doubted by ld. AO. Facts are brought to our notice out of the eight shareholders five have been assessed for the same assessment year u/s 143(3) of the Act and complete details of their financials and bank transactions have been examined by ld. AO in the scrutiny proceedings. This is also an admitted fact that each of the shareholders were duly served notice u/s 133(6) of the Act which is sufficient to prove the identity of such shareholders. As far as the genuineness of the transaction is concerned, the same have taken place through banking channel which is traceable from the origin to the destination of such payments and further confirmed from the documents furnished before us. All these transactions are duly recorded in the respective balance sheets of the shareholder companies. Creditworthiness of the transaction is also proved from the fact that all the shareholder companies were having more than sufficient share capital and reserve and surplus fund for giving share application money. Even otherwise ld. AO has not made the addition for charging of higher share premium and has made the addition of unexplained cash credit but still charging of share premium is a commercial decision and the same can be challenged only with sufficient documentary evidence. It thus brings to a conclusion that since the assessee filed complete details of identity and creditworthiness of the share subscribers and genuineness of the transaction before ld. AO, the onus shifted to ld. AO to disprove the material placed before him and without doing so the additions made by ld. AO are based on conjectures and surmises and the impugned additions*

cannot be justified and therefore, the impugned action of ld. AO cannot be held to be justified.

19. Our view is further supported by following judicial pronouncements:

“i) CIT vs. Gagandeep Infrastructure (P) Ltd. 80 taxmann.com 272 (Bombay) wherein it was held by High Court that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso.

ii) PCIT vs. Chain House International (P) Ltd. 98 taxmann.com 47 wherein Madhya Pradesh High Court held that “The question raised by the revenue in regard to issuing the share at a premium is purely a question of fact. It is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe to shares at such a premium or not and moreover the section 68 does not envisages any law on share premium it only requirement is to identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants which same has been discharged by the respondent authority and the HIGH COURT OF M.P. BENCH AT INDORE Pg. No.--58-- (ITA No.112/2018 & Other connected matters) same has been accepted by the appellate authorities thus, the same cannot be reconsidered in these appeals as it is a pure question of fact.” SLP preferred by revenue was dismissed by Hon’ble Supreme Court and the same is reported in 103 taxmann.com 435(SC).

iii) CIT vs. Kamdhenu Steel & Alloys Limited [ITA No.972 of 2009] dated 23.12.2011 wherein the Delhi High Court in a batch of 11 appeals was required to adjudicate on the very issue of addition made by the A.O u/s 68 in respect of share application monies received by the assesseees as alleged unexplained cash credit. In all these cases, the Department had alleged that the share application monies were received from persons who were ‘entry operators’ and the monies received by way of share application was nothing but was routing of unaccounted money of assessee in the form of subscription to share capital. However,

in the assessments made the A.Os had not brought on record any material or evidence to substantiate such finding. Accordingly, on appeal the appellate authorities had deleted the additions made u/s 68 of the Act.

iv) CIT vs. Orissa Corpn (P) Ltd. 159 ITR 78 where the Court held that "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 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 is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

20. *We, therefore, respectfully following the judgments referred herein above by the Hon'ble Courts and also considering the facts and circumstances of the case, are of the considered view that since the assessee has placed sufficient documents and materials on record to prove the identity and creditworthiness of the shareholders and the genuineness of the transaction of receiving share capital and share premium, invoking the provisions of Section 68 of the Act was not justified in the instant case. We, therefore, reverse the finding of the CIT(A) and delete the addition of Rs. Rs.1.40 Cr made u/s 68 of the Act and allow all the grounds raised by the assessee.*

21. *In the result, the appeal filed by the assessee is allowed."*

13. Our view is further supported by the judgment of the Hon'ble Jurisdictional Calcutta High Court in the case of *Principal CIT vs. Sreeleathers* reported in [2022] 448 ITR 332 (Cal) wherein Hon'ble Court held as follows:

"Section 68 of the Income-tax Act, of 1961, 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 provision are "the assessee offers no explanation". This would mean that the assessee offers no proper, reasonable and acceptable explanation as regards the amount credited in the books maintained by the assessee. No doubt the Act places the burden of proof on the taxpayer. 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 confirmations, the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit 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 concerning the cash credit, the Assessing Officer should consider it objectively before he decides to accept or reject it. 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. While drawing the inference, it cannot be assumed in the absence of any material that there have been some illegalities in the assessee's transaction. Held, dismissing the appeal, that the allegations against the assessee were in respect of thirteen transactions. The Assessing Officer issued a show-cause notice only in respect of one of the lenders. The assessee responded to the show-cause notice and submitted the reply. The documents annexed to the reply were classified under three 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 had brushed aside these documents and in a very casual manner had stated that merely filing the permanent account number details, and balance sheet did not absolve the assessee from his responsibility of proving the nature of the transaction. There was 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 had discharged his initial burden and the burden shifted onto 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". Such usage was uncalled for as the allegation of money laundering is a very serious allegation and the effect of a case of money laundering under the relevant Act is markedly different. The order passed by the Assessing Officer was utterly perverse and had been rightly set aside by the Commissioner (Appeals). The Tribunal had rightly deleted the additions under section 68."

14. We, therefore, respectfully following the ratio laid down in the above case laws and consistent with the view taken in the above referred decision of this Tribunal and also observing the fact that since

the assessee has successfully proved the three necessary ingredients i.e., identity and creditworthiness of the share applicants and genuineness of the transactions as provided u/s 68 of the Act, are of the view that no interference is called for in the order of the ld. CIT(A) deleting the addition made by the Assessing Officer u/s 68 of the Act and the same is upheld.

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

Order pronounced in the Court on 26th July, 2023 at Kolkata.

Sd/-

**(SANJAY GARG)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 26/07/2023

SJC S.P.S.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata