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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.2848/Mum/2023

(**निर्धारण वर्ष** / Assessment Year: 2009-10)

M/s. JR Fiber Glass Industries Pvt. Ltd. 1/21, Rocky Industrial Estate, I. B. Patel Road, Goregoan (East), Mumbai-400063.	**बनाम** / Vs.	National Faceless Appeal Centre ACIT-Circle-4(3)(1) Room No. 649, M. K. Road, Aayakar Bhavan, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACJ6312K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Satyaprakash Singh
Revenue by:	Ms. Kavitha Kaushik (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 24/01/2024

घोषणा की तारीख /Date of Pronouncement: 31/01/2024

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee company against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 21.06.2023 for the assessment year 2009-10.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the action of the AO adding Rs.2.15 crore on account of the share capital/premium collected by the assessee company u/s 68 of the Income Tax Act, 1961 (hereinafter "the Act") treating the same as bogus.

3. Brief facts on the issue are that the assessee company had filed its return of income for AY. 2009-10 declaring total income of Rs.70,85,858/-. Later on, the case of the assessee was reopened u/s 147 of the Act on 29.03.2014 after recording the reason that the assessee had issued 2,15,000/- shares on premium (*share of face value of Rs.10*

allotted at a premium of Rs. 90). According to the AO, the shares of assessee company were issued on high premium, which needs verification and therefore according to him Rs.1.93 crores had escaped assessment. Therefore, he reopened the assessment and noted that the assessee had received share application money of Rs.21,50,000/- and premium on it of Rs.1,93,50,000/- [Total Rs.2,15,00,000/-]. According to him, the investments on shares were made by seven (7) parties as under: -

Sr. No.	Name of Allottees	No. of Shares Allotted
1	Mona Digital Equipment Ltd	50,000
2	Prarambh Multitrade Pvt. Ltd.	15,000
3	Kapindra Multitrade Pvt. Ltd	30,000
4	Dura Allowy Cutters Pvt. Ltd.	35,000
5	Radhe Krishna Chemicals Pvt. Ltd.	10,000
6	Ambuj Mercantile Pvt. Ltd.	45,000
7	Raw Gold Securities Pvt. Ltd.	30,000
	Total	2,15,000

4. According to the AO, shares were issued at premium of Rs. 90 per share and in order to verify the identity and creditworthiness of the aforesaid parties, he issued notice u/s 133(6) of the Act on 11.02.2015 which were returned back by the Postal Authorities stating "*parties unknown or left*". Therefore, the AO asked the assessee to produce the parties for verification; and since assessee failed to produce the parties and submitted only the financials of three (3) parties i.e. (i) M/s. Prarambh Multitrade, (ii) M/s. Kapindra Multitrate and (iii) M/s. Ambuj Mercantile; and that parties returned low income, according to him, the creditworthiness of these parties are not proven. Therefore, he was of the opinion that assessee failed to prove the genuineness of the deposit in share-capital of Rs.2.15 cr and therefore, he added total

amount of Rs.2.15 crores as un-explained deposit received as share-capital. Aggrieved by the action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the aforesaid addition by holding as under:-

> "6.2 The appellant in its Ground of Appeal No. 2 assailed the AO in making addition of Rs.21500,000/- u/s 68 of the Act on account of share application and share premium. The AO in the assessment order noted that the assessee received share application money of Rs.2150,000/- and Rs.1,93,50,000/- as share premium making a total investment of Rs.2,15,00,000/-.

Sr. No.	Name of Allottees	No. of Shares Allotted
1	Mona Digital Equipment Ltd	50,000
2	Prarambh Multitrade Pvt. Ltd.	15,000
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6	Ambuj Mercantile Pvt. Ltd.	45,000
7	Raw Gold Securities Pvt. Ltd.	30,000
	Total	2,15,000

> The assessee was asked to produce the above parties for verification. The AO noted that the assessee filed the financials of three parties namely Prarambh Multitrade, Kapindra Multitrade, and Ambuj Mercantile. The AO noted that their financials could not derive confidence in accepting these entities as genuine and their creditworthiness. The AO stated that the creditworthiness of these parties is not proved further the letters sent to these parties returned back and proceeded to add the share capital of Rs. 21500000/- as unexplained deposits,
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> 6.2.1 The appellant in its submission stated that the AO had not made any comment in the remand report as the appellant has not submitted nay additional evidence and it relies on the

submission earlier filed before the AO. The appellant further submitted that the transaction receiving the share premium is in the nature of the 'capital receipt' and that the capital receipt cannot be taxed as income of the assessee as this receipt is outside the scope of income taxable under the Act. he appellant further submitted the Board resolution, bank statement, ITR and other relevant details to stress the genuinity of the claim. The appellant at length stressed on the establishment of identity, creditworthiness and genuinity of the share premium. In order to support its contention, the appellant relied on a number of the case laws and judicial pronouncements.

6.2.2. The AO in the remand report stated that the assessee did not submit any new detail, however the notices u/s 133(6) were issued and the assessee was asked to produce the share applicant for verification, however the assessee did not produce them and that the assessee's claim of the share premium as share premium as capital receipt is an alternate ground and is not acceptable and section 68 of the Act speaks of any sum credited in the books of assessee whether it is capital or revenue receipt is immaterial. The -AO further stated that the plea of the appellant may be dismissed.

6.2.3. The submission of the appellant is perused and is found to be not satisfactory as the claim that the share premium is a capital receipt and cannot be taxed as income of the appellant is untenable. An amount which 'is received by the appellant and is credited in its books of account even for academic exercise is-accepted Is of capital nature, the appellant is still required to prove the source of the same to the satisfaction of the AO about

> its identity, genuinity and creditworthiness, a mere claim that the receipt is of capital nature cannot provide the appellant protection from the operation of the provision of section 68 of the Act. Therefore, in view of the foregoing discussion the addition made by the AO on account of receipt of share premium is sustained. The Ground of Appeal No. 2 is dismissed."

5. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

6. We have heard both the parties and perused the records. We note that the assessee in its return of income have declared total income of Rs.70,85,858/- and is in the business of manufacture and sale of Pollution Control Equipment's and Trading of Flex. And has shown in the relevant year purchase of Rs.22,44,35,165/- and sale of Rs.29,79,92,075/-. And after claiming administrative expense of Rs.5,40,97,327/- had shown the net profit of Rs.71,04,167/- i.e. profit ratio of 2.3% and returned income of Rs.70,85,858/-. Even though, the AO estimated assessee's income from business of Rs.6,73,93,851/- (@ 25% of the turnover), the Ld. CIT(A) has deleted the addition. And the Department has not preferred any appeal against the action of the Ld. CIT(A)/NFAC. Before us, the Ld AR Shri Satya Prakash Singh appearing for assessee has challenged the action of the Ld. CIT(A) confirming the action of the AO making an addition of Rs.2.15 crores in respect of share capital/premium received by the assessee from seven (7) parties (supra) on the ground that the assessee was not able

to discharge the creditworthiness of these parties. Before the AO the assessee in order to prove the "*nature and source*" of the share capital/premium of Rs.2.15 cr the assessee has produced the following documents. (i) Copy of Board Resolution which is found placed at page no. 1 to 3 of PB, (ii) List of details (name and address of the parties) (iii) Copy of PAN details of seven (7) share subscribers and gave details about their respective jurisdictional ITO/AO which details are found placed at page no. 3 to 11 of PB, (iv) Valuation Report which is found placed at page no. 12 to 29 of PB, (v) and ITR Acknowledgment of 4 parties, and Balance-sheet of the 3 parties which are found placed at page no. 34 to 95 of PB and (vi) Bank statement highlighting the transaction which are found placed at page no. 96 to 109 of PB. According to the Ld. AR, the assessee by producing the aforesaid relevant documents has discharged the burden to prove the *nature and source* of the credit entry of Rs.2.15 cr as share capital/premium. Further, according to the Ld. AR, in the relevant year AY. 2009-10, the assessee has received the share capital, on a premium of Rs.90 from the share subscribers, which premium received by it could not have been brought to tax in the year under consideration. According to him, the assessee has received share capital of Rs.21.50 Lakh on premium of Rs.1,93,50,000/-. And according to the Ld. AR, the assessee when called upon by AO to prove the nature and source of Rs.2.15 cr had filed the share-subscribers PAN details along with the details of their respective jurisdictional AO's ITO and since all the seven (7) share subscribers

were legal entities and were being regularly assessed to tax by the department, the identity of share-subscribers were proved before the AO, and also pointed out that in this digital world, the AO could have easily verified from the department data-base on the click of mouse the PAN of any person, and he would come to know the entire details of that person. According to Ld AR, when assessee has produced the relevant documents (supra), it can be presumed that AO would have conducted such an exercise and didn't find anything adverse to note, but merely because three parties reflected low income in their ITR, cannot be the basis for branding them un-worthy of credit, which AO could not have done unless AO enquires from the share subscribers ITO's and finds from them any adverse reports of these entities, the AO of assessee cannot brand them unworthy of credit and for such a proposition relied on the decision of Hon'ble High Court of Calcutta in the case of CIT vs M/s Dataware Private Ltd [ITAT No 263 of 2011]. According to Ld AR, the AO did not conduct any enquiry worth its name and merely because the notices once issued by him couldn't be served, he drew adverse inference against them. In this regard, the Ld AR submitted that the share capital/premium in question has been collected in the FY. 2008-09 and the re-opened assessment was carried out in the year 2015 and with the passage of time (six years), there may be change in address and that might be the reason for return of notices, which cannot be the sole ground to doubt the share subscribers and their investment made (share-capital/premium) as unexplained. The Ld. AR pointed out that all seven share subscribers are assessed to

tax and that assessee had filed PAN details of all 7 share subscribers, ITR acknowledgement of 4, thus the identity of share subscribers stands proved. And by filing the balance-sheet as well as bank statement was able to show the creditworthiness; and since the assessee has filed the bank statement which shows that share capital/premium has passed through proper banking channel and a perusal of the bank statement would reveal that there is no cash deposit before the bank transfer to assessee, genuiness of the transaction cannot be doubted. Thus, according to him, the assessee has discharged the burden to prove the identity, creditworthiness and genuineness of the share transaction. So Ld. CIT(A) erred in confirming the addition.

7. Per contra, the Ld. DR submitted that three (3) parties who subscribed namely Prarambh Multitrade Pvt. Ltd, (ii) Kapindra Multitrade Pvt. Ltd. and (iii) M/s. Dura Allow Cutters Pvt. Ltd. (supra) had meagre income. And therefore, the AO has rightly observed that they did not had the creditworthiness. And since the notices couldn't be served and assessee failed to produce the share subscriber, the Ld. CIT(A) has rightly the confirmed the action of the AO. Therefore, according to him, there should not be any interference from our part.

8. Having heard both the parties and after perusal of the records, we note that assessee is a private limited company and has infused share capital of Rs.21,50,000/- (Rs.21.50 Lakhs) which was allotted to seven (7) entities on shares of face value of Rs.10/- each, at a premium

of Rs.90/- per share i.e. share premium of Rs.1.93 cr. To support the premium charged on shares, the assessee had filed the Valuation Report found placed at page no. 12- 29 of PB. The AO/Ld. CIT(A) has not disputed the share premium of Rs.90/- per share which assessee received to the tune of Rs.1.93 cr (*even though this was the reason for re-opening*). According to Ld. AR, in the relevant assessment year ie. AY 2009-10, the AO/Ld. CIT(A) could not have added the share premium of Rs.1.93 cr in any case and the addition of Rs.1.93 cr was *per-se* legally unsustainable. In order to appreciate this contention of Ld. AR of assessee, we note that AO has made the addition of Rs.2.15 cr as unexplained deposit in share capital by alleging that assessee did not produce the parties/subscribers and failed to prove the creditworthiness of the parties. Even though, AO has not specifically mentioned section 68 of the Act, the Ld. CIT(A) while deciding the appeal of assessee has examined the addition as if made u/s 68 of the Act. Therefore, before we advert to the merit of the addition, let us re-visit section 68 of the Act which we need to examine the law as it stood in AY 2009-10. However, we note that AO framed the assessment in the year 2015 [i.e, on 26.03.2015] and it is presumed that he has taken the provision of section 68 of the Act, which was in the statute as on that date, when section 68 of the Act reads as under:-

> *Section 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 of such company also offers an explanation about the nature and source of such sum so credited; and

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

Provided further that nothing contained in the first proviso shall apply if the person, in whose 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].

9. Here it is to be noted that the first proviso and second proviso was inserted by Finance Act, 2012 with effect from 01.04.2013, so it is applicable only for/from AY 2013-14 and not for this AY 2009-10.

10. Next let us refer to the definition of income stated in Section 2(24) of the Act. Section 2(24) of the Act includes:-

i) profits and gains

……..

……

xvi) any consideration received for issue of shares as exceeds the Fair Market Value of the shares referred to in clause (viib) of sub-section (2) of section 56.

11. It is noted that this amendment was made by an insertion of clause (xvi) in section 2(24) of the Act was by Finance Act 2012 with effect from 01.04.2013.

12. Correspondingly, the Parliament inserted sub-clause (viib) in sub-section 2 of section 56 of the Act by Finance Act 2012, w.e.f. 01.04.2013, that is for AY 2013-14 (not this AY 2012-13) in respect of computing and taxing the premium of shares in the hands of assessee (*i.e.to tax the difference in consideration of value of shares if it exceeded the fair market value*), which for the purpose of complete understanding of the law though not applicable is reproduced as under:-

Section 56(2)(viib):

> "Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:
>
> Provided that this clause shall not apply where the consideration for issue of shares is received-
>
> (i) By a venture capital undertaking from a venture capital company or a venture capital fund, or
>
> (ii) By a company from a class or classes of persons as may be notified by the Central Government in this behalf.
>
> Explanation- For the purposes of this clause,
>
> (a) The fair market value of the shares shall be the value-
>
> (i) As may be determined in accordance with such method as may be prescribed, or
>
> (ii) As may be substantiated by the company to the satisfaction of the Assessing Officer based on the value, on the date of issue of shares, of its assets, including intangible assets being

goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

Whichever is higher:

(b) Venture capital company, venture capital fund, and venture capital undertaking shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation to clause (23FB) of section 10]".

13. So, we note that in this assessment year before us i.e. AY 2009-10, the law in force was that if any sum is found credited in the books of an assessee in a financial year and, if the AO asks for the explanation of assessee in respect of *the nature and source* thereof, then the assessee is duty bound to explain the nature and source of the credit entry in the books and if the assessee fails to explain or if the AO is not satisfied, he may charge to income tax the sum so credited. So, the assessee is bound to explain before the AO the nature and source of share capital, i.e. the identity, creditworthiness and genuineness of the share capital. In this AY, the assessee is bound to know about the share applicants who wish to invest their identity, whether they have the financial capacity (creditworthiness) and they are genuine investors in their company (assessee). In this AY, the assessee is not bound by law at the time of collection of share capital to ask the share-applicants from where it is getting the money to invest in the assessee's company. And we also note that share premium can be taxed if it exceeds the fair market value only from

AY 2013-14 and not in this A.Y. 2009-10. For coming to such a conclusion let us discuss few case laws:

(A) Coming to the share premium, it is noted that this Tribunal in ITA-2411/KOL/2017 in the case of **Kanchan Plywood Products Pvt. Ltd. –vs.- ITO** vide order dated 01.05.2019 has taken note that -

Per contra, the Learned DR vehemently supported the order of the authorities below and wondered us to how the assessee-company issued share to three Private Limited Companies when its face value of Rs. 10/- at a premium of Rs. 990/-. According to the Learned DR, the assessee-company had a meager return of income in the year under consideration and therefore, question of any person subscribing such high premium to the shares of the assessee-company cannot be believed. According to the Learned DR, when the income of the assessee is meager, the action of the share subscribing companies in giving astronomical prices for the shares is against preponderance of probabilities and cited the decision of the Hon'ble Supreme Court as well as Delhi High Court in CIT vs N .R. Portfolio Pvt. Ltd.

Further, according to Ld. AR in the case of unlisted companies, it is common knowledge that premium fixed is a matter of mutual agreement and ITAT Mumbai in the case of Gagandeep Infrastructure Pvt. Ltd., (supra) has held that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. And the aforesaid view of the ITAT has been upheld by the Hon'ble Bombay High Court order dated 20th March 2017. Further the Hon'ble High Court observed as under-

"(i) 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. Infact, 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 Section 68 of the Act with retrospective effect nor does the proviso so introduced 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 essential 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 has found satisfied.

(ii) 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 CIT vis. Lovely Exports (P) Ltd. 317 ITR 218 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. "

(B) The Tribunal Mumbai Bench in the case of DCIT vs. M/s. Alcon Biosciences (P) Ltd., ITA No. 1946/M/2016, Order dated 28.02.2018 held as under·

"As regards the AOs observation with regard to the issue of shares at a face value of Rs.10/- issued at a premium of Rs.990 per share, we find that there is no merit in the findings of the AO for the reason that the issue of shares at a premium and subscription to such shares is within the knowledge of the company and the subscribers to the share application money and the AO does not have any role to play as long as the assessee has proved genuineness of transactions. We further notice that the AO cannot question issue of shares at a premium and also cannot bring to tax such share premium within the provisions of section 68 of the Act,

before (supra) held that Proviso inserted to section 68 is prospective in nature.

Hon'ble M.P. High Court in the case of CIT vs. Chain House International (P) Ltd., order dated 07.08.2018, decision reported in 98 taxmann.com47 has held at para 52 as under-

> "Issuing the share at a premium was a commercial decision. It is the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe the shares at such a premium or not. This was a mutual decision between both the companies. In day to day market, unless and until, the rates if fixed by any Govt. Authority or unless there is any restriction on the amount of share premium under any law, the price of

the shares is decided on the mutual understanding of the parties concerned ..".

(C) The Mumbai Tribunal in the case of ACIT-l(l) vs. M/s. Gagandeep Infrastructure Pvt. Ltd. the ITAT has held as under:

"We have carefully perused the orders of the lower authorities. In our considered view, the issue of shares at premium is always a commercial decision which does not require any justification. Further the premium is a capital receipt which has to be dealt with in accordance with Sec. 78 of the Companies Act, 1956. Further, the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature in a capital receipt and is not income for its ordinary sense. It is not in dispute that the assessee had filed all the requisite details/documents which are required to explain in the books of accounts by the provisions of Sec. 68 of the Act. The assessee has successfully established the identity of the companies who have purchased shares at a premium. The assessee has also filed bank details to explain the source of the share holders and the genuineness of the transaction was also established by filing copies of share application forms and Form No. 2 filed with the Registrar of Companies.

Considering all these undisputed facts, it can be safely concluded that the initial burden of proof as rested upon the assessee has been successfully discharged by the assessee. Even if it is held that excess premium has been charged, it does not become income as it is a capital

receipt. The receipt is not in the revenue field. What is to be probed by the AO is whether the identity of the assessee is proved or not. In the case of share capital, if the identity is proved, no addition can be made u/s 68 of the Act. We draw support from the decision of the Hon'ble Supreme Court in the case of Lovely Exports Ltd. 317 ITR 218. "

(D)**[Green Infra Limtied – 38 taxmann.com 253 (Mumbai-Trib).**

10. We have considered the rival submissions and carefully perused the orders of the lower authorities and the material evidences brought on record in the form of Paper book. The entire dispute revolves around the charging of share premium of Rs. 490/- per share on a book value of Rs. 10/- each. This dispute is more so because of the fact that the assessee company was incorporated during the year under consideration. Therefore, according to the revenue authorities, it is beyond any logical reasoning that a company with zero balance sheet could garner Rs. 490/-per share premium from its subscribers. Such transaction may raise eyebrows but considering the subscribers to the assessee company, the test for the genuineness of the transaction goes into oblivion. It is an undisputed fact admitted by the Revenue authorities that 10,19,000 equity shares has been subscribed and allotted to IDFC PE Fund-Il which company is a Front Manager of IDFC Ltd., in which company Government of India is holding 18% of shares. The contributors to the IDFC PE Fund-Il who is a subscriber to the assessee's share capital, are LIC, Union of India, Oriental Bank of Commerce, Indian Overseas Bank and Canara Bank which are all public sector undertakings. Therefore, to raise eyebrows to a transaction where

there is so much of involvement of the Government directly or indirectly does not make any sense.

10.1 No doubt a non-est company or a zero balance company asking for a share premium of Rs. 490/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. Details of subscribers were before the Revenue authorities. The AO has also confirmed the transaction from the subscribers by issuing notice u/s. 133(6) of the Act. The Board of Directors contains persons who are associated with IDFC group of companies, therefore their integrity and credibility cannot be doubted. The entire grievance of the Revenue revolves around the charging of such of huge premium so much so that the Revenue authorities did not even blink their eyes in invoking provisions of Sec. 56(I) of the Act.

[Hon'ble Bombay High Court in the case of Apeak Infotech-88 taxmann.com. 695 (Bombay) when the question was "whether the amount received as share premium on issue of share by the respondent-assessees-companies could be taxed as profits and gains of business in the hands of the assessees under section 28(iv) of the Act".

In any case, we may point out that the amendment to section 68 of the Act by the addition of proviso thereto took place with effect from April 1, 2013. Therefore, it is not applicable for the subject

assessment year 2012-13. So for as the pre-amended section 68 of the Act is concerned, the same cannot be invoked in this case, as evidence was led by the respondents-assessees before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke section 68 of the Act to bring the share premium to tax. Similarly, the Commissioner of Income-tax (Appeals) on consideration of facts, found that section 68 of the Act cannot be invoked. In view of the above, it is likely that the Revenue may have taken an informed decision not to urge the issue of section 68 of the Act before the Tribunal.

It is further pertinent to note that the definition of income as provided under section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value, This Came into the statute only with effect from April 1, 2013 and thus, would have no application to the share premium received by the respondent-assessee in the previous year relevant to the assessment year 2012-13. Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in CIT-v.-Gagandeep Infrastructure (P.) Ltd. [201TI 80 taxmann.com.272/247 Taxman 245/394 ITR 680 (Bom) has while refusing to entertain a question with regard -to the proviso to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.

(E) **ITA-2270/KOL/2016 –Trend Infra Developers Pvt. Ltd.**

The assessee specifically argued before the ld. CIT(A) that the allotment of shares at a premium cannot be considered as sham or income of the assessee. It was pleaded at a preliminary level that the receipt of share capital and share premium is on capital account and that the same cannot be subject to tax as income. Specific submissions were also made in the context of introduction of section 56(2)(viib) inserted by the Finance Act, 2012 with effect from 01.04.20l3 which reads as under:

> "(viib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received-
(iii) By a venture capital undertaking from a venture capital company or a venture capital fund, or (iv) By a company from a class or classes of persons as may be notified by the Central Government in this behalf.
Explanation- For the purposes of this clause,
(c) The fair market value of the shares shall be the value-

(iii) As may be determined in accordance with such method as may be prescribed, or

(iv) As may be substantiated by the company to the satisfaction of the Assessing Officer based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher:

(d)Venture capital company, venture capital fund, and venture capital undertaking shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation to clause (23FB) of section 10]".

It was pleaded that the aforesaid provisions cannot be made applicable for the year under appeal. Accordingly, it was argued that the issuance of shares of premium cannot be brought to tax under any section of the Income Tax Act up to assessment year 2012- 13.

We find that the reliance placed by the Id. AR in the decision of Hon'ble Bombay High Court in Pr. CIT vs. Apeak Infotech reported in 88 Taxmann.com 695 dt 08.06.2017 wherein the question raised before the Hon'ble Bombay High Court are as under:

A. Whether on the facts and circumstances of the case and in law, the Tribunal was correct to uphold the decision on Commissioner of Income Tax (Appeals) that the share premium received by the assessee-company cannot be taxed under Section 68 of the Act ignoring the ratio laid down by this Court in its decision reported in the case of Major Metals Ltd. vs. Union of India [2013J 3591TR 450 (Bom)?

B. Whether on the facts and circumstances of the case and in law, the Tribunal as well as the Commissioner of Income Tax (Appeals) was right in deleting addition made by the Assessing Officer, by holding that the share premium receipt is capital in nature?"

The Hon'ble Court held as under:

Regarding Question A:

(a) The issue raised by the Revenue in this question is to bring to tax the share premium received under section 68 of the Act. We find that the issue of bringing the share premium to tax under section 68 of the Act was not an issue which was urged by the appellant Revenue before the Tribunal. The only issue which was urged before the Tribunal as recorded in para II of the impugned order is the addition of share capital and share application money in the hands of the assessee as income under section 28(iv) of the Act. We find that the Commissioner of Income-tax (Appeals) did consider the issue of applicability of section 68 of the Act and concluded that it does not apply.
The Revenue seems to have accepted the same and did not urge this issue before the Tribunal. Mr. Bhoot, learned counsel appearing for the Revenue also fairly states that the issue of applicability of section 68 of the Act was not urged by the Revenue before the Tribunal.

(b) It is a settled position in law as held by this court in CIT v. Tata Chemicals Ltd. [20021 J 22 Taxman 6431256 ITR 395 (Bom.) that in an appeal under section 260A of the Act, the High Court can only decide a question if it had been raised before the Tribunal even if not determined by the Tribunal. Therefore, no occasion to consider the question as prayed for arises.

(c) In any case, we may point out that the amendment to section 68 of the Act by the addition of proviso thereto took place with effect from April 1, 2013. Therefore, it is not applicable for the subject assessment year 2012-13. So for as the pre-amended section 68 of the Act is concerned, the same cannot be invoked in this case, as evidence was led by the respondents-assessees before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke section 68 of the Act to bring the share premium to tax. Similarly, the Commissioner of Income-tax (Appeals) on consideration of facts, found that section 68 of the Act cannot be invoked. In view of the above, it is likely that the Revenue may have taken an informed decision not to urge the issue of section 68 of the Act before the Tribunal.

(d) We may also point out that decision of this court in Major Metals Ltd. v. Union of India [20121 19 taxmann.com 1761207 Taxman 185/[20131 359 ITR 450 Bom. proceeded on its own facts to uphold the invocation of section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the assessee-company were not creditworthy inasmuch as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000 at premium at Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by this court in its writ jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this

case has been given by the authorities that shareholder/share applicants were unidentifiable or bogus.

(e) In the above view Question No. A is not being entertained in view of the decision in Tata Chemical Ltd. (supra). Accordingly, the question (A) is not entertained.

Regarding Question B :

(a) We find that the impugned order of the Tribunal upheld the view of the Commissioner of Income-tax (Appeals) to hold that share premium is capital receipt and therefore, cannot be taxed as income. This conclusion was reached by the impugned order following the decision of this court in Vodafone India Services (P.) Ltd. (supra) and of the apex court in G. S. Homes and Hotel (P.)Ltd. (supra). In both the above cases the court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income.

(c) It is further pertinent to note that the definition of income as provided under section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from April 1, 2013 and thus, would have. no application to the share premium received by the respondent-assessee in the previous year relevant to the assessment year 2012-13. Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in CIT v. Gagandeep Infrastructure (P.) Ltd. [2017] 80 taxmann.com

272/247 Taxman 245/394 ITR 680 (Bom.) has while refusing to entertain a question with regard to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.

(c) In view of the above. question No. B as proposed also does not give rise to any substantial question of law as it is an issue concluded by the decision of this court in Vodafone India Services (P.) Ltd. (supra) and in the apex court in G. S. Homes and Hotels (P.)Ltd. (supra).Thus not entertained.

14. Relying on the aforesaid judicial precedents of Hon'ble High courts and the Tribunal, we are of the opinion that in this AY i.e. AY 2009-10, the amendment in section 68 of the Act as discussed (supra) is not applicable in this AY. Further, as noted, the definition of income as provided under section 2(24) of the Act at the relevant time (AY 2009-10) did not define as income any consideration received for issue of shares in excess of its fair market value. This came into effect from 01.04.2013 and thus would have no application to the share premium received by the assessee in the previous year relevant to AY 2009-10. Therefore, the share capital/premium collected by assessee company will be tested as per the law existed prior to the amendment brought in by Finance Act, 2012; and so far as the pre-amended section 68 of the Act is concerned, it is noted that assessee had led evidence before AO/Ld. CIT(A) to prove the *nature and source* of the disputed credit entry. In this regard, it is noted that seven (7) parties has subscribed to share capital of Rs.2.15 Lakhs. That is assessee had

allotted its shares of face value of Rs.10 per share for a premium of Rs.90 per share (*Valuation Report valued per share at Rs.105 per share*). The nature of the credit entry is proved to be share capital/premium to the tune of Rs.2.15 cr (Rs.21.15 Lakh share capital + premium of Rs.1.93 cr), by producing the copy of the resolution passed by Board of the assessee company wherein it was decided to allot 2,15,000 Equity shares of Rs.10/- at a premium of Rs.90/- (*Refer copy of resolution of board of director of assessee company date 28th Feb, 2009 placed at page no. 1 to 3 of the PB*) and a perusal of the same reveals that seven (7) parties which are legal entities as noted (supra) in chart were allotted shares as spelled out therein chart. The address of the entities are given therein. The assessee had filed before the AO/Ld. CIT(A) the seven (7) shares subscribers 'PAN' details along with their respective jurisdictional ITO's/AO's, which fact is discernable from placed at page 4 to 11 of PB. Assessee company has filed Form-2 as per section 75(1) of the Companies Act, 1956 (Return of allotment) which is statutory document filed before the Registrar of Companies, a copy of which is found placed at page 30 to 33 of PB which reveals that assessee has shown the allotment of 215000 equity shares of Rs.10 per share for a premium of Rs.90 per share, which proves that assessee has allotted 2,15,000 shares as on 28.02.2009. Therefore, assessee has discharged the burden to prove the *nature* of credit entry of Rs.2.15 cr as a capital receipt. Next as per the requirement of law to prove the source of credit entry from the allotees of share, it is noted that assessee has furnished the PAN, ITR copies of

seven entities, details of respective share-subscriber, and financials of four (4) share-subscribing companies (i) M/s. Prarambh Multitrade, (ii) M/s. Kapindra Multitrate and (iii) M/s. Dura Allow cutter Pvt. Ltd. From perusal of balance-sheet of M/s. Prarambh Multitrade Pvt. Ltd., we find that it has subscribed for 15000 shares and had share-capital/reserve of more that Rs.10.9 cr (refer page no. 43 PB). And we find from perusal of page no. 58 of PB that M/s. Kapindra Multitrade had subscribed 30000 shares and paid Rs.27,00,000/- had share capital/reserve of more than Rs.18 cr. Further, on perusal of page 71 of PB which shows the balance sheet of M/s. Dura Allow Cutter Pvt. Ltd, we find that it was allotted 35000 share and had invested Rs.31,50,000/- and [it had share capital of Rs.10 Lakh, reserve of Rs.7.5 Lakh and share premium account of Rs.37,96,200/- and loan of Rs.7 cr]. And perusal of page no. 84 of PB reveals the balance-sheet of M/s. Ambuj Mercantile Pvt. Ltd, which had share capital and reserve of more than Rs.5.13 cr and had been allotted 45,000 shares. Thus assessee was able to discharge the burden of proving the credibility of four share subscribers; share capital and premium has been passed on assessee through banking channel which fact is discernable from bank statement file with the paper book and the other three (3) share-subscribers identity are proved by their respective PAN details, ITR, Confirmation found placed at page no. 96 to 109 of PB. And the assessee has filed the details of PAN & respective jurisdictional ITO's/AO of the seven share-subscriber. Thus, we find force in the

contention of assessee that it has discharged the burden to prove the *nature and source* of share subscribers s the law stood in AY 2009-10.

15. Section 68 under which the addition has been sustained by the Ld CIT(A) 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. "*

16. The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words ‘shall’ be charged to income-tax as the income of the assessee of that previous year". The Hon’ble Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "*may*" and not "*shall*". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Hon’ble Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570.

17. In a case wherein the AO made the addition u/s 68 of the Act because the lenders of loan to assessee did not turn up before him [AO], the Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd.

(supra) 159 ITR 78 has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. The Hon'ble Apex Court ratio was taken note by the Hon'ble Gujarat High Court in the case of Dy CIT vs Rohini Builders (2002) 256ITR360 wherein the Hon'ble High Court observed at pages 369 and 370 of this order are reproduced hereunder:-

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

18. In the case of Nemi Chand Kothari 136 Taxman 213, (supra), the Hon'ble Guahati High Court has thrown light on another aspect

touching the issue of *onus* on assessee under section 68 of the Act, by holding that the same should be decided by taking into consideration also the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the order are reproduced herein below:-

> *"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the*

assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:

"Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden) of proving that fact is upon him. "

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What, thus, transpires from the above discussion is that white section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s)of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and IT is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been. eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub- creditors, for, these aspects may not be within the special knowledge of the assessee. "

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" ... If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor… "

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"In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee …."

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"Keeping in view the above position of law, when we turn to the factual matrix of the present case, we find that so far as the appellant is concerned, he has established the identity of the creditors, namely, Nemichand Nahata and Sons (HUF) and Pawan Kumar Agarwalla. The appellant had also shown, in accordance

> *with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from. undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness."*

19. Further, in the case of CIT v. S. Kamaljeet Singh [2005] 147 Taxman 18(All.) their lordships, on the issue of discharge of assessee's onus in relation to a cash credit appearing in his books of account, has observed and held as under:-

> *"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AA C, setting aside the assessment order."*

20. We also take note of the decision of the Hon'ble High Court, Calcutta in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata 347 ITR 347 wherein the Court held as follows:

> *"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.*
>
> *16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."*

21. In a case where the issue was whether the assessee availed cash credit as against future sale of product, the AO issued summons to the creditors who did not turn up before him, so AO disbelieved the existence of creditors and saddled the addition, which was overturned by Ld. CIT(A). However, the Tribunal reversed the decision of the Ld. CIT(A) and upheld the AO's decision, which action of Tribunal was challenged in the Hon'ble High Court, Calcutta in the case of Crystal Networks (P.) Ltd. v. Commissioner of Income-tax 353 ITR 171 wherein the Tribunal's decision was overturned and decision of Ld. CIT(A) upheld and the Hon'ble High Court held that when the

basic evidences are on record the mere failure of the creditor to appear cannot be basis to make addition. The court held as follows:

> *8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).*
>
> *9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of Udhavdas Kewalram v. CIT [19671 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.*
>
> *10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the*

learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:

> *"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "*

11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

12. Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed.

22. When a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, the Hon’ble Calcutta High Court held that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this regards our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the COMMISSIONER OF INCOME TAX, KOLKATA-Ill Versus DATAWARE PRIVATE LIMITED ITAT No. 263 of 2011 Date: 21st September, 2011 wherein the Hon’ble Court held as follows:

> *"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.*
>
> *So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.*
>
> *We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."*

23. Our attention was also drawn to the decision of the Hon'ble Supreme Court while dismissing SLP in the case of Lovely Exports as has been reported as judgment delivered by the CTR at 216 CTR 295:

> *"Can the amount of share money be regarded as undisclosed income under section 68 of the Income tax Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee- company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.*

24. Our attention was also drawn to the decision of the Hon'ble Calcutta High Court while relying on the case of Lovely Exports, in the appeal of COMISSIONER OF INCOME TAX, KOLKATA-IV Vs ROSEBERRY MERCANTILE (P) LTD., ITAT No. 241 of 2010 dated 10- 01-2011 has held:

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT (A) ought to have held that the assessee had not established the genuineness of the transaction. "

It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4, 00, 000/- and Rs.20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00, 000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.

On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

25. Our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner Of Income Tax vs M/s. Nishan Indo Commerce Ltd dated 2 December, 2013 in INCOME TAX APPEAL NO.52 OF 2001 wherein the Court held as follows:

"The Assessing Officer was of the view that the increase in share capital by RS.52,03,500/- was nothing but the introduction of the assessee's own undisclosed funds/income into the books of accounts of the assessee company. The Assessing Officer accordingly treated the investment as

unexplained credit under Section 68 of the Income Tax Act and added the same to the income of the assessee.

Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) being the First Appellate Authority and contended that the Assessing Officer had no material to show that the share capital was the income of the assessee company and as such the addition made by the Assessing Officer under Section 68 of the Act was wrong.

The learned Commissioner of Income Tax (Appeals) after hearing the department and the Assessee Company deleted the addition of Rs. 52, 03,500/- to the income of the assessee company during the Assessment Year in question. The learned Commissioner of Income Tax Appeals found that there were as many as 2155 allottees, whose names, addresses and respective shares allocation had been disclosed.

The Commissioner of Income Tax Appeals, further found that the Assessee Company received the applications through bankers to the issue, who had been appointed under the guidelines of the Stock Exchange and the Assessee Company had been allotted shares on the basis of allotment approved by the Stock Exchange. The Assessee Company had duly filed the return of allotment with the Registrar of Companies, giving complete particulars of the allottees.

The Commissioner of Income Tax (Appeals) found that inquires had confirmed the existence of most of the shareholders at the addresses intimated to the Assessing Officer, but the Assessing Officer took the view that their investment in the Assessee Company was not genuine, on the basis of some extraneous reasons. The Commissioner of Income Tax (Appeals) took note of the observation of the Assessing Officer that enquiry conducted by the Income Tax Inspector had revealed that nine persons making applications for 900 shares were not available at the given address and rightly concluded that the total share capital issued by the Assessee Company could not be added as unexplained cash credit under 'Section 68 of the Income Tax Act. Moreover, if the nature and source of investment by any shareholder, in shares of the Assessee Company remained unexplained, liability could not be foisted on the company. The concerned shareholders would have to explain the source of their fund.

The learned Commissioner on considering the submissions of the, respective parties and considering the materials, found that the Assessing Officer had applied the provisions of Section 68 of the Income Tax Act arbitrarily and illegally and in any case without giving the assessee adequate opportunity of representation and/or hearing.

Learned Tribunal agreed with the factual findings of the learned Commissioner and accordingly the learned Tribunal dismissed the appeal of the Revenue and affirmed the decision of the learned Commissioner.

Mr. Dutta appearing on behalf of the petitioners cited judgment of the Division Bench of this Court in Commissioner of Income Tax Vs. Ruby Traders and Exporters Limited reported in 236 (2003) ITR 3000 where a Division Bench of this Court held that when Section 68 is resorted to, it is incumbent on the assessee company to prove and establish the identity of the subscribers, their credit worthiness and the genuineness of the transaction.

The aforesaid judgment was rendered in the context of the factual background of the aforesaid case where, despite several opportunities being given to the assessee, nothing was disclosed about the identity of the shareholders. In the instant case, the assessee disclosed the identity and address and particulars of share allocation of the shareholders. It was also found on the facts that all the shareholders were in existence. Only nine shareholders subscribing to about 900 shares out of 6, 12,000 shares were not found available at their addresses, and that too, in course of assessment proceedings in the year 1994, i.e., almost 3 years after the allotment.

By an order dated 2nd May, 2001, this Court admitted the appeal on three questions which essentially centre around the question of whether the Appellate Commissioner erred in law in deleting the addition of Rs. 52, 03, 500/- to the income of the assessee as made by the Assessing Officer. We are of the view that there is no question of law involved in this appeal far less any substantial question of law.

The learned Tribunal has concurred with the learned Commissioner on facts and found that there were materials to show that the assessee had disclosed the particulars of the shareholders. The factual findings cannot be interfered with, in appeal. We are of the view that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds."

26. Further, our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner of Income Tax vs M/s. Leonard Commercial (P) Ltd on 13 June, 2011 in ITAT NO 114 of 2011 wherein the Court held as follows:

"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.
In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under section 68 of the Income-tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

27. In the light of the discussion (supra) and the judicial precedents, and especially the binding decision of the Hon'ble Bombay High Court in Apeak Infotech (88 Taxman.com 695). We find that the premium collected by assessee could not brought to tax in AY. 2009-10. Further, we note that in the facts and circumstances of the case, the assessee has been able to discharge the burden to prove *the nature and source* of the credit entry

i.e. share capital of Rs.21.15 lakhs and the assessee has filed the Valuation Report which is found placed at page no. 12 to 29 of PB which justifies the premium collected by assessee premium of Rs.90 per share (Rs 1.93cr). Therefore, the share premium cannot be held to be high in the facts and circumstances of the case. Moreover, in the light of the detailed finding of fact given by us at para (14) supra and at the cost of repetition, we find that the assessee has filed the PAN details of seven (7) entities/share subscribers and has filed their respective ITR Acknowledgment. In order to prove the creditworthiness, assessee has filed the financials of four (4) share subscribers companies. From a perusal of page no. 43 of M/s. Prarambh Multitrade Pvt. Ltd., it is noted that it has share capital/reserves of Rs.10.9 crores; and from perusal of the page no. 58 of PB, the balance-sheet of M/s. Kapindra Multitrade Pvt. Ltd., we note that the share capital/premium of Rs.18 crores; and a perusal of page 71 of PB i.e. balance-sheet of M/s. Duralloy Cutters Ltd reveals that company had share capital and loan of Rs. 8 crore and page no. 84 of PB reveals balance-sheet of M/s. Ambuj Mercantile Pvt. Ltd. which shows that it has total share capital plus loan of Rs.5.13 crore. The other three (3) companies has filed their PAN details and confirmation. In the light of the aforesaid documents, and the judicial precedents cited in the facts and circumstances of the case, we are of the view that the assessee has discharged the burden the proving the *nature of source* of the credit entry, therefore, the addition was not warranted because even after submitting the aforesaid documents, the AO didn't make any fruitful enquiry. Merely because the share-subscribers returned low income cannot be the sole reason to brand them as not

creditworthy as held by the Hon'ble Calcutta High Court in Date Ware Pvt. Ltd. (supra). It is not the case of the AO of assessee that the transactions shown by the share-subscribing companies have not been accepted by their respective AO's. Despite the assessee furnished the details of creditors/investors, the AO didn't make any enquiry from the data base of the department, but insisted on the assessee to produce the creditors (*according to assessee, at the fag end of assessment, assessee was asked to produce the share subscribers or they could have been produced*). Taking into consideration, the overall facts and circumstances of the case in hand, we are of the view that assessee discharged the burden to prove the *nature and source* of the credit entry of Rs.2.15 cr in AY. 2009-10 and then the onus shifted to the AO to counter the same by adducing contrary material, which in this case, the AO has failed to do. Therefore, Ld. CIT(A) erred in confirming the addition. Therefore, we direct deletion of addition of Rs.2.15 cr.

28. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 31/01/2024.

Sd/-	Sd/-
(S RIFAUR RAHMAN)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 31/01/2024.
Vijay Pal Singh, (Sr. PS)

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**