

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA Nos. 6040 & 6120/MUM/2019
Assessment Years: 2012-13 & 2013-14

Forever Flourishing Fin. &
Inv. Pvt. Ltd.,
A-401, Pearl Arcade, Off J P
Road, Dawood Baug Lane,
Andheri (W),
Mumbai-400058.
PAN NO. AAACF 4311 Q
Appellant

DCIT(CC)-3(4),
Central Circle-3(4), Room No.
1915, 19th floor, Air India
Building, Nariman Point,
Mumbai-400021.

Vs.

Respondent

Assessee by : Mr. Ashok Bansal/Ajay Daga
Revenue by : Mr. Ankush Kapoor, CIT-DR

Date of Hearing : 13/07/2023
Date of pronouncement : 31/07/2023

ORDER

PER OM PRAKASH KANT, AM

These two appeals by the assessee are directed against two separate orders dated 25.07.2019 and 24.07.2019 for assessment year 2012-13 and 2013-14 respectively, passed by the Ld. Commissioner of Income-tax (Appeals)-51, Mumbai [in short 'the Ld. CIT(A)']. Being identical issue in dispute, permeating from same set of facts and circumstances, involved in these appeals, same



were heard together and disposed off by way of this consolidated order for convenience.

2. The grounds raised in ITA No. 6040/Mum/2019 for assessment year 2012-13 are reproduced as under:

A. Validity of Assessment

1. *The CIT (A) erred in holding that the assessment was validly re-opened.*

1.i. *In doing so, he did not appreciate that facts narrated in the reasons recorded for reopening of the assessment were already before the A in the course of original assessment proceedings pursuant to notice u/s 143(2) of the Act dt. 23.09.2013 which assessment was pending when the case was transferred to his charge by CIT-8 by his order dt. 20.08.2014 for these very facts but for the reasons best known to AO he did not pass the order us 143(3) though he was having sufficient time available with him as the case record were transferred to him by CII's order dt. 20.08.2014 and the assessment was getting barred by limitation of time on 31.03.2015 and the AO could not have taken recourse to section 147 of the Act to cover up the lapse on his part.*

1 ii. *In any event, the CIT(A) did not appreciate that the return of income filed us 139(1) of the Act which was selected for scrutiny was deemed to have been accepted in law us 143(3) of the Act having regard to all the material and the information available on record and, therefore, the issue of notice us 148 of the Act on the same set of facts and circumstances is nothing but change of opinion which is not permissible in law as held by the Apex Court in the case of Kelvinator of India Ltd.*

1.iii. *Further, in any event, the CIT (A) erred in holding that information received by the AO through Departmental channels was credible and actionable and was sufficient to invoke the provisions of section 147 of the Act ignoring the settled position of law that the AO before assuming jurisdiction us 147 of the Act is required to make some*



preliminary enquiry and has to form his independent opinion of income escaping assessment which facts are totally missing in the appellant's case.

2. The CIT(A) in justifying the validity of assumption of jurisdiction u/s 147 of the Act did not appreciate that the information received by the AO was vague and the crucial link between the information made available and the formation of belief was absent in as much nowhere in the reasons recorded as well as in the order disposing of objections to the reasons recorded the AO has listed out name of the companies from whom Rs.10.50 crs. were received by the appellant towards share capital and premium which were alleged to be bogus and in any event, the CIT(A) could not have improved upon from what has already been stated in the reasons recorded.

3. The CIT(A) erred in holding that the assessment made was in accordance with law even if no opportunity was given to the appellant to cross examine the persons whose statements were heavily relied upon in drawing the adverse inference in the light of the fact that no corroborative evidence was brought on record to support the said statements and he did not appreciate that giving of opportunity to cross-examine was highly imperative on the facts and circumstances and non-giving thereof has violated the principles of natural justice which has rendered the assessment as null and void.

B. Merits

74. The CIT(A) erred in confirming the addition u/s 68 of the Act of Rs.105000000/- in respect of share capital and securities premium.

4.1. In confirming the addition as above, the CIT(A) erred in

a. not appreciating that the primary onus which lay on the appellant stood fully discharged and the same shifted to the AO who neither dislodged the material and evidence placed on record nor made any independent enquiry,

b. not appreciating that, the AO merely relied upon the statements of alleged entry providers and / or dummy directors without bringing any corroborative material in



support of the same and in any event, the statements of alleged entry providers were recorded by other officers of the Dept. in the enquiries unconnected with the appellant,

C. relying upon various judicial pronouncements which are distinguishable on facts and by-passing the decisions of the jurisdictional high court as well as persuasive decisions of other high courts relied upon by the appellant which are on identical facts,

d. not appreciating that no addition can be made us 68 of the Act in respect of share capital if the identities of the share applicants were established, and

e. holding that the AO has observed that the alleged bogus shareholders have within a short span of time sold the shares of the appellant to entities of the appellant group at face value and thereby incurred huge losses, a fact not borne out from the record.

5. Without prejudice to the above, the CIT(A) did not appreciate that in drawing the inference that the appellant is an entry provider, then consistent with his said stand, no addition could have been made in the hands of the appellant.

6. The CIT(A) erred in not appreciating that if the financials of the appellant did not justify receiving of share capital at a huge premium and the financials of the companies who have invested in share capital of the appellant also did not justify receiving of share capital at a huge premium then no addition could have been made in the hands of the appellant and the same, if at all, was required to be made in the hands of Mahavir Group of cases who have availed loans from the appellant in as much as the genesis of notice u/s 148 of the Act on the appellant was the search action on the said group to verify huge loans taken by them including from the appellant.

Your appellant, therefore, submits that the order under appeal be quashed and in the alternative addition made be directed to be deleted.



2.1 The grounds raised in ITA No. 6120/Mum/2019 are reproduced as under:

1. The CIT(A) erred in not adjudicating upon Gr. No. 1 before him with regard to assumption of jurisdiction by the AO in the face of the objection of the appellant as provided u / s 124(3) of the Act.

2. The CIT (A) erred in confirming the addition u/s 68 of the Act of Rs.9,16,35,375/- in respect of share capital and securities premium.

2.1. In confirming the addition as above, the CIT(A) erred in

a. not appreciating that the primary onus which lay on the appellant stood fully discharged and the same shifted to the AO who neither dislodged the material and evidence placed on record nor made any independent enquiry,

b. not appreciating that, the A merely relied upon the statements of alleged entry providers and / or dummy directors without bringing any corroborative material in support of the same and in any event, the statements of alleged entry providers were recorded by other officers of the Dept. in the enquiries unconnected with the appellant,

c. relying upon various judicial pronouncements which are distinguishable on facts and by-passing the decisions of the jurisdictional high court as well as persuasive decisions of other high courts relied upon by the appellant which are on identical facts,

d. not appreciating that no addition can be made u/s 68 of the Act in respect of share capital if the identities of the share applicants were established, and

e. holding that the AO has observed that the alleged bogus shareholders have within a short span of time sold the shares of the appellant to entities of the appellant group at face value and thereby incurred huge losses, a fact not borne out from the record.

3. Without prejudice to the above, the CIT(A) did not appreciate that in drawing the inference that the appellant



is an entry provider, then consistent with his said stand no addition could have been made in the hands of the appellant.

3. On perusal of the grounds raised in these two appeals, we find that on merit grounds raised in both the appeals are identical except the difference of amount involved. The ground challenging validity of the reassessment has only been raised in assessment year 2012-13. As far as merit of the additions is concerned, before us, the Ld. Counsel argued appeal for assessment year 2013-14 and requested for following those arguments in the assessment year 2012-13 also. The grounds challenging validity have been argued in AY 2012-13 and grounds on merit have been stated to be covered by the arguments for assessment year 2013-14. In view of the submission of the parties in assessment year 2012-13, we are adjudicating the grounds challenging the validity of the reassessment and as far as merit is concerned, we are adjudicating on the grounds of the assessment year 2013-14 and said finding shall be followed in assessment year 2012-13.

The Validity of the Reassessment in Assessment Year 2012-13

4. Briefly stated facts of the case are that the assessee filed its return of income for the assessment year consideration on 29.09.2012 declaring total income of Rs.5,12,240/-. A search action u/s 132 of the Income-tax Act, 1961 (in short 'the Act') was carried out by the Investigation Wing of the Income-tax Department, in "Mahavir Group" of cases including M/s Mahavir Road, &



Infrastructure P. Ltd. i.e. Flagship Company of Mahavir Group. During search, it was observed that “Mahavir Group” of Companies received unsecured loan from the assessee company, therefore, the assessee company was covered under survey proceedings u/s 133A of the Act on 21.11.2013. During survey action it was observed that assessee issued shares at huge premium to various share applicant companies. The Investigation Wing was of the opinion that share premium received by the assessee was without any basis and huge premium was not justified considering the investments of the assessee. The Investigation Wing further carried out inquiries about the share holders who invested in the company. The Investigation Wing observed that the shareholder companies of the assessee were not available at their stated address. It was further noticed by the Investigation wing that 15 shareholder companies of the assessee, were concerns of “Shri Deepak Patwari” and “Sh Devesh Upadhyay”, both entry operators, who had floated more than 100 companies with dummy director with sole purpose of providing accommodation entries to the various beneficiaries. The Investigation Wing referred to statement of “Shri Deepak Patwari” recorded on oath u/s 132(4) on 14.11.2011 and subsequent statement u/s 131 on 01.02.2012 and 27.07.2013. In those statements, Shri Deepak Patwari had identified the alleged dummy director of those concerns. The investigation wing also recorded statement of the alleged dummy directors. The Investigation Wing supplied the material containing statements of relevant persons to the Assessing Officer, who, after



recording reasons to believe that income escaped assessment, issued a notice u/s 148 of the Act on 01.02.2016. The assessee in response, requested to treat original return of income filed on 29.09.2012 as being filed in response to notice u/s 148 of the Act. After providing opportunity of being heard, the Assessing Officer completed the reassessment proceedings u/s 147 r.w.s. 143(3) of the Act on 30.06.2017, wherein, he added the share capital along with share premium received from 15 shareholders during the year under consideration amounting to Rs.10,50,00,000/- in terms of section 68 of the Act. On further appeal, the Ld. CIT(A) rejected the grounds challenging validity of the reassessment as well as upheld the addition made u/s 68 of the Act on merit.

5. Before us, the Ld. Counsel of the assessee challenging the validity of the reassessment referred to Ground No. 1(i) and submitted that in the case original assessment proceedings pursuant to notice u/s 143(2) of the Act dated 23.09.2013 were initiated and same continued, therefore in the process of continuance of scrutiny proceedings u/s 143(3) of the Act, the Assessing Officer is not justified in issuing notice u/s 148 of the Act for reopening of the assessment.

5.1 In support of ground, the Ld. Counsel relied on the decision in the case of Bangalore Bench of the ITAT in the case of M/s VVD Construction Pvt. Ltd. v. DCIT ITA Nos. 3384 & 3388/Bang/2018 dated 22.03.2021 and decision of Hon'ble Bombay High Court in



the case of Jainam Investments (439 ITR 154), Hon'ble Delhi High Court in the case of Es Advertising (Mauritius) S.N.C. ET Compagnie 437 ITR 1.

6. On the contrary, the Ld. Departmental Representative (DR) referred to the report of the Assessing Officer dated 04.02.202, a copy of which was filed during the course of the hearing and submitted that the Assessing Officer on verification in Income-tax Department system (on server) found that proceedings u/s 143(3) of the Act were already dropped by the then Assessing Officer. Thereafter assessment was reopened on 05.01.2016 by the Assessing Officer, however same was also dropped due to notice issued sans approval from the Competent Authority and thereafter again Assessing Officer recorded the reasons to believe and issued notice u/s 148 of the Act in respect of current reassessment proceedings. The Ld. Counsel of the assessee did not dispute the report of the current Assessing Officer. In the circumstances, the allegation of the Ld. Counsel of the assessee of issue of notice u/s 148 for present reassessment proceedings, during the continuance of the scrutiny proceedings u/s 143(3) of the Act, are without any basis or supporting documents. Thus the ratio of the decisions relied upon by the Ld. Counsel of the assessee cannot be applied over the facts of the assessee and accordingly the ground No. 1(i) of the appeal is dismissed.



7. In ground No. 1(ii), the assessee has challenged the reassessment proceedings on the basis of the change of the opinion.

7.1 Before us, the Ld. Counsel of the assessee submitted that all the material and information in respect of shareholders duly was filed during the course of the regular assessment proceedings and no adverse inference has been drawn by the Assessing Officer. Therefore, reopening of the assessment on same set of information, which was already available on record, amount to “change of opinion”. The Ld. Counsel in support of contention, relied on the decision of the Hon’ble Supreme Court in the case of Kelvinator of India (123 Taxman 433).

7.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Assessing Officer had already dropped the proceedings u/s 143(3) of the Act and therefore no opinion was framed or made in respect of alleged shareholders. Accordingly, the contention of the assessee of change of the opinion in reassessment proceedings is without any basis or support of the documents and thus accordingly rejected. The ground No. 1(ii) of the Act is accordingly dismissed.

8. Regarding ground No. 1(iii) of the Act, the Ld. Counsel has referred that before assuming jurisdiction u/s 147 of the Act, the Assessing Officer was required to make some preliminary inquiry



and has to be form his independent opinion of income escaping assessment. Due to failure on the part of the Assessing Officer for doing so, the reassessment proceedings are therefore valid.

8.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the prior to 01.04.2021 there was no provision under the Act for making inquiry before issue of notice u/s 148 of the Act. The provision for conducting inquiry prior to issue of notice has been introduced w.e.f. 1/4/2021 by way of inserting new section i.e. 148A of the Act. Under the provisions during relevant period, the Assessing Officer was required to only form reasonable belief on the basis of a reasonable material and sufficiency or correctness of the material was not required to be examined at that stage of issue of notice u/s 148 of the Act. In absence of any specific provision of making inquiry prior to issue of notice u/s 148 of the Act, it was not mandatory for the Assessing Officer for making preliminary inquiry before issue of notice u/s 148 of the Act. Accordingly the ground No. 1(iii) raised by the assessee is dismissed.

9. In ground No. 2, the assessee has challenged the validity of the issue of the issue of notice u/s 148 of the Act on the ground that reasons recorded are vague and crucial link between the information made available and reasons recorded was absent. It was contended that in the reasons recorded, the Assessing Officer



has not listed name of companies from whom share premium was received.

9.1 We have heard rival submission of the parties with reference to the ground. In our opinion reasons have been recorded on the basis of specific information, *firstly*, information found during the course of the search in the case of 'Mahavir Group' of cases, *secondly*, information gathered during survey proceedings in the case of the assessee, *thirdly*, information gathered by the Investigation Wing in respect of shareholders, the information being from one of the creditable source and linked with the reasons recorded in the case of the assessee, we don't find any infirmity in rejecting contentions of the assessee by the Ld CIT(A). There is no particular format is specified statutorily for recoding reasons, thus, it is not material to record names of the shareholders specifically in the reasons recorded and reassessment can't vitiate for that reason.

10. In next ground, the assessee has challenged the validity of the reassessment proceedings on the ground that no cross-examination of the persons whose statements have been relied in drawing adverse inference were provided to the assessee and also no corroborative evidence were brought on record to support those statements. According to the Ld. Counsel, due to lack of opportunity for cross-examination, the Assessing Officer has violated of the principle of natural justice and which has rendered the assessment as null and void.



10.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In our opinion, this is an issue in dispute which has been examined while deciding on merit of addition and initiation of the proceedings u/s 147 cannot be quashed merely for the reason that during the course of the reassessment proceedings, the assessee has not been provided opportunity for cross-examining the persons whose statement have been related by the Assessing Officer and this issue shall be adjudicated while deciding the merit of the addition. Accordingly, the grounds challenging validity of the reassessment of the assessee is dismissed.

Adjudication of Addition on Merit:

11. Now we take up the appeal of the assessee challenging the addition of share capital and share premium in terms of section 68 of the Act on merit. In assessment year 2013-14, the assessee company allotted shares of face value of Rs.100/- per share at a premium of Rs.875/- per share. The details of the shareholders are reproduced as under:

Original Share Holder	Details of Shareholders to whom shares were first allotted						
	Date of allotment	Nos of Shares allotted	Face value/share	Total Amount Received (FV)	Premium/ Share	Total Premium Received	Grand Total (FV+Premium)
Adopt Developers	30/03/2013	4100	100	410000	875	3587500	3997500
Assemble Construction Pvt. Ltd.	30/03/2013	6650	100	665000	875	5818750	6483750
Barbie Tradelink Pvt. Ltd.	30/03/2013	7175	100	717500	875	6278125	6995625
Binapani	30/03/2013	4600	100	460000	875	4025000	4485000



Merchanddise Pvt. Ltd.							
Blossom Dealcom Pvt. Ltd.	30/03/2013	7175	100	717500	875	6278125	6995625
Comfort Dealtrade Pvt. Ltd.	30/03/2013	4100	100	410000	875	35875000	3997500
Evernew Conclave Pvt. Ltd.	30/03/2013	14850	100	1485000	875	12993750	14478750
Faster Trade Venture Pvt. Ltd.	30/03/2013	2526	100	2526000	875	2240000	2496000
Gayatri Dealtrade Pvt. Ltd.	30/03/2013	5100	100	510000	875	4462500	4972500
Intimate Buildcon Pvt. Ltd.	30/03/2013	3575	100	357500	875	3128125	3485625
Positive Devcon Pvt. Ltd.	30/03/2013	9025	100	9025000	875	7896875	8799375
Sraboni Sales Pvt. Ltd.	30/03/2013	1525	100	152500	875	1334375	1486875
Variety Trade-Link Pvt. Ltd.	30/03/2013	4100	100	410000	875	1334375	1486875
Visible Realestate	30/03/2013	4100	100	410000	875	3587500	3997500
Wonder Procon Pvt. Ltd.	30/03/2013	17925	100	1792500	875	15684375	17476875
Total		93985		9398500		82236875	9,16,35,375

11.1 In response to the query by the Assessing Officer for justifying the genuineness of the share capital/premium, the assessee filed name, address and PAN of the shareholders along with confirmation from them. The assessee also filed balance sheet of share holders/subscribers, their bank statement and acknowledgement of the income tax return filed. But according to the Assessing Officer, the share premium charged from the share subscriber/shareholder was excessive looking to the valuation of the assessee company. The Assessing Officer referred, **firstly**, to statement of accountant of the assessee company recorded on 21.11.2013 (during the course of survey action) u/s 131 of the Act wherein, he submitted that



assessee company was planning to start a new business i.e. construction and land development and for which the investors had invested their money in the assessee company but he could not justify the quantum of share premium. He stated that the amount received by way of share premium was further utilized for shares and securities and giving loans and advances. **Secondly**, the ld AO referred to statement of the director of the assessee company, Shri Krishan Kumar, which was recorded 03.12.2013 before the ACIT of the Investigation Kalyan, Thane, wherein he was asked to explain genuineness of the share premium transactions of the assessee company however, he requested for further time for filing relevant details but ultimately no such details were filed before the Investigation Wing. **Thirdly**, The Assessing Officer has relied on the statement of Shri Deepak Patwari, wherein he stated that shareholder companies, who invested in assessee, were dummy companies floated by him engaging dummy directors. The said statement of Shri Deepak Patwari was recorded u/s 132 of the Act on 14.11.2011 and subsequently u/s 131 on 01.02.2012 and 22.07.2013 by the Investigation Wing, Kolkata. The Assessing Officer relying on the statement of sh Deepak Patwari and dummy directors including Shri Guha, Shri Ajay Kumar Thakkar etc. that the assessee had obtained accommodation entry of share capital. The Assessing Officer has extensively referred to the statement of those persons from para 11.2 to 14 (on page 7 to 64)of the impugned order. The Assessing Officer concluded his finding in



para 19 of the assessment order. For ready reference said conclusion is reproduced as under:

“19. For the following reasons, the inevitable finding of fact is that the issue of shares is not genuine and therefore the share capital issued by the company needs to be taxed under Section 68 of the Act -

*a premium of Rs. 875 per share on a face value of Rs. 100 was alleged to have been paid by various companies in the case of an unlisted private company with a level of assets and earnings per share as displayed by the assessee. No dividends have ever been declared by the company. For Assessment Year 2012-13 the company had a profit of Rs.5,47,964 on a capital employed of Rs. 15,30,84,461 (Share capital Rs. 1,54,40,000 + Share Premium Rs. 13,76,44,461) i.e. the return on capital was 0.35% as against which share premium of Rs. 8,22,36,875 was collected. **Neither the past performance of the company nor its present earnings justify the amount of premium which has been charged; which company?***

(ii) even the most reputed companies do not command such a high premium on their share value when their return on capital employed is 0.35% per annum. It is incomprehensible as to why any person will invest in the shares of a company which is earning just 0.35% per annum;

*(iii) the assessee has **not furnished any details as to how and on what basis the share premium amount was fixed;***

(iv) if the value of the premium was worked out on the basis of the advice of financial consultants and advisors the assessee would have certainly furnished the details about such consultants and advisors;

(v) there are no indicators as to the date on which the pricing was arrived at;

(vi) the net worth as disclosed by the balance sheet, the potential earnings as disclosed by earnings per share or



even the vague protestations of future prospects would not justify a high premium of Rs. 875/- per share. If such a high figure was fixed in consultation with experts or financial institutions, it is inconceivable as to why the assessee was unable to provide even the barest of details of such consultation;

*(vii) the only inference that could be drawn was that no such consultation took place, **the rate of premium was fixed unilaterally by the assessee without any reference point to past records, present earnings or future prospects.** The object was not to attract genuine investors by pegging the premium at a realistic level but to bring in large amounts of unaccounted funds in the guise of share premium;*

(viii) It is not known as to why any of the existing shareholders / directors did not subscribe to the shares issued by the assessee company and whether the issue was made on rights basis and whether all the compliances of the provisions of Companies Act were done;

(ix) the Minutes of Meetings of the Board of Director and of the Members were called for but have not been furnished;

(x) it is not clear as to how the assessee company approached these subscribers in Kolkata when it is stated that these companies are not related to the assessee company;

(xi) the confirmations from the shareholders are in the same format with not a single word being different in any of the confirmations and surprisingly date being missing from each of the confirmations;

(xii) copies of bank statements of the shareholders which have been furnished show that they have received the funds on the same date on which the cheque issued by them to the assessee company was presented to their bankers;

(xiii) though called for however the assessee company has not furnished the details called for vide the aforementioned questionnaire issued vide notice dated 14-03-2016.



(xiv) the companies which have subscribed to shares of the assessee company have subsequently transferred the shares of the assessee company to its promoters / group warp concerns so that the control of the assessee company comes back to its promoters. The transfer of shares is at a loss of about 90% and these companies have not even reflected this loss in their tax returns;

(xv) the directors of the companies which have invested in the capital of the assessee company were not able to answer the questions as to what was the basis of their deciding to invest in the share capital of the assessee company;”

11.3 The Assessing Officer after making factual observations as above, relied on various decisions of the Hon’ble Courts and concluded that the amount of Rs.93,98,500/- received as share capital and Rs.8,22,36,875/- towards share premium totaling to Rs.9,16,35,375/- was unexplained cash credit in terms of section 68 of the Act. The relevant finding of the Assessing Officer is reproduced as under:

“20. The fact that the share application monies have come through account payce cheques is, at best, neutral. The question requires a thorough examination and not a superficial examination. It anything, in the light of the material gathered by the investigation wing about the modus operandi followed by the entry providers, the fact that the money was sent through banking channels loses all force. The modus operandi involves receipt by the entry providers of equivalent amount of cash from the assessee. The fact that the companies which subscribed to the shares were borne on the file of the ROC is again a neutral fact. Every company incorporated under the Companies Act, 1956 has to comply with statutory formalities. That these companies were complying with such formalities does not add any credibility or evidentiary value. In any case, it does not ipso facto prove that the transactions are genuine Investigation by the Investigation Wing has revealed that hundreds of companies



are floated and acquired, this is even corroborated by the facts recorded in several decisions of the Courts and Triounals some or which are -

CIT v. Focus Exports Pvt. Ltd. (Del HC)(ITA No. 218/2012; order dated 16.9.2014);

CIT v. Nova Promoters & Finlease (P.) Ltd. [2012] 18 taxmann.com 217 (Delhi HC);

Gagan Industries Private Ltd. V. ACIT (ITA No. 230/Ind/2012; AY 2005-06; Order dated 16.7.2012)(Indore Tribunal)

Balaji Coal Private Limited v. DCIT (ITA No. 366/Ind/2012; AY 2007-08; Order dated 30.4.2013)(Indore Tribunal);

Shri Jai Shiv Shankar Traders Pvt. Ltd. V. ITO (ITA No. 1068/Del/2013; AY 2008-09; Order dated 18.2.2015)(Delhi 'G' Bench);

Shree Astha Vinayak Traders Pvt. Ltd. v. ITO (ITA No. 1069/Del/2013; AY 2008-09; Order dated 18.2.2015)(Delhi 'G' Bench);

21. Compliance with statutory norms and requirements is only one aspect, out in the present case bona fide and genuineness of the transactions is the issue. The genuineness of the transaction critically hinges on the truth and veracity of the claim made by the assessee. The assessee was provided copy of relevant extracts of Statements u/s 131 of the I.T. Act, 1961 of aforementioned Kolkata based Companies on 18-03-2016

22. The Hon'ble Delhi High Court has in the case of *CIT v. Nova Promoters & Finlease (P.) Ltd. (2012] 18 taxmann.com 217 (Delhi)* observed as follows -

"The Tribunal also erred in law in holding that the Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee-company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no



explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of 'M' and 'R', the entry providers, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also figured as share applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The Commissioner (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference. (Para 31]

Where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to



show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under section 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. However, the Court cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed 'accommodation entry providers', whose business it is to help assesseees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such 'entry providers'. The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a premeditated plan - a smokescreen • conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. The ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under section 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The instant case does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary. [Para 38]

23. In the instant case, not only does the material show the link between the entry providers and the assessee-company, but the same has also been provided to the assessee in compliance with the rules of natural justice. Out of the list of



companies whose names figured in the information given by them to the investigation wing. 12 companies had provided the so-called "share subscription monies" to the assessee. There was, thus, specific involvement of the assessee-company in the modus operandi followed by Mr. Patwari.

24. Reliance is being placed upon the law laid down by the Supreme Court in *Sumati Dayal V. CIT* [1995] 214 ITR 801 / 80 Taxman 89 (SC) in applying the test of human probabilities. Section 68 of the Income Tax Act provides 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 Supreme Court held as follows:

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See : Parimisetti Seetharamamma [1965] 57 IT 532 at page 536). But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut it, the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably.

25. It has been contended that an addition within the meaning of Section 68 would not be justified in law in its hands even if the share application money was received from



bogus share holders. It was submitted that the companies were duly identified being income tax assesseees whose PANs were also furnished. Consequently, relying on the decision of the Delhi High Court in the case of CIT v. Lovely Exports (P.) Ltd. (2008] 299 IT 268/(2007] 158 Taxman 440 (Delhi) and the order rendered by the Supreme Court in a Special Leave Petition arising therefrom, it was urged that recourse to the provisions of Section 68 was not in order. Now, in order to appreciate the submission it would be necessary to consider the Judgment of the Delhi High Court in Lovely Exports (P.) Ltd. (supra). The Division Bench of the Delhi High Court dealt with a batch of appeals relating to three assesseees. In the case of Lovely Exports (P.) Ltd. (Supra) the Assessing Officer had proceeded to make an addition on the ground that the share applicants in question did not exist. The assessee had furnished necessary details such as the PAN of the share applicants. The share money had been received through banking channels. The Assessing Officer made an addition only on the ground that some of the summons which were issued to the applicants were returned unserved, whereas in the case of others the summons though served, had not been complied with. Now it is in this background that the Division Bench of the Delhi High Court noted that the Assessing Officer did not carry out any enquiry into the income tax record of the persons who had furnished the details in order to ascertain the status of the share applicants. Significantly, the judgment of the Delhi High Court makes a distinction between a case where shares are allotted in the course of a large scale subscription to the shares of a public company on the one hand and a case of private placement on the other. In the case of allotment of shares of a public company, the company may have no material other than the application forms and the bank transaction details to furnish some indication of the identity of the subscribers. This distinction between a public issue of share capital and private placement has been made out in the following observations of the Delhi High Court:

"15. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the



preponderance of evidence indicates absence of culpability and complexity (sic) of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of Sections 68 and 69 of the Income Tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer 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 Company." (Emphasis supplied).

26. *It is this decision of the Delhi High Court against which a Special Leave Petition before A.% 20135 4 the Supreme Court came to be dismissed on 11 January 2008. In CIT v. Lovely Exports (P.) Ltd. [2008] 6 DTR 308 (SC) while dismissing the Special Leave Petition the Supreme Court observed that if the share application money was received by the assessee from allegedly bogus share holders whose names were given to the Assessing Officer, the department was free to proceed to reopen their individual assessments in accordance with law. On this ground, the Supreme Court while dismissing the Special Leave Petition found no infirmity in the judgment of the Delhi High Court. The principle which was emphasised by the Delhi High Court in the case of Lovely Exports was followed by another Division Bench in CIT v. Value Capital Services (P.) Ltd. (2008) 307 ITR 334 (Delhi). In CIT v. Oasis Hospitalities (P.) Ltd. (2011) 331 ITR 119/ 198 Taxman 247/9 taxmann.com 179 (Delhi), a Division Bench of the Delhi High Court observed that the initial burden must be upon the assessee to explain the*



*nature and source of the share application money received. In order to discharge this burden, the assessee is required to prove: (a) Identity of shareholder; (b) Genuineness of transaction; and (c) Credit worthiness of shareholders. As far as the creditworthiness of the subscriber is concerned, that can be proved by producing a bank statement of the subscriber showing that it has sufficient balance in its account to enable it to subscribe to the share capital. The Delhi High Court held that once the initial burden has been discharged, the observations of the Supreme Court in the case of *Lovely Exports (P.) Ltd. (supra)* would suggest that the Department is free to proceed to reopen the individual assessments in the case of alleged bogus shareholders in accordance with law and is not remediless. This would be more so when the assessee is a public limited company and has issued share capital to the public at large as in such cases the company cannot be expected to know every detail pertaining to the identity and financial worth of the subscriber. However, the initial burden on the assessee would be some what heavy in case the assessee is a private limited company where the shareholders are closely related because in such a case the assessee cannot feign ignorance about the status of the parties. The judgment of a Division Bench of this Court in *CIT v. Creative World Telefilms Ltd. [2011] 203 Taxman 36 (Mag.)/ 333 IT 100 / 15 taxmann.com 183 (Bom.)* is along the same lines.*

27. *In the present case considering all the material on record including the material which had a bearing on the credit worthiness and financial standing of the alleged subscribing companies to the share capital of the petitioner. None of the companies was held to have a financial standing or credit worthiness which would justify making of such a large investment of the magnitude it has made at a premium of Rs. 875/- per share. The allotment of shares, it must be noted, has taken place in pursuance of a private placement. The principles which have been applied in relation particularly to the public subscription of shares of a public limited company can obviously have no application to the facts of a case such as the present.*

28. *Before leaving this aspect of the matter, it would be relevant to advert to two decisions of the Supreme Court, the*



first being in *CIT V. P. Mohanakala* (2007) 161 Taxman 169 / 291 / TR 278 (SC). While considering the scope of Section 68, the Supreme Court observed as follows:

"15.. When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee offer no explanation" means where the assessee offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

29. The Supreme Court noted, following the earlier decision in *CIT v. Orissa Corpn. (P.) Ltd.* [1986] 159 ITR 78/25 Taxman 80 (SC) that where the conclusion of the Tribunal was not unreasonable or perverse or based on no evidence, no question of law as such would arise for consideration. The Court further observed thus:

"25. ... The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The transactions though apparent were held to be not real one. May be the money came by way of



bank cheques and paid through the process of banking transaction but that itself is of no consequence.

30. In view of the discussion above, there is no doubt that the amounts received by the assessee company towards share capital and share premium are not genuine transactions. The assessee did not file any detail to substantiate the genuineness of share capital received with premium. The entire amount of Rs. 93,98,500 received towards share capital and also the amount of Rs. 8,22,36,875 towards share premium is added to the total income of the assessee u/s 68 of the Act. Thus, a sum of Rs. 9,16,35,375 (Rs. 93,98,500 + Rs. 8,22,36,875) is added w/s 68 of the Act. Penalty proceedings u/s 271(1)(c) are initiated for furnishing inaccurate particulars of income thereby leading to concealment of income.”

11.4 On further appeal, the Ld. CIT(A) analyzed the facts of the case in the light of the judicial precedents on the issue of section 68 of the Act. The Ld. CIT(A) in para 5.4 made observations in respect of assessee's share subscribers/shareholders as under:

- i. The taxable incomes shown by the share applicant companies are very meagre.*
- ii. Though the financials of the share applicant companies are extremely weak, still, they have managed to receive huge share premium in the range of Rs. 30 crores to Rs. 48.2 crores.*
- iii. The entire funds at the disposal of the share applicant companies have been deployed for making investments and/or advancing loans & advances.*
- iv. There are no fixed assets shown in the form of building, plant & "machinery, computers etc.*
- v. The administrative, expenses shown by these share applicant companies are nominal.*

11.5 Before the Ld. CIT(A), the assessee mainly raised following contentions which are reproduced by the Ld. CIT(A) in para 5.5 of



the impugned order for ready reference said contentions are reproduced as under:

“The assessee in the appellate proceedings has broadly raised the following contentions in its written submissions :-

- (i) It had discharged its onus by submitting full details of the said share applicants in the form of name, address, PAN, bank statement, balance sheet, confirmations etc. and thus, it had duly discharged its primary onus of proving the identity and creditworthiness of the share applicants and genuineness of the transactions.*
- (ii) It was not allowed to cross-examine Shri Deepak Patwari, Shri Devesh Upadhyay and their dummy directors, on the basis of whose statements, an adverse inference was drawn by the AO.*
- (iii) The onus was on the AO to demonstrate that the funds introduced by way of alleged accommodation entries of share capital at a huge premium had emanated from the coffers of the assessee.”*

11.6 The Ld. CIT(A) referred to the decision of the Hon’ble Delhi High Court in the case of Nova Promoters Pvt. Ltd. (supra) and then analyzed financials of the each of the shareholders. The Ld. CIT(A) again relied on the statement of the directors of shareholder companies and Shri Deepak Patwari. The Ld. CIT(A) in para 5.9 of impugned order held that the assessee failed to discharge its onus in respect of share capital and share premium introduced, observing as under:

*“5.9 From the aforesaid discussion, it can be observed that the **AO was in possession of incriminating material seized as well as incriminating statements recorded during the search conducted on Shri Deepak Patwari and Devesh Upadhyay, Entry operators, statements recorded during the survey conducted on the assessee group and the***



subsequent investigations carried out on the alleged 15 bogus share applicant companies based at Kolkata. From these investigations carried out, it was clear that the assessee and other entities of its group had availed of accommodation entries from the said 15 share applicant companies, who were connected with the entry operators, Shri Deepak Patwari. In statements recorded, Shri Deepak Patwari had identified the dummy directors of his dummy concerns to be J Rao, Birja Kumar Sharma, Girija Kumar Sharma, Amit Agarwal, Baikunth Nath Pandey, Radhe Shyam Sharma, Dibakar Mahato, Manoj Kumar Singh, G. Vinod Kumar, Jaydeep Singh, Kamala Kanta Bhuiyan, Akash Shrivastava, Aarti Panda, Suraj Kumar Panda, Krishna Jaiswal, Biplab Guha, Navin Kumar Singh, Gopal Sonkar, Avnish Singh, Jasminder Singh, Chittranjan Bhuiyan, etc.: It was found by the AO that the directors of the said 15 share holder companies are out of the dummy directors listed by Shri Deepak. Patwari in his statements recorded. Thus, there was a direct link established between the assessee and the said 15. share applicant companies which were not carrying out any genuine business **but solely engaged in providing accommodation entries and therefore, the onus cast upon the assessee was of a higher degree which cannot be said to have been discharged by only submitting name, address, PAN, Annual Report, bank statement etc..** The onus could have been discharged by producing before the AO the share applicants as its witness alongwith their books of accounts and supporting evidences etc. or atleast providing their latest addresses. However, it is observed that though most of the **said 15 share applicants were found to be not existing at the stated addresses, the assessee did not even provide their latest addresses to the AO.** Therefore, the assessee has clearly failed in discharging its onus of proving the genuineness of the transactions entered into with the said 15 share applicants of introduction of funds in the form of share capital at a huge premium.”

11.7 The Ld. CIT(A) also rejected the contention of the assessee seeking cross-examination, observing as under:

“5.10 The assessee further contends that it was not allowed to cross-examine Shri Deepak Patwari, entry operator as well as



the dummy directors, whose statements were relied upon by the A to draw adverse inference. Therefore, it was contended by the assessee that the principles of natural justice have been violated and accordingly the assessment order is vitiated. It is observed that there is no dispute that the said 15 alleged share applicant companies were not found at the stated addresses and the assessee could not provide their latest addresses. It is also a fact that the said share capital at a premium was received by way of private placement and therefore, it is surprising that the said 15 alleged share applicant companies who are based at Kolkata and are not at all related to the assessee group have subscribed. Further, in statements recorded, Shri Deepak Patwari had identified the dummy directors of his dummy concerns to be J Rao, Birja Kumar Sharma, Girija Kumar Sharma, Amit Agarwal, Baikunth Nath, Pandey, Radhe. Shyam Sharma, Dibakar Mahato, Manoj Kumar Singh, G Vinod Kumar, Jaydeep Singh, Kamala Kanta Bhuiyan, Akash Shrivastava, Aarti Panda, Suraj Kumar Panda, Krishna Jaiswal, Biplab Guha, Navin Kumar Singh, Gopal Sonkar, Avnish: Singh, Jasminder Singh, Chittranjan Bhuiyan, etc. It was found by the AO that the directors of the said 15 share holder companies are out of the dummy directors listed by Shri Deepak Patwari in his statements recorded. Moreover, from the discussion in the preceding paras, it is apparent that the primary onus of proving the genuineness of the transactions of receipt of share capital at a premium from the said 15 companies has clearly not been discharged. An opportunity to cross-examine is not an absolute. right. It is to be provided only once the basic onus cast upon the assessee is discharged. In the instant case, the basic onus to prove the genuineness of the transaction by producing the alleged 15 share applicants or atleast providing their latest addresses has clearly not been discharged by the assessee. In view of the factual scenario, the assessee cannot insist on being granted an opportunity to cross. examine the alleged hawala/bogus suppliers and on being provided the evidences relied upon by the AO.”

11.8 The Ld. CIT(A) for the first time , relied on statement of Shri Rakesh Sahewal, Accountant of the assessee group recorded on 13/06/2014 and statement of sh Devesh Upadhyay dated



30/12/2014. The relevant observation of Id CIT(A) is reproduced as under:

“5.14 It is also noted that search action was simultaneously conducted on the Assessee Group along with the search action on R K Kedia group of cases on 1306 2044. Kishan Kinadara is tie nain person of the Assessee Group, In course NO of the search action, the residential premises of Rakesh Sahewal, accountant of the Assessee Group was also covered. In the statement recorded of Rakesh and he works under his instructions. It was also admitted that the assessee and a number of other entities of the group controlled by Krishan Khadaria are engaged in receiving as well as providing accommodation entries of share application, loan etc. It was also explained that the cheque investment by the investors in share application, loan, etc is returned back by them in cash and similarly the investments made by them by way of cheque is received back in cash from the investees. Moreover, as noted earlier, even Shri Devesh Upadhyay in his statement on oath recorded on 30.12.2014 has admitted to be in the dubious business of providing accommodation entries and has also listed out some of his controlled concerns through dummy directors. The concern listed out includes M/s Barbie Tradelink Pvt. Ltd., Ms Blossom Dealcom Pvt. Ltd. and M/s Comfort Dealtrade Pvt. Ltd.. The relevant portion of the statement on oath of Shri Devesh Upadhyay is reproduced as under:

Q.3 • Kindly state in brief about your sources of income.

Ans. My main business activity is that of an accommodation entry provider. and main source of my income is from commission earned by providing various types of accommodation entries through various "jama, khare companies" under my control. A small portion of my income also comes from financial and Tax consultancy.. I run my business from my office located at P 39, Prince Street, Kolkata-13.

Q. 4. Please state as to what do you mean by "accommodation entry", "entry operator",



"jama kharchi companies" and "nature of various accommodation entries"?

Ans. The above terminology is used frequently in the business of accommodation entries. Accommodation entry is a financial transaction between two parties where one party enters the financial transaction in its books for accommodating the other party. Here one party provides book entry of influx of funds to the other party (beneficiary) in a manner that this other party doesn't have to pay any tax on such influx of funds. For this, such influx of funds in the books of beneficiary is done in the form of either some liability, which is never repaid by the beneficiary or in the form of some tax exempt income. These transactions are accommodated in lieu of cash of equal amount taken from the beneficiary. The entry operator earns some commission charged over and above this amount of accommodation entry, generally at certain fixed percentage for giving such accommodation entry. The purpose of such transactions is to accommodate one party (the beneficiary) by influx of money in its books through the other party, who takes cash in unaccounted manner from such beneficiary.

An entry operator is a person who is in the business of giving such accommodation entries in lieu of cash after charging certain percentage of commission in cash.

Jama kharchi companies refer to the companies under the control of accommodation entry operator, and from the books of these companies, funds are transferred, in one form or the other, to the books of the beneficiary. There is no actual business activity in these companies and funds (to be transferred to beneficiary) in the books and bank accounts of these companies are brought by a complex rotation of funds through the accounts of various other entities under the control of accommodation entry provider.

Various types of accommodation entries are given in the business of accommodation entries to different beneficiaries. Some of these accommodation entries used in our parlance are Long Term/ Short Term Entry, One time Share Premium Entry, Unsecured Loan Entry etc.



Q. 7. Kindly, furnish names of your such companies which are used for routing and providing accommodation entries to beneficiaries.

Ans. I don't remember all my such companies at present. However, some of these companies are as follows:

- "a). M/s Albino Overseas Private Limited.
- b) M/s Amanat Suppliers Private Limited
- c) M/s Anjali Suppliers Private Limited
- d) M/s Barbie Tradelink Private Limited
- c) M/s Beagle Vyapaar Private Limited
- f: M/s Blossom Dealcom Private Limited
- 8) MIs Camellia Vinimay Private Limited
- h) M/s Chaturbhuj Marketing Private Limited
- i) M/s Comfort Dealcom Private Limited
- j) 'MIs Comfort Dealtrade Private Limited
- k) M/s Devatma Distributors Private Limited
- 1) M/s Eash Vyapaar Private Limited
- m) Ms Eden Vyapaar Private Limited
- n) M/s Ekta. Tradecom Private Limited.
- "o) M/s Gallant Commosales Private Limited
- "P) M/s Graceful Tie-Up Private Limited
- q) M/s Hemlata Vinimay Private Limited
- r) M/s Inova Commotrade Private Limited
- s) M/s Kansabati Tradecom Private Limited
- t) . MIs Kapeeshwar. Vintrade Private Limited
- u) MIs Lavender Exim Private Limited
- v). MIs Mahamani Tradelink Private Limited"



11.9 Thereafter, relying on the various decisions cited, the Ld. CIT(A) upheld the addition made u/s 68 of the Act.

12. Before us the learned counsel of the assessee submitted that the order of the Ld. CIT(A) is perverse on facts and decision has been arrived upon by him applying the ratio of the various decision on those wrong facts cited by him. He submitted that **firstly**, the Ld. CIT(A) has mentioned wrongly that 15 share applicants were not found at their stated address by the Assessing Officer and the assessee did not provide their latest addresses. According to him, the assessee supplied confirmation name address and PAN details of the shareholders, but the Assessing Officer at any point of time during assessment proceeding neither issued any notice under section 133(6) of the Act or notice under section 131 of the Act or carried out for verification of identity of those shareholders, there's the contention of the Assessing Officer that those 15 shareholders were not founded their stated address is factually incorrect. The fact noted by the Ld CIT(A) that the assessee did not provide their latest address is also incorrect and based on the presumption. The learned counsel asked the learned DR to support the said contention by way of documentary evidence, but no such evidence was filed by the learned DR. The learned counsel mentioned that when the investigation wing already recorded the statements of the director of shareholder companies, then identity of those companies stands verified. **Secondly**, the learned counsel submitted that all



investor companies are engaged in investment activity and having net-worth for investment in shares of the assessee company. He submitted that being an investment company, there was not any unusual in accepting the money and further investment into the assessee company and no adverse inference can be drawn by way of that observation. **Thirdly**, the learned counsel submitted that addition has been made purely based on the statement of third parties mainly sh Deepak Patwari and directors of the Shareholder companies, but neither the statement nor cross-examinations of those persons have been provided to the assessee. He submitted that since addition are based solely on the statement of those persons and therefore it is sine qui non to provide their cross examination. Failure on the part of the Assessing Officer, being in the nature of violation of the principle of natural justice, addition needs to be deleted. **Fourthly**, without prejudice, he submitted that the statement of Sri Deepak Patwari relied upon by the Assessing Officer are for the period prior to serve in the case of the assessee and in his statement, he has nowhere stated that accommodation entries of share capital /premium have been provided to the assessee. The extract of statement of directors of the share holding companies reproduced by the assessing officer shows that statements are identically worded where they expressed ignorance about activities of shareholding companies but all of them have said stated of being engaged in accommodation entries, thus statements are either tutored or given under duress or coercion and thus need



independent cross examination. Further the statement of Rakesh Sahwal and Devesh Upadhyay referred by the ld CIT(A) in impugned order are in relation to the search dated 13/06/2014 i.e. subsequent to survey in the case of assessee. The said statements have been referred without confronting the same to assessee. The ld CIT(A) based on their statements has inferred that assessee was also an accommodation entry provider. In that case no addition of section 68 is warranted in the case of the assessee and only addition for earning commission is liable. Thus there are contradictions in finding of ld CIT(A). Further, in support of claim that there is violation of principles of natural justice for not providing cross examination, the ld Counsel relied on decision dated 2/09/2015 of Hon'ble supreme Court in the case of **Andman Timber Industries Vs CCE, Kolkatta in Civil Appeal No. 4228 of 2006.**

13. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that assessee received share capital and share premium from 15 subscribers. The Assessing Officer was in possession of the information gathered during the course of search action on the Mahavir Group of cases, survey action on the case of the assessee and information gathered by the Investigation Wing Kalyan in post survey proceedings carried out at Kolkata. The Ld. Assessing Officer based on this information asked the assessee to justify the



genuineness of the share capital and share premium received. The assessee in support of its claim filed the details of name, address, confirmation, bank statement, balance sheet, income-tax acknowledgement of statement of those investors etc. However, the Assessing Officer did not carry out any physical verification of the share subscribers by way of issue of notice u/s 133(6) or 131 of the Act. The Assessing Officer merely relied on the information which was gathered by the Investigation Wing and no independent verification of said information has been carried out by the Assessing Officer. Further, we observe that though the Ld. CIT(A) has mentioned that the Assessing Officer asked the assessee to provide new address of the share subscribers, however during the course of the hearing before us when the Ld. DR was asked to produce any letter or query raised by the Assessing Officer seeking new address from the assessee, but he could not support the finding of the Ld. CIT(A) by way of any documentary evidence, thus it is clear that order of the Ld. CIT(A) is factually perverse as far as fact of seeking new address from the assessee. Further, the Ld. Counsel of the assessee referred to the Paper Book page number 124 to 125 and submitted that the assessee sought copy of the material/statements which have been relied upon by the Assessing Officer. However, according to the assessee only extract of their statement was provided in pen drive at the fag end of assessment proceedings and no complete statements were provided. The relevant part of letter of assessee is reproduced as under:



“Kindly refer to the meeting which our CA Shri Ajay Daga had with your goodself yesterday whereat the relevant extract of statements of Shri Deepak Patwari and his so called dummy directors were furnished by you in the pen-drive for our comments.

At the outset it is submitted with all the emphasis at our command that you have given the above extract of the statements at the fag end of this month by which time the assessment is to be finalised, the same is totally against the settled principle of law of affording a reasonable time to the assessee for rebutting such statements. In the circumstances, it is not only difficult but impossible to give adequate response to the same within the short time available.

However, with a view to co-operating with the Dept. we have examined the statements superficially having regard to almost no time available to us and our observations on the same are as under:

- i. We have not received any share application money from the companies listed in the statement dt22.7.13 of Shri Deepak Patwart averred to be the companies controlled by him. Thus on this limited issue alone the said statement of Shri Patwari has no relevance and, therefore, no further comments are necessary.*
- ii. Even the statements of so called employees / dummy directors of Shri Patwari furnished to us have no relevance at all as their names do not appear in the name of persons listed out in the statement of Shri Patwari as his employees/dummy directors. The said statements also cannot be used against us.*
- iii. Even otherwise on going through the statements of so called dummy directors strangely it emerges that most of the said persons are puny persons, were not in employment since last two to three years with M/s. Deepak Patwari, have no educational background, and the answers to each of the questions raised are stereotyped which is quiet impossible of different persons giving exactly the same answers implying thereby that either the*



answers were put in their mouth or the investigation. officer recorded the answer and made them sign. Such statements cannot have any evidentiary value.

- iv. Moreover no information has been brought on record as to the treatment of the said statements in the assessments of Shri Deepak Patwari and /or the companies controlled by him.*
- v. In any event if you are relying upon the statements of these persons, then they constitute Deptt's witness and we hereby request you to allow us to cross examine them to ascertain the veracity of their statements. Unless that is done please note that in law the Dept, cannot draw adverse inference against us.”*

13.1 Thus, the Assessing Officer for making addition has merely relied on the statements of third party i.e. Director of the subscriber companies and another person claimed to being an entry provider but no cross-examination of those persons have been provided to the assessee.

13.2 In our opinion, cross-examination of the witnesses is one of the essential ingredients of the principle of natural justice and in absence of which the oral evidences given by the persons cannot be utilized against the assessee. The Assessing Officer cannot gather material or evidence at the back of the assessee and use it unilaterally. Evidence has to be tested on cross examination. Failure to afford opportunity to the assessee to cross-examine a third party whose evidence is sought to be utilised would make the assessment void as held in the cases of *Kishinchand Chellaram v. CIT* (1980) 4 Taxman 29 (SC), *Sona Electric Co. v. CIT* (1984) 19



Taxman 160 (Delhi), Nathu Ram Prem Chand v. CIT (1963) 49 ITR 561(All). In case of CIT v. Ashwani Gupta (2010) 322 ITR 396 (Del), the Delhi High Court while dealing with the issue of not providing the opportunity to cross examine the witnesses has held that once there is a violation of principles of natural justice inasmuch as seized material is not provided to the assessee nor is cross examination of the person on whose statement the AO relied upon, granted, then, such deficiencies would amount to denial of opportunity and consequently would be fatal to the proceedings.

13.3 Before us, the Ld. Counsel of the assessee has relied on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and submitted that in absence of cross-examination of third parties, no addition can be sustained. The relevant part of the decision in the case of Andman Timber Industries (supra) is reproduced as under:

“We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating



Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

13.4 We find that the sole basis of the addition in the case of the assessee is the statements of Shri Deepak Patwari and directors of the shareholder companies. We may like to mention here that the statement of Shri Deepak Patwari referred by the Assessing Officer pertains to the period prior to the survey carried out in the case of the assessee. Shri Deepak Patwari has mentioned that those companies who have invested in the assessee were operated by him through dummy director. But he has not stated that the share capital invested in the assessee company was in the nature of accommodation entry. Since, the Assessing Officer has merely relied on the statement of Shri Deepak Patwari and the directors of the shareholder companies without any other corroborative material or any independent inquiry carried out by the AO at his own and no cross examination of those persons have been provided , which being in violation of principle of natural justice, therefore, we set



aside the order of Id CIT(A) on merit and delete the addition . The grounds of the assessee challenging the merit of the additions are accordingly allowed for AY 2013-14. The facts and circumstance in AY 2012-13 being identical, the ground on merit of addition are allowed for AY 2012-13 also.

14. In the result, appeal for the assessment year 2012-13 is partly allowed whereas appeal for assessment year 2013-14 is allowed.

Order pronounced in the open Court on 31/07/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/07/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai