

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH MUMBAI**

**BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI S RIFAUR RAHMAN , ACCOUNTANT MEMBER**

**ITA No. 1863/Mum/2021
(Assessment Year: 2010-11)**

ITO – Ward 5(1)(1), Room No.570, 5 th Floor, Aayakar Bhavan, M.K.Road, Mumbai- 400020.	बनाम/ Vs.	AMSTrading&Investment Pvt Ltd., 1 st Floor, ShatrunjayApartments, 28 Sindhi Lane, Nanubhai Desai Road, Mumbai – 400004.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFCA6183N		
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

Appellant by :	Smt.Sujatha Iyengar.DR
Respondent by :	Shri.AjaySingh&ShriYogesh Joijode.AR

सुनवाई की तारीख / Date of Hearing	07/06/2023
घोषणा की तारीख /Date of Pronouncement	25/08/2023

आदेश / ORDER

PER PAVAN KUMAR GADALE - JM:

The revenue has filed the appeal against the order of Commissioner of Income Tax (Appeals)-48, Mumbai passed u/sec143(3) r.w.s 147 and Sec 250 of the Income Tax Act, 1961 (“the Act”).The revenue has raised the following grounds of appeal:-

1. "Whether on the fact and circumstances of the case the, LdCIT(A) was justified in deleting the additions on account of

accommodation entries by way of share capital and share premium of Rs1,55,00,000/- u/s. 68 of the I.T Act, 1961 from M/s. Empower Industries Ltd without appreciating the fact that Shri. Devang Master, Director of M/s. Empower Industries Ltd has accepted in his statement recorded u/s. 132(4) of the I.T. Act, 1961 on 12.03.2013 that M/s. Empower Industries Ltd is engaged in providing the accommodation entries by way of Share Premium and Share application and the onus was on the assessee to establish genuineness of such transactions especially when the assessee Company was found to be indulged in getting accommodation entries from the entry provider during the search action conducted by Investigation Wing of the Department?"

2. *"Whether on the fact and circumstances of the case the, LdCIT(A) was justified in deleting the additions on account of unexplained expenditure estimated as undisclosed income on account of alleged transaction/commission paid calculated as @5% amounting to Rs. 7,75,000/-for obtaining accommodation entries by way of Share Premium and Share application money of Rs. 1,55,00,000/- added u/s. 68 of the I.T. Act, 1961?"*
3. *"Whether on the fact and circumstances of the case and in law, the Ld. CIT(A) has allowed the appeal of the assessee on the same grounds without appreciating the facts of the AO's remand report wherein the AO has categorily commented that the assessee has submitted its bank statement only for two days i.e. on 22.03.2010 & 23.03.2010 for transferring the total amounts of Rs. 1,55,00,000/- and the nature and the utilization of fund transfer are not found of genuine nature?"*
4. *"Whether on the fact and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's appeal for A.Y. 2010-11 whereas the appeal of the assessee for A.Y2012-13 has been dismissed on the same grounds i.e. accommodation entries of Share Premium and Share application?"*

5. *The appellant prayed that the order of the LdCIT (A) on the grounds be set aside and that of the Assessing Officer be restored.*
6. *The appellant craves leave to add, amend or alter all or any of the grounds of appeal which may be necessary.*

2. The brief facts of the case are that the assessee company is engaged in the business of investments and trading. The assessee has filed the return of income for the A.Y 2010-11 on 03.10.2010 disclosing a total income of Rs. Nil and the assessee was completed u/s 143(3) of the Act on 20.03.2013 accepting the returned income of Rs. Nil. Subsequently the assessing Officer (AO) has received the information from DGIT(Inv) Mumbai that the assessee is engaged in obtaining the accommodation entries and is a beneficiary. During the F.Y 2009-10 the assessee has received the share application money from M/s Empower Industries Ltd who are engaged in the providing accommodation entries. The AO has reason to believe that the income has escaped the assessee and after recording the reasons for reopening of assessee, has issued notice u/s 148 of the Act. In response to the notice, the assessee has filed the letter to treat the return of income filed on 03.10.2010 as due compliance and the assessee was provided with the reasons and the objections were filed. The A.O. has disposed off the objections on 22-12-2015.

3. Subsequently the AO has issued notice U/sec 143(2) and 142(1) of the Act, in compliance to the notice the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. The AO on perusal of the financial statements found that the assessee during the financial year 2009-10 has issued 38750 shares of Rs. 10/- each paid up at a premium of Rs.490/- per share. Whereas the assessee has received the share application money from M/s Empower Industries Ltd of Rs.1,55,00,000/- consisting of paid up share value at Rs 8/- per share and share premium of Rs.392/- per share including the security and premium is Rs. 1,55,00,000/-. Whereas to examine the transactions, the AO has issued the show cause notice dated 9-03-2016. The assessee has submitted the details vide letter dated 17-03-2016 the copy of Audit, Copy of Pan Card of the investor company, bank statement reflecting the transactions, copy of share application form, copy of Form .No 2 filed with the R.O.C. and the judicial decisions. The A.O dealt on the information and relied on the statement recorded, and no valuation report was submitted and further the assessee has failed to produce the parties. Finally the AO found that the share application money and share premium does not satisfy the test of genuineness, creditworthiness and identity as per the provisions U/sec68 of the Act and treated as unexplained credit u/s 68 of the Act Rs.1,55,00,000/- and the A.O has estimated brokerage/

commission @5% of the value of Rs. 7,75,000/- U/sec69C of the Act and assessed the total income of Rs.1,62,75,000/- and passed the order u/s 143(3) r.w.s 147 of the Act dated 23.03.2016.

4. Aggrieved by the order, the assessee has filed an appeal with the CIT(A).The Ld. CIT(A) considered the grounds of appeal, statement of facts, findings of the A.O, submissions of the assessee and the remand report and the catena of Hon'ble High Court and the Hon'ble Tribunal decisions on the genuineness, creditworthiness and identity as per the provisions U/sec68 of the Act. Further the assessee has discharged its burden by submitting the information and the A.O has failed to make enquiries and deleted the additions and granted relief to the assessee observing at Page 44 Para 6.15 to 6.22 of the order read as under:

6.15. After considering the AO's remand report and rejoinder of the assessee I feel that all the queries raised by the AO are well explained by the assessee. I do not find any discrepancy in the action done by M/s. Empower India Ltd when it holds ample amount in the form of Reserve & Surplus fund. Also, the transactions for this period i.e. 22.03.2010 to 31.03.2010 are in continuous flow in the form of debit and credit entries. The AO's observation in respect of opening balance in the bank account at Rs. 11,40,124/- as on 22.03.2010 and closing balance as on 31.03.2010 is of Rs. 4,10,699/- do not hold much influence on this issue. In fact bank balance as on 22.03.2010 is reflected at Rs. 2,26,40,099/- and as on 23.03.2010 at Rs. 4,89,60,807/-. Opening and closing balance generally keeps on changing as per the transactions take place in debit and credit entries. Also, the assessee's account shows various transactions in between this

period which looks quite good i.e. six debit transactions dated 23.03.2010 out of which 3 transactions made with Jhankar Banquet for amounting of Rs. 50,00,000/- each and 2 debit transactions made with Roshabh Enterprise for amounting of Rs. 50,00,000/- also one transaction with Blue Peacock for amounting of Rs 25,00,000/-. The common feature which emerges from the AO's report is that M/s. Empower India Ltd had broadly made investments in assessee company by paying share premium out of its reserve fund. Normally reserves originate from profits only, though it is not always the case. The amount brought in by assessee in its books as share capital/ share premium from M/s. Empower India Ltd is duly reflected in the said statement. Therefore, no view can be taken

6.16 Besides the assessee has also submitted relevant details about the share transaction i.e. share application form copy of bank statement, audited account, confirmation etc. Therefore it is not the case that assessee failed to discharge its onus in this respect.

6.17 Further, the assessee has relied upon the judgments of Hon'ble ITAT Mumbai given on similar line in the case of ITO 9(2)(3), Mumbai vs City gold Education Research Ltd., wherein, M/s. Empower Industries Ltd. made investment in the shares of City gold Education Research Ltd., paying high share premium. The relevant part of the said judgment is reproduced as under for the sake of clarity:-

5.6 In the case of M/s. Empower Industries India Limited, Mumbai (Rs.5,00,40,000/-) the said company has given 28th Annual Report in the year under consideration. Thus it is a very old company. The said company has also declared dividend of 3% in A.Y. 2010-11. The financial statement of the said company reveal the following:

i. Equity share capital of Rs. 12,41,42,875, share application money of Rs. 93,88,06,000 and reserves and surplus of Rs. 18,70,917 ii. Fixed Assets of Rs. 5,13,06,789 including additions made in the current year of Rs. 1,19,64,849/- majorly in computer and computer peripherals. iii. The company has inventories of

Rs.3,15,18,831 and huge cash and bank balance of Rs. 5,57,69,177 which includes balance of ED with Foreign Bank of Rs. 1,31,91,650.

iv. The company has huge investments of Rs. 64,64,25,000.

v. The said company has written off GDR issue expenses of Rs. 10,10,43 and paid salary and wages of 2,31,46,513.

5.6.1 The above details prove that the company had capacity to make investment in the appellant's company and also issue shares at premium.

5.6.2 Identity was proved by submitting the PAN card and registered address of the said company. 5.6.3 Bank account of the said company reflects the payment made to the appellant company for investing in shares. But there is no entry in bank accounts which reflects that the appellant company has paid back the amount of investment.

5.6.4 As regards the statement of ShriDevang Dinesh Chandra Master, Director of Empower Industries India Limited recorded u/s. 131 on 12.03.2013 where he admitted, that the entire trading activity in sale and purchase of computer hardware and software is bogus and this was mainly done to increase the top link of bank and other credit proposal the said company has made bogus purchases and sales to other companies. It does not mean that this company has also made bogus investment in M/s. Citygold Education Research Ltd. Also in the statement recorded u/s. 131 nowhere it is mentioned that investment made is bogus.

5.6.5 As regards Ahmedabad Investigating Wing's action u/s. 132 that ShriDevang Dinesh Chandra Master is only a entry provider the said company has made bogus purchases and sales to other companies, which does not mean that it has made bogus investment too.

5.6.6 The above company has specifically confirmed the transaction of making investment in the shares of appellant company vide confirmation filed by the appellant at page 40 of PB.

Therefore, statement of ShriDevang Dinesh Chandra Master, Director of Empower Industries India Limited is not called for.

5.6.7 The amount which has been paid by the said company never came back to the appellant company. The said company are holding till date the shares of the appellant company.

5.6.8 Hence addition made in the assessment is not correct.

7. We find that the AO proceeded to discredit the investors of the assessee, which is completely erroneous. The AO was looking for proof beyond doubt and proceeded on an element of suspicion that the amounts of investments are really those of the assessee, which have been ploughed back by the assessee. But the settled principle of law is that any amount of suspicion however, it strong might be, is no substitute for proof. Suspicion is not sufficient enough to lead to the conclusion that the investments received by the assessee company are all manipulated receipts and on that basis he can record a finding that the explanation of the assessee is not satisfactory. According to us, so long as the proof and identity of the investor and the payment received from him is through a doubtless channel like that of a banking channel, the receipt in the hands of the assessee towards share capital or share premium does not change its colour. The money so invested in the assessee company would still be the money available and belonging to the investors. The consistent principle followed is that the investors sources and creditworthiness cannot be explained by the assessee. If the Department has a doubt about the genuineness of the investor's capacity, it is open to it to proceed against those investors. Without taking such a course of action, the AO proceeded on conjectures and surmises that the assessee has, in fact, ploughed back the money. The very approach of the AO is completely opposed to settled legal principles enunciated and they have arrived at conclusions contrary to the legal principles on the subject. Further, they are finding fault with the assessee for the alleged failure of its investors in proving beyond doubt that they have the capacity to invest at the moment they did in the assessee. The Assessee is not expected to perform a near impossibility.

8. From the above, it is clear that the assessee has completely produced the evidences before the AO i.e. the identity of the shareholder by filing the registered address with ROC, PAN No. along with copy of returns of income furnished with particular Ward of the department of the investors. The assessee has also received money from shareholders through account payee cheque and issued documents such as share certificate, return of allotment filed with ROC forms which were filed before the AO. The assessee has also filed copies of bank statement of the subscribers showing that it had sufficient balance in its accounts to enabled the subscriber to subscribe the share capital. In view of these facts and circumstances, once the AO has not rebutted the evidences, the AO cannot disbelieve the same. This issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of CIT vs. Gagandeep Infrastructure Pvt. Ltd. (2017) 394 ITR 680 (Bom), wherein Hon'ble High Court had held as under: -

(e) We find 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. In any view of the matter the three tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are

bogus. The Apex Court in Lovely Exports (P.) Ltd.(supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.

9. Further, in recent decision of Hon'ble Bombay High Court in the case of CIT vs. Orchid Industries Pvt. Ltd (2017) 397 ITR 136 (Bom) following the case law of Gagandeep Infrastructure Pvt. Ltd deleted the addition by observing in as under: -

"5] The Assessing Officer added Rs.95 lakhs as income under Section 1 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6] The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee In view of these voluminous documentary evidence, only because those

persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case"

10 We have also made enquiry from the learned Sr Departmental Representative, whether the investors or this company is a Shell company or in the list prepared by Ministry of Corporate Affairs, Govt of India. The learned Sr. DR, stated that this information is not available with the department. Further, we made enquiry from the learned Counsel for the assessee whether this company has been strike off from the Registrar Of Companies or not, the learned Counsel stated that it is very much on the register of Registrar of Companies. In view of these facts, we reach to a conclusion that this is existing company and even the investors, are existing.

11. In view of the above facts and circumstances of the case, we are of the view that CIT(A) has rightly deleted the addition and we confirm the same. This issue of revenue's appeal is dismissed."

6.18 Further, in the case of ITO-4(3)(4), Mumbai vs Sidhivinayak Filaments P Ltd, vide order dated on 21 June, 2019 the Hon'ble ITAT Mumbai, on similar issue has decided the issue in great length in which Empower India is one of the investor and directed to delete the addition in respect of unexplained share application money. The relevant part is reproduced as under:

"We have heard rival submissions and perused the materials available on record including the entire documents filed by the assessee before the lower authorities which are not in dispute before us. These documents are also placed on record in the form of detailed paper books by the assessee. We find that the Id. CIT(A) had elaborately dealt with the entire issue by due appreciation of the various documentary evidences submitted in of investor companies duly proving the three necessary ingredients of Section 68 of the Act viz. identity of the investors, creditworthiness of the investors and genuineness of the ITA No.3003/Mum/2017 M/s. Siddhivinayak Filaments P. Ltd. transactions. We find that none of these documentary evidences

were controverted by the ld. AO by proceeding to make further enquiry in this regard. None of these facts were even denied by the ld. AO or any deficiencies were found thereon by the ld. AO and we also take note of the fact that out of the five investor companies who had invested monies in the assessee company, four of them are public limited companies which are listed CIT(A) had placed reliance on the co-ordinate bench decision of this Tribunal in the case of Gagandeep Infrastructure supra, wherein it was held that the amendment to Section 56(2)(viib) and proviso to Section 68 of the Act are only prospective in nature and applicable only from A.Y.2013-14 onwards and not earlier. We find that this judgment has been subsequently approved by the Hon'ble Jurisdictional High Court. We find that the Ld. DR vehemently relied upon the decision of Hon'ble Delhi High Court in the case of Navodaya Castles (P) Ltd.. reported in 50 taxmann.com 110 We hold that the decision of Hon'ble Jurisdictional High Court would bind this Tribunal. Hence, in view of the aforesaid observations and various decisions of Hon'ble Jurisdictional High Court relied upon by the ld. CIT(A) while granting relief to the assessee, we do not deem it fit to interfere in the said order of the ld. CIT(A). Accordingly, ground No.2 raised by the revenue is dismissed."

6.19 Further the Hon'ble M. P. High court Indore Bench in case of PCIT vs. Chainhouse International, ITA No.112/2018, directed to delete a similar addition in respect of share application money by Empower India Pvt.Ltd. and other companies. Relevant findings are reproduced as under :-

"73. The investor company has made investment of Rs.742.45 crore in shares of Reliance Industries Ltd. The investor company also has made investment of Rs.641.02 crore in the shares of Reliance Communication Ltd. The net worth of the investor company as on 31.3.2010 was Rs.3979.51 crore which includes Reserve and surplus of Rs.3947.48 crore. The investor company had been assessed under Section 143(3) for the relevant assessment year 2010-11 and assessed at Rs.30.03 crore and paid tax on book profit of Rs.62.53 crore under Section 1151. The investor company also filed its return of income for assessment year 2010-11 declaring taxable of Rs.24.85 crore. Income from operations and other income during the assessment year 2010-11

was amount to Rs.217.25 crore whereas in the previous year it was Rs.261.15 crore. The Commissioner Income Tax (Appeals) and appellate tribunal have taken into account the following facts and documents to arrive at the conclusion that the genuineness of the investigation has been proved:

"(D. On 17.12.2013 action under Section 132 was taken. During post search enquiries, the assessee HIGH COURT OF M.P. BENCH AT INDORE Pg. No.--67- (ITA No.112/2018 & Other connected matters) submitted the details of share capital received by the assessee company including receipt of share capital from M/s Sonata Investment Ltd. Mumbai amounting to Rs.37.80 crore.

(ii). On 13.1.2014, the investigation wing, Delhi made necessary enquires by issue of notices under Section 133(6) to the investor company.

(iii) On 11.2.2014, the investigation wing, Delhi received confirmatory reply dated 5.2.2014 from Sonata Investment Ltd. confirming the investment made.

(iv) Thereafter, the case was centralised with AO, Central Circle-18, New Delhi. (v) The AO issued various questionnaires dated 12.10.2015, 13.10.2015 and 02.11.2015 (questionnaires dated 13.10.2015 and 2.11.2015 are exactly same and identical to the assessee company.

(vi) On 5.11.2015 the assessing officer made enquiries from Sonata Investment Ltd by way of notice under Section 133(6) dated 5.11.2015.

(vii) On 16.12.2015 the assessing officer received the reply from Sonata Investment Ltd. vide their letter dated 15.12.2015 confirming the subscription of share capital of Rs.37.80 crore (inclusive of share premium) by way of banking channels. Copy of notices under Section 133(6) dated 5.11.2015 and reply from Sonata Investment Ltd dated 15.12.2015 are available at pages 11 to 14 of order of the CIT(A)."

74. The ITAT examined the identity and creditworthiness of the investor / share applicant and genuineness of the transaction and

given the following finding in para 25 23, 41, 42, 43, 44, 45 and 46 which reads as under :

"25. We find that M/s. Sonata Investment Ltd. presently known as REL Utility Engineers Ltd. the subscriber company had made investment in share application money at Rs.3, 7.80 crores out of which it had received Rs.37.30 crores from top Industrial house of the country namely Reliance Infra. The investor company enjoyed Rs.3979 crores net worth as on 31.3.2010. Therefore the said subscriber had sufficient fund to make investment. We support our HIGH COURT OF M.P. BENCH AT INDORE Pg. No.-68-- (ITA No.112/2018 & Other connected matters) view by relying decision of Hon'ble Delhi High court in the case of Goodview Trading Pvt. Ltd. 77 taxmann.com 204 (Delhi) wherein it was held that no addition can be made where there is a sufficient net worth of the investor company. Similarly we find that there was no incriminating documents found during search hence, no addition could be made in the hands of the assessee as held by the Hon'ble Delhi High court in the case of Kurle Paper Mills)P) Ltd. 380 ITR 571 dated 6.7.2015. During the course of assessment proceedings to held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee.

43. If the totality of facts and the ratio of judicial pronouncements as discussed hereinabove, are analyzed, we are of the considered opinion that the onus primarily cast upon the assessee, as provided under section 68 of the Act, has been duly discharged by the assessee as the identity of the share subscribers, creditworthiness and genuineness of the transaction is not to be doubted or it can be said that the same has been proved/ explained by the assessee. Now, the onus has reverted back upon the Revenue to prove otherwise which has not been discharged by the AO before making additions under section 68 of the Act.

44The Ld. AO merely relied upon the suspicion and statement recorded from ShriNaresh Kumar HIGH COURT OF M.P. BENCH AT

INDORE Pg. No.- -71- (ITA No.112/2018 & Other connected matters) during night considering it vague and whereas the inquiries made under section 133(6) were duly complied with by the investor company / The AO was expected to disprove the claim of the assessee with the help of evidence, if any, received from the investigation wing, as has been claimed by the Revenue. The Revenue has nowhere proved that any malafide is done by the assessee. Failure to do so, vitiate the addition made under the set of facts Reference can be made to the decision in CIT V. Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC) and the ratio laid down in the decision of Hon'ble Gauhati High Court in the case of Khandelwal Construction v. CIT 227 ITR 900 (Guw.). The satisfaction has to be derived from the relevant facts and that to on the basis of proper enquiry by the Assessing Officer and such enquiry must be reasonable and just.

45. In the present case, the AO has not brought any evidence on record that the amounts received from M/s. Sonata Investment Ltd. presently known, as REL Utility Engineers Ltd. is merely accommodation entry. As mentioned earlier, the AO has acted merely on the basis of statement of Shri Naresh Kumar and high premium amount only. The ratio laid down by Hon'ble Madhya Pradesh High court in CIT v. Peoples General Hospital Ltd (2013) 356 ITR 65 (MP), [2013] 216 320(MP)/ (2013) 35 taxmann.com 444 (Madhya Pradesh) is squarely gives shelter to the assessee, wherein it was held that where the assessee establishes the identity of share applicant, burden of proving creditworthiness was not on assessee

6.20 In view of the above facts and respectfully following the decision of the Hon'ble M. P. High court Indore Bench in case of PCIT vs. Chain house International and Hon'ble ITAT, Mumbai, in the case of ITO 9(2)(3), Mumbai vs Citygold Education Research Ltd., I allow the assessee's ground no. 2 and direct the Assessing Officer to delete the addition made u/s. 68 of the Act, of Rs. 1,55,00,000/-.

6.21 Further, in same ground the assessee has raised another ground objecting for the addition made on account of unexplained expenditure estimated as undisclosed income on account of

alleged transaction/ commission paid calculated @5% amounting to Rs. 7,75,000/- for obtaining bogus share capital entries added u/s 69C of the Act. Since, the main addition of Rs. 1.55 crores made u/s. 68 of the Act, is deleted as above, the minimum expenditure made by assessee to obtain these entries also has to be deleted. Hence, the AO is directed to delete the addition of Rs. 7,75,000/- made u/s. 69 of the Act.

6.22 Therefore, this ground of appeal is allowed.

Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the Ld. DR submitted that the CIT(A) has erred in deleting the addition of share application money and share premium and also commission expenditure irrespective of the facts that the assessee has failed to establish the, identity, genuineness and creditworthiness of the transaction and share premium charged is on higher side in comparison with net worth of the assessee company and relied on the judicial decisions. The Ld.DR supported the order of the A.O.

6. Contra, the Ld. AR supported the order of the CIT(A) and submitted that the assessee has cooperated in submitting the information in assessment proceedings, whereas the AO has ignored the vital information and details and unilaterally made addition of share premium and share capital and also estimated the commission expenditure u/s 69C of the Act. The Ld. AR substantiated with the written

submissions on the disputed issue filed before the CIT(A) referred at page 118 to 125 of the paper book as under:

"2. With regards to the identity, genuineness and Creditworthiness of the transactions with Empower Industries India Limited, following details are enclosed:

Copy of Annual Accounts along with the relevant annexures for A.Y 2010-11

Copy of PAN card of Empower Industries India Limited.

Bank Statement highlighting the relevant transactions.

Copy of Share application form and supporting.

3. Copy of Form 2 filled with the ROC by the assessee company.

4. With regards to your honour's query as to why share capital / share premium received by the assessee company should not be treated as Income under section 68 of the Income Tax Act, 1961, in this regards it is submitted that provision of section 68 of the Income Tax Act, 1961 reads as under:

"68. 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:

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless -

(a) the person, being a resident in whose name such credit is recorded in the books company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in those name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."

It is submitted the section 68 of the Income Tax Act, 1961 cited above is very clear that the assessee is supposed to prove the nature and source of the credit and the assessee not required to explain the source of the source.

In this regards a useful reference could be made of the following judgments for Honourable Supreme Court and various high courts:

It was held that the fact an assessee was unable to satisfy the authority as to the source from which the depositor derived the money not justify the addition being made in respect of the cash credit. (1973) 87 ITR 349 (SC) Daulatram Rawatmull (1976) 103 ITR 344 (Patna) Sarogi Credit Corpn. (1966) 59 ITR 632 (Asm) Tolaram Daga (1988) 32 ITJ 300 (Pune) (AM) Suresh Kalmadi]

The burden cast on the assessee stands discharged the moment the assessee proves the identity of the creditor, his capacity to lend and the genuineness of the transaction. The assessee cannot be further required to prove the source of the source of the money out of which loan was given [S. Hastimal vs. CIT (1963) 49 ITR 273 (Mad): TC42R. 1233].

Where there is positive evidence like (i) the existence of creditors, (ii) their IT file numbers, and (iii) the confirmation letters issued by such creditors, the mere fact that there is a prevalent general practice of utilisation of fictitious hundies through bogus persons could not be held against the assessee [CIT vs. S.C. Ghosal (1977) 106 ITR 980 (Cal): TC42R.1222].

Where the creditors gave loans to the assessee through account payee cheques and the assessee furnished details of loans stating their nature and the mode of transactions and also produced the certificate from his bankers, the assessee was held to have discharged the onus placed on him [Addl. CIT vs. Bahri Bros. P. Ltd. (1984) 42 CTR (Pat) 66: (1985) 154 ITR 244 (Pat): TC42R.1223].

Where the assessee's explanation regarding the source of cash credits is not prima facie absurd and the same is capable of examination, rejection of such explanation without such examination would be arbitrary [CIT vs. K. SKannan Kunhi 1973 CTR (SC) 27: (1973) 87 ITR 395 (SC): TC421 1269]

It has been held that where the assessee discloses the nature and source of receipt and there is dispute about the both of the disclosures the Assessing Officer can not infer that the receipt assessable to tax. [1965) 57 ITR 532 (SC) Parimiseti Seetharamamma.

When the assessee furnishes names and addresses of the alleged parties the burden shifts to the department to establish the revenues case and in order to sustain the addition the revenue has to pursue the enquiry and to establish the lack of credit worthiness and mere issue of notice under section 131 is not sufficient. [1986) 159 ITR 78 (SC) Orissa Corpn. (P) Ltd.]

When the assessee files confirmation letters from the creditors to explained establish the source of the credits and the ITO does not call upon the assessee to adduce any evidence in support of the letters the assessee can be said to have discharged the onus cast on him and onus shifts on the department. (1995) 212 ITR 199 (Orissa) Baishnab Charan Mohanty.]

Once the source of the credit, the genuineness of the remittance and the identity of the lender are established, it would be for the Department to show that the amount in question is not a loan but constitutes income assessable to tax [Bedi & Co. Pvt. Ltd. vs. CIT (1983) 144 ITR 352 (Karn).]

In holding a particular receipt as income from undisclosed source, the fate of the assessee cannot be decided by the Revenue on the basis of surmises, suspicions or probabilities [Northern Bengal Jute Trading Co. Ltd. vs. CIT (1968) 70 ITR 407 (Cal): TC42R. 11631.]

1.4.3 From the facts of the and all the judgments stated above it is very clear that section 68 of Income Tax Act, 1961 cannot be imposed on the assessee if the assessee files Name, Address & Confirmation letters of the parties, bank statements to show the genuineness of the transactions. Since your assessee complied with all the above requirements your honour is not justified in stating the transaction as unexplained cash credit by invoking u/s. 68 of the Income Tax Act, 1961.

1.4.4 It is further submitted that the proviso to section 68 was inserted by Finance Act, 2012 w.e.f 01.04.2013 whereby the assessee is required to explain the source of source. However, the said provisions of the proviso to Section 68 do not apply to the assessee company during the year under consideration i.e. for A.Y. 2010-11.

It is therefore submitted that your assessee has duly explained share application money/ share premium properly and therefore the same does not remained unexplained and invoking of section 68 is not justified.

Submission dated 18.03.2016

1. Copy of Share Valuation report for A.Y.2010-11 of the assessee company is enclosed. It is submitted that from the Share valuation report for A.Y.2010-11, it can be seen that the Value of Equity shares of the company by discounted cash flow method is Rs.486.28/- per share. However the company has charged Rs.500/- on the issue of equity shares. In this regards, it is submitted that the company has charged Rs.10/- towards the face value of the shares & Rs.490/- per share as the premium on such issue. It is further submitted that your assessee has collected share premium of Rs. 816.45 per share on

face value of Rs. 10/- per share. However, to justify the premium charged, we would like to give our explanation as under

It is submitted that you assesses company is in business and commands a significant goodwill, excellent past performance and high investors confidence, resulting into bright future prospect for the Assessee company in long term. Issue of Shares at premium will also to keep the debt equity ratio low, so that more of the owned funds can be used for the purpose of business rather than debt fund which involves high servicing cost. Shares are issued at premium with a view to strengthen capital base keeping share capital low so that servicing of share capital (by paying dividend and issue of free shares/s bonus shares) is easy and better in future.

Also the future prospects of the company are very bright considering which the investors agreed to share premium and hence the premium charged by the assessee company is justified. The investors have confidence in the assessee company and they believe that their valuation will go up even more than the price they were paying for shares.

The brand and the intrinsic value of the company has to be considered while deciding the share price and therefore the shares are subscribed at premium by the investors.

It is finally the decision of the investors that at what price and why they want to take the shares of the company. Therefore it is submitted that the premium charged by the assessee company is justified. It is therefore submitted that no addition should be made with regards to the share premium for the year under consideration.

2. Details of Share application money as specified by your honour in the notice is for A.Y.2013- 14 enclosed.

With regards to above ground, it is submitted that the assessee company has discharge its prima facie onus by proving the nature and source of the share application money received by the assessee. Further the assessee company has submitted all the

required supporting which proves the creditworthiness, identity and genuineness of the transaction. Further, the assessee company as per Section 68 of the Income Tax Act, 1961 only needs to prove source of the credit in the books of account and not source of source. It is further submitted that the assessing officer has mentioned in the assessment order in para 4.8 that the appellant has not submitted that share valuation report but in fact the same is submitted to the assessing officer vide our letter dated 18.03.2016 (copy enclosed). It is further submitted that the assessee company has submitted the bank statement of the shareholder which is enough to prove that the shareholder had sufficient fund to make such investment. Further after producing the bank statement of said party, the assessee company has satisfactorily discharge its onus cast upon him. After discharging the onus cast upon the assessee it is the duty of the assessing officer to scrutinize the same and further to discredit the evidence given by the assessee there has to strong reason and material before the assessing officer. Further the assessing officer has not ment tioned reason anywhere in the assessment order to discredit the documents produced by the assessee company proving creditworthiness of the said party. There has to be cogent reason and materials with the assessing officer and the assessing officer cannot make such addition on the basis of suspicion.

Further, it is submitted that the money has been received by the assessee company through banking channel and the transaction entered by the assessee with the said party was not with the mala fide intention. It is further submitted that the said party was proved as bogus as per the information received from DGIT(inv), Mumbai but the transaction entered by the assessee cannot be termed as bogus if the assessee has not taken bogus accommodation entry from the said party and the transaction entered was in good faith. Further, the assessing officer has not brought on record any material which state that the appellants own money has been routed by taking bogus accommodation entry. To make addition u/s 68 of the Income Tax Act, 1961, the appellant company has to prove the creditworthiness, genuineness and identity of the transaction once the appellant

has discharge its onus, it is upon the assessing officer to prove that the transaction entered by the appellant is not genuine.

We further place reliance on the following case laws:

*M/S PIONEER BUILDWELL (P) LTD vs. INCOME TAX OFFICER
6070/DEL/2013)*

"Keeping in view of the findings given so Assessing Officer as well as the LdFirst Appellate Authority and the documentary finding by the assessee before us. We are of the considered view that Ld. First Appellate Authority has deleted the addition in dispute on the basis of various documentary evidence filed by the assessee before the Assessing Officer as well as before him. Hon'ble Supreme Court of India in the case of CIT VS Lovely Export 299 ITR 261 (SC) which has confirmed the order of Hon'ble Delhi High Court has held that once the identity of the share holder have been established, even if there is a case of bogus share capital, it cannot be added in the hands of company unless any adverse evidence is not on record. Ld. First Appellate Authority has examined the documentary evidence filed by the assessee before the Assessing Officer as well as before him and held that the assessee has provided confirmations from all the parties as well as various evidences to establish the genuineness of the transaction, assessee has also relied upon the judgment of Nemi Chand Kothari Vs. CIT 264 ITR 254 (Gauhati) wherein it has held that it is a certain law that the assessee is to prove the genuineness of transaction as well as the creditworthiness of the creditor must remain confined to the transactions which have taken place between the assessee and the creditor. It is not the business of assessee to find out the source of money of creditors. Similar observation has also been given in the case of Hastimal 49 ITR 273 (Madr) and Daulatram Rawatmal (1973) 87 ITR 349 (SC). Ld. First Appellate Authority has cited various decisions rendered by ITA NO.6070/Del/2013 the Hon'ble Supreme Court of India as well as the Hon'ble Jurisdictional High Court in the impugned order and finally has held that the assessee has substantiated the transaction regarding share application money received by it was genuine transaction and the same were not accommodation entries. He did not find any evidence collected by the AO which could prove otherwise and deleted the additions in

dispute. As regard to the addition of Rs.12,500/- made on account of commission which was presumed to have been allowed by the assessee for obtaining the Hawala entry in dispute, the ld. CIT(A) observed that the Assessing Officer was not able to brought anything on record that it was assessee's own money which was rooted in the form of share application money and has rightly deleted the same."

Sunshine Metal & Alloys v. ITO (Mum.) (ITA No. 3212/Mum./2014, dt. 12.10.2018) (AY2008-09)

Allowing the appeal of the assessee the Tribunal held that; If (a) the assessee has furnished the Name, Address, PAN no and Share Application Form to prove that the shares were allotted to the applicants and (b) the bank statement show that money was received through banking channels and there were no immediate withdrawals to suggest that the share application amounts have been returned back to these parties in cash, it means the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions. Additions can not be made as cash credits.

ITO v. Dhanlaxmi Equipment P. Ltd. (2018) 63 ITR 33(SN) /193 TTJ 236 (Jaipur)(Trib.) Tribunal held that the assessee had again furnished complete particulars of all these companies in terms of name, address, permanent account number, copy of their confirmation, copy of their Income-tax returns, copy of their balance-sheet and bank statements through which the cheque payment had been made. Further, the Commissioner (Appeals) had returned a finding that the balance-sheet and the bank statement of these companies proved their creditworthiness for making further investment during the year 2010-11. Even the Assessing Officer had not taken any effort to examine these documents and had gone by the so-called prima facie view of the Deputy Director and such a prima facie view without further examination could not be a basis for forming a final view. If the Assessing Officer failed to unearth any wrong or illegal dealings, he could not obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company. In the absence of any falsity having been found in the documents

submitted by the assessee to prove the identity, creditworthiness and genuineness of the share transaction, these documents could not be summarily rejected as had been done by the Assessing Officer

Divine Leasing & Finance Ltd vs. Commissioner of Income Tax (ITA No. 880/2006) "Thus, the question is whether in the present case, the AO had material to conclude that the share applicants in questions did not exist. It is seen that the assessed company has furnished the necessary details such as PAN No./Income-tax Ward No./ration card of the share applicants and some of them are assessed to tax. The share application money has been received through banking channel. In some case, the confirmations/affidavits of share applicants containing the above detail were also filed. It is seen that the AO did not carry out any inquiry into the income tax record of the persons who have given the PAN No./Ward No. in order to ascertain the non-existence of the share applicants in question. The AO has neither controverted nor disapproved the material filed by the assessed. In the case of CIT v. Makhni & tyagi (P) Ltd. reported in 267 ITR 433(Del), the jurisdictional High Court has held that when the documentary evidence was placed on record to prove the identity of all the shareholders including their PAN/GIR numbers and filing of other documentary evidence in the form of ration card etc. which had neither been controverted nor disapproved by the AO, no interference was called for. The Tribunal was justified in deleting the addition. The AO proceeded to make the impugned addition on the ground that in some case some summons issued were returned unserved and in some case summons though served but there was no compliance. In this connection, it may be mentioned that in the case of CIT v. Orissa Corporation 159 ITR 78, the Honble Court has held that when the assessed borrows the loan and if an assessed gives names and address of the creditors, who are assessed to tax and full particulars is furnished then the assessed has discharged the duty. If the Revenue merely issues summons Under Section 131 and does not pursue the matter further, the assessed does not become responsible for the same even if the creditors do not appear. Addition cannot be made under Section 68."

PCIT v. Himachal Fibers Ltd (2018) 98 taxmann.com 172/259 Taxman 4 (Delhi) (HC) Section 68 of the Income-tax Act, 1961 - Cash credit (Share capital) - In course of assessment, Assessing Officer noted that assessee was a sick company during relevant year but had nevertheless collected substantial amounts to extent of Rs. 12 crores invested by two share applicants Assessing Officer took a view that identity of shareholders and genuineness of - transaction had not been established and, accordingly, brought to tax said amount -Tribunal as well High Court found that even though assessee was a sick company earlier, yet it pulled out of woods in year 2010 - It was also noticed that identity of share applicants was clearly revealed but Assessing Officer did not conduct any enquiry except resting his conclusions on surmises - Accordingly, addition made by Assessing Officer was deleted - Whether on facts, SLP filed against order passed by High Court was to be dismissed

In view of the above case laws, it is submitted that the assessee company has discharged its onus by submitting the Annual Accounts, PAN Card, Bank Statement highlighting relevant transaction and copy of share premium form which proves genuineness and creditworthiness of the creditor and established identity of the said creditor with respect to share application money received. It is therefore prayed before your honour considering the submission made by the assessee company, the additions made by the Ld. AO needs to be deleted and necessary directions should be given in this regards.

3.5 Further it is submitted that the assessee has disclose all the facts at the time assessment proceedings u/s 143(3) of the Income Tax Act, 1961, there is no non compliance on part of the assessee and same has been mentioned in the assessment order. Reopening of assessment was done merely because of verification of facts for the satisfaction of the assessing officer. It is therefore submitted before your honour that reopening of

assessment is bad in law and assessment order passed u/s 147 of the Income Tax Act, 1961 should be squashed.

3.6 It is further submitted that the assessing officer has made the addition amounting to Rs.7,75,000/- u/s 69C of the Income Tax Act, 1961 on account of commission/ brokerage paid to the entry provider for giving bogus accommodation entry in the books of the appellant, it is submitted that when the assessee company has not taken any bogus accommodation entry for the year under consideration, the addition made u/s 69C by the assessing officer is not sustainable and should be deleted. The Ld. AO has made the addition with a predetermined mind set on the basis of surmises, conjectures, presumptions and assumptions which need to be deleted

3.7 In view of the above facts and submissions, the disallowance of Rs 1,55,00,000/- is made by your honour on account of Section 68 of the Income Tax Act, 1961 and addition of Rs 7,75,000/- u/s 69C of the Income Tax Act, 1961 is unjustified and needs to be deleted.

7. Further the contentions of the Ld. AR are that, the AO has relied only the statement and the statement was never confronted to the assessee nor cross examination was granted to the assessee. The Ld. AR emphasized that the assessee has discharged its obligation by submitting the financial statements of the investor, where the payments are made through the banking channels and genuineness of the transactions, identity and credit worthiness of the share holder has been proved in the proceedings. The remand report was called by the CIT(A) and the AO was provided with the opportunity and the assessee has filed the reply.

Further at page 104 of the paper book, the method of valuation of shares was placed, which was filed before the revenue authorities and the Ld. AR relied on the following judicial decisions as under:

1. *ITO Vs. Siddhivinayak Filaments Pvt Ltd, ITA No. 3003/Mum/2017.*
2. *PCIT Vs. Agson Global P. Ltd., [2022] 441 ITR 550*
3. *Pr. CIT Vs. Chain House International Pvt Ltd., (2018) 174 DTR 97*
4. *CIT Vs. Lovely Exports (P) Ltd., reported in (2008) 216 CTR 195 (SC)*
5. *Pr. CIT Vs. SDB Estate Pvt Ltd (ITA.No1356 of 2015)(Bombay)*
6. *Pr. CIT Vs. Paradise inland Shipping P. Ltd. (2018) 400 ITR 439 (Bom)*
7. *CIT Vs. Orchid Industries Pvt Ltd., (2017) 397 ITR 136(Bombay)*
8. *Pr. CIT Vs. Acquaic Remedies Pvt Ltd, ITA No. 83 of 2016(Bombay)*
9. *ITO Vs. M/s Nita Jajoo Ventures Pvt Ltd., ITA No. 2890/Mum/2017.*
10. *Ancon Chemplast P. Ltd. Vs. ITO, [2022] 189 ITD 156*
11. *Pr. CIT Vs. Pushti Consultants Pvt Ltd., (ITA No. 1332 of 2016)(Bombay)*

8. Further the assessee has submitted the copy of annual accounts of M/s empower industries India Limited placed at page 36 to 86 of the paper book. The bank statement highlighting the receipts of Rs. 1,55,00,000/- placed at page 88 and 89 of the paper book. The assessee has filed the copy of share application form and Copy of Form 2 filed with the ROC. The Ld. AR has highlighted the MCA data of the M/s Empower India limited being a active and listed company.

9. We heard the rival submissions and perused the material on record and the judicial decisions. The disputed issues envisaged by the Ld.DR that the CIT(A) has erred in deleting share application money along with share premium and the commission estimated by the revenue authorities. The assessee has received the share application money from M/s Empower Industries Ltd and due to search u/sec132 of the Act on the group, the statements were recorded by the investigation wing that they are only providing accommodation entries and no business activity is conducted. The A.O based on the statements recorded in the course of the search of the group, has made addition of share capital including premium in the hands of the assessee and estimated unexplained expenditure. The A.O has overlooked the various documentary evidences filed by the assessee in support of investments including the confirmation letter, PAN Card, Audited financial statements, bank statement reflecting the transactions, copy of share application form, copy of Form .No 2 filed with the R.O.C. etc. In spite of assessee filing all the details, prima-facie the A.O has not conducted any investigation or enquiry in respect of the information submitted by the assessee and relied only on the information of a third party whose statement was not cross examined or tested. We find that the CIT(A) has considered the detailed facts, submissions of the assessee and remand report. The assessee prima-facie has

complied with the ingredients required u/s 68 of the Act of genuineness, identity and creditworthiness. The CIT(A) relied on the catena of judicial decisions in his order and has test checked the creditworthiness and identity of shareholders and came to a reasonable conclusion that the assessee has discharged its burden on submitting the information. Further, the A.O has failed to make further enquiries and relied only on statement of the key person, which was retracted subsequently. We found the order of the CIT(A) is a reasoned and logical order, where the CIT(A) has dealt on the facts, provisions of law and Judicial decisions and applied the ratio of decisions to the present case and deleted the additions. Further, the Ld.DR could not controvert the findings of the CIT(A) with any new cogent evidence or information to take a different view. We considering the facts, circumstances and the submissions of the assessee are of the view that the CIT(A) order is reasoned and conclusive. Accordingly, we do not find any infirmity in the order of the CIT(A) and upheld the same and dismiss the grounds of appeal of the revenue.

10. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 25.08.2023.

Sd/-

(S RIFAUZ RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated: 25/08/2023

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / Concerned CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

1.

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai