

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, KOLKATA

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

I.T.A. No. 250/Kol/2020
Assessment Year: 2012-13

Vish Realty Solutions Private Limited 55, Ezra Street 2 nd Floor Kolkata - 700001 [PAN : AADCV9938N]	Vs	Income Tax Officer, Ward-5(3), Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri S. Jhajharia, A/R
Revenue by :	Shri Vineet Kumar, Addl. CIT, D/R

सुनवाई की तारीख/Date of Hearing : 16/01/2024
घोषणा की तारीख /Date of Pronouncement: 21/02/2024

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the assessee against the order of the Commissioner of Income Tax (Appeals) -10 (hereinafter the "Id. CIT(E)") dt. 02/12/2019, passed u/s 263 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2012-13.

2. The assessee has raised the following grounds of appeal:-

"1. That the Learned Commissioner of Income Tax (Appeals)-IO, Kolkata erred in passing an order dated 2nd of December, 2019 under section 143(3) of the Income Tax Act, 1961 dismissing the appeal of the Appellant without allowing reasonable opportunity of being heard.

2. That the learned Commissioner of Income Tax (Appeals) - 10, Kolkata erred in confirming the addition of share application money of Rs. 5,86,00,000/- made by the Assessing Officer under section 68 of the Income Tax Act, 1961 on irrelevant considerations and arbitrary grounds.



3. *That the learned Commissioner of Income Tax (Appeals)-10, Kolkata erred in confirming the addition of Rs. 5,86,00,000/- made by the Assessing Officer under section 68 of the Income Tax Act, 1961 on the basis of judgments which are distinguishable on facts as well as on law.*

4. *That the learned Commissioner of Income Tax (Appeals)-10, Kolkata erred in confirming the addition of share capital of Rs. 5,86,00,000/- made under section 68 of the Income Tax Act, 1961 in disregard to the binding judgments of Hon'ble Apex Court, Hon'ble Jurisdictional High Court and the Hon'ble Jurisdictional ITAT which directly lays down ratio on the merits of the addition of share capital under section 68 of the Income Tax Act, 1961.*

5. *That the appellant craves leave to add, alter or delete all or any of the grounds of appeal."*

3. Facts in brief are that the assessee is a private limited company engaged in the business of development of property. Nil income declared in the return for Assessment Year 2012-13 furnished on 30/09/2012. Case selected for scrutiny through CASS followed by issuance of notice u/s 143(2) and 142(1) of the Act. During the year under consideration, the assessee received share application money of Rs.5,86,00,000/-. The assessee was asked to furnish various details and documents in order to explain identity and creditworthiness of the share subscribers and genuineness of the transactions. Necessary details were filed by the assessee. However, personal appearance of the directions/share subscribers was not complied. Solely for this reason, the ld. Assessing Officer referring to various decisions came to the conclusion that the assessee had introduced its own unaccounted

funds in the form of share application money and made the addition u/s 68 of the Act. Petty disallowance u/s 14A of the Act of Rs.30,216/- was also made. Income assessed at Rs.5.86 Crores.

4. Aggrieved the assessee preferred appeal before the Id. CIT(A) challenging the addition of Rs.5.86 Crores made towards unexplained share application money. Again, the assessee filed complete details in the form of audited balance sheet, identity details, income tax returns, bank statements and other supporting details so as to explain the nature and source of alleged sum. The Id. CIT(A) though accepted the fact that the assessee has filed various details to prove the identity, creditworthiness of the share applicants and genuineness of the transactions but without finding any defect in such details, referred to plethora of judgment wherein, the addition u/s 68 of the Act were confirmed when the assessee could not explain the nature and source of sum received but while concluding the finding has referred the transactions relating to long term capital gain. Though the issue was regarding unexplained share application money but for reasons best known to the Id. CIT(A), he has referred the transactions as long term capital gain. The relevant part of the impugned order is extracted as under:-

*"12. I am in agreement with the Ld. AO that the transactions relating to the claim of LTCG as made by the Ld. AO come within the ambit, of "suspicious transactions", and therefore the **rules of suspicious transactions** would apply to the case. Payment through Banks, performance through stock -exchange and other such features are only apparent features. The real features are the manipulated and abnormal -rice of off load and the sudden dip thereafter. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the Ld.AO fall in*

the realm of "suspicious" and "dubious" transactions. The Ld. AO has therefore necessarily to consider the surrounding circumstances, which he indeed has done in a very meticulous and careful manner. In the case of Win Chadha vs CIT (International Taxation) in ITA No. 3088 & 3107/Del/2005, the Hon'ble Delhi ITAT 'B' Bench has observed, on 31.12.2010 as under:....."

- 4.1. Further, while concluding the finding, the ld. CIT(A) has stated that he finds no infirmity in the order of the Assessing Officer and has confirmed the addition u/s 68 of the Act of Rs.5,86,00,000/-.
5. Aggrieved, the assessee is now in appeal before this Tribunal.
6. The ld. Counsel for the assessee referred to the detailed paper book filed which *interalia* includes copy of the audited financial statements, bank statements, certificate of incorporation, income tax return, master data from portal of Ministry of Corporate Affairs, PAN Cards, copies of documents representing source of source of the shareholder companies. Further he also stated that the assessee has discharged its primary onus by furnishing all relevant details and no discrepancy has been found in the said details. It was also submitted that all the alleged share applicants were having sufficient funds in the form of share capital and reserve and surplus to cover up the investments made in the equity share capital of the assessee company. It was also submitted that, complete documents/evidence have been submitted before the lower authorities which are more than sufficient to prove the identity and creditworthiness of the share applicants and genuineness of the transactions. Reliance was placed on the recent decision of this Tribunal in the case of *M/s. Inter Securities Pvt. Ltd. vs.*

ITO in ITA No. 609/Kol/2018; Assessment Year 2012-13; order dt. 16/10/2023.

7. On the other hand, the ld. D/R, vehemently argued supporting the orders of both the lower authorities and stated that the alleged share applicants are paper companies and the investments made in the equity shares of the assessee company is in the nature of accommodation entry by way of which assessee has routed its unaccounted income in its books through share applicants money. He also referred to a chart stating that the alleged share applicant companies have offered meagre income to tax even though huge amount of share application money has been given by them to the assessee and that most of this alleged share applicant companies are registered at common address and directors are mostly common which thus indicates that the alleged share applicant companies are part of the racket of companies providing accommodation entries and are *jamakharchi* and shell companies which have been used by the assessee to route its own unaccounted income.

8. We have heard rival contentions and perused the material placed on record. Addition u/s 68 of the Act at Rs. 5.86 Crores is in dispute before us wherein both the lower authorities have held that the assessee had been unable to explain the nature and source of this share application money which included share capital and share premium totaling to Rs.5.86 Crores, on account of issue of share of face value of Rs.10/- and premium of Rs. 490/- received from 10 share subscribers. The assessee has placed before us copies of audited financial statements, bank statements, certificate of incorporation, income tax return, master

data from portal of Ministry of Corporate Affairs, PAN Cards, copies of documents representing source of source of the shareholder companies. The assessee has also provided a chart showing the net worth of the alleged share subscribers to show that the share applicant companies did not have enough net worth to invest in the assessee company. The chart is extracted for ready reference:-

SI. No.	Name	Shares allotted	Amount invested	Networth
1	Shree Bahubali Corporation Ltd.	10,000	50,00,000/-	19.85 Cr
2	Kalkat Consultants Pvt. Ltd.	10,000	50,00,000/-	6.31 Cr
3	Zodiac Vintrade Pvt. Ltd.	20,000	1,00,00,000/-	8.91 Cr
4	Frontline Commosale Pvt. Ltd.	10,000	50,00,000/-	1.93 Cr
5	Corus Vincom Pvt. Ltd.	4,400	22,00,000/-	1.41 Cr
6	Jaishree Commotrade Pvt. Ltd.	12,000	60,00,000/-	22.90 Cr
7	Banshidhar Vyapaar Pvt. Ltd.	12,600	63,00,000/-	29.44 Cr.
8	Moonlight Tradelinks Pvt. Ltd.	12,000	60,00,000/-	9.84 Cr.
9	Sparkal Dealers Pvt. Ltd.	12,000	60,00,000/-	4.92 Cr.
10	Impression Tradelinks Pvt. Ltd.	11,800	59,00,000/-	7.75 Cr.
		1,14,800	5,74,00,000/-	

10. The details filed before us in respect of the share subscriber companies also stood furnished before both the lower authorities. As far as assessee is concerned, in terms of provisions of Section 68 of the Act, it has discharged the primary onus by furnishing all the documents and details relevant/necessary to explain the identity, creditworthiness of share applicants and genuineness of the transactions. Once these documents have been filed then, the burden shifts over the revenue authorities and they have to examine those details and find out any discrepancy in such documents and then confront the assessee. Perusal of the impugned order as well as the assessment order reveals that no such discrepancies have been noticed

by the assessing authorities except giving general remarks about the income and business turnover. It is also noteworthy that even when complete details were filed to explain the nature and source of share application money, ld. CIT(A) is referring the transaction as long term capital gain.

10.1. In the paper book, the assessee had filed the confirmation letters and all the share subscribers have stated to have given the share application money and the source of such share application money in the confirmation letter which the share applicants received before making the investment in the assessee company. In other words, source of source has been explained by the assessee company. We also notice that the summons u/s 131 of the Act were issued to the Directors of the assessee company who have appeared before the Assessing Officer and submitted all the documents to establish the identity and creditworthiness of the shareholders and genuineness of the transactions. Therefore, on one hand, the share applicants have sufficient funds to explain the investment, so as to prove the identity and creditworthiness and on the other hand, the genuineness of the transaction is also proved as a fair investment has been made in the assessee company. Therefore, since the criteria to prove all the three ingredients i.e., the identity and creditworthiness of the share applicants and genuineness of the transactions have been fulfilled by the assessee so as to prove the nature and source of alleged sum, no addition is called for u/s 68 of the Act.

11. Our view is further supported by the recent decision of this Tribunal in the case of *M/s Inter Securities Pvt. Ltd.*, where this Tribunal while adjudicating the identical issue and taking into consideration the settled judicial precedents, has held as follows:-

“6. We have heard rival contentions and perused the material placed on record.

7. Addition u/s 68 of the Act at Rs. 3.59 Crores is in dispute before us wherein both the lower authorities have held that the assessee had been unable to explain the nature and source of this share application money which included share capital and share premium totaling to Rs.3.59 Crores, on account of issue of share of face value of Rs.10/- and premium of Rs.90/- received from 14 share subscribers. We notice that the assessee has furnished following documents/information/evidence of all the alleged share subscribers:-.....

8. All the above details stood furnished before both the lower authorities. As far as assessee is concerned, in terms of provisions of Section 68 of the Act, it has discharged the primary onus by furnishing all the documents and details relevant/necessary to explain the identity, creditworthiness of share applicants and genuineness of the transactions. Once these documents have been filed then, the burden shifts over the revenue authorities and they have to examine those details and find out any discrepancy in such documents and then confront the assessee. Perusal of the impugned order as well as the assessment order reveals that no such discrepancies have been noticed by the assessing authorities except giving general remarks about the income and business turnover. In the paper book, the assessee had filed the confirmation letters and all the share subscribers have stated to have given the share application money and the source of such share application money in the confirmation letter which the share applicants received before making the investment in the assessee company. In other words, source of source has been explained by the assessee company. We also notice that the summons u/s 131 of the Act were issued to the Directors of the assessee company who have appeared before the Assessing Officer and submitted all the documents to establish the identity and creditworthiness of the shareholders and genuineness of the transactions.

8.1. So far as the share premium of Rs.90/- charged by the assessee is concerned, we notice that as on 31/03/2011, the total of share capital & reserve surplus held by the assessee is Rs. 1,00,88,262/-. For computing the book value as on 31/03/2011, we need to divide total of share capital and reserve and surplus with 110000 equity shares issued upto 31/03/2011. Thus the book value as on 31/03/2011 would come to Rs.91.65 (Rs.1,00,81,262/- ÷) Rs.1,10,000/-). The share application money received during financial year 2011-12 is Rs.100/-, which comprises of share premium of Rs.90/- charged on equity shares of face value of Rs.10/-. Considering the book value, per share as on 31/03/2011 at Rs.91.65, we find that the assessee has not charged any exorbitant share premium from the share applicants and the share premium charged is not highly excessive in comparison to the book value. Therefore, on one hand, the share applicants have sufficient funds to explain the investment, so as to prove the identity and creditworthiness and on the other hand, the genuineness of the transaction is also proved as a fair investment has been made in the assessee company. Therefore, since the criteria to prove all the three ingredients i.e., the identity and creditworthiness of the share applicants and genuineness of the transactions have been fulfilled by the assessee so as to prove the nature and source of alleged sum, no addition is called for u/s 68 of the Act.

9. We find support from the various decisions as referred by the ld. Counsel for the assessee in the list of case-law (supra). We, find that this Tribunal in the case of DCIT, vs. Narsingh Ispat Limited; ITA No. 225/Kol/2023 order dt. 26/07/2023, under identical facts and issue held as under:-

"7. We have heard rival contentions and perused the material available on record. The revenue is aggrieved with the deletion of addition of Rs.19,14,50,000/- made by the assessing officer u/s 68 of the Act. We notice that the assessing officer when called for the details from the respective share applicants, namely, M/s. Honesty Dealers Pvt. Ltd. and M/s Seaview Agencies Pvt. Ltd., for the sum of Rs.10,52,00,000/- and Rs.8,62,50,000/-, received against the issue of equity capital during the year, both the share applicants of replied to the notice under section 133(6) of the Act and have filed complete details including bank statements, income tax returns, audited balance sheets, confirmation of accounts etc.. It was also submitted that the alleged share applicants are part of the assessee's group. However, when the summons under section 131 of the Act were not complied by the directors of the assessee company, the

impugned additions were made under section 68 of the Act. Thereafter when the assessee preferred appeal before the ld. CIT(A), filing complete details and also stating that the source of source of the alleged sum is duly proved with the fact that both the alleged share applicants have received equity share capital and share premium in the preceding years and those years have been assessed to tax and even addition has been made in the hands of M/s. Honesty Dealers Pvt. Ltd., towards unexplained share capital at Rs.14,80,00,000/- in AY 2009-10. Based on these submissions, the ld. CIT(A), deleted the impugned addition by observing as follows:-

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

are companies having common Directors with the assessee company and they have been regularly filing their returns of income. Appellant has submitted assessment order for M/s. Honesty Dealers Pvt. Ltd. for assessment year 2009-10. Similarly, appellant has also submitted the assessment orders in the case of M/s. Seaview Agencies Pvt. Ltd. for AY: 2011-12 and 2012-13. This shows that both these companies have their separate existence and these have been verified independently by their respective AOS Regarding creditworthiness of the two parties, it is notice that M/s. Honesty Dealers Pvt. Ltd. had received share capital of Rs. 1,4,80,00,000/- in AY: 2009-10 and in scrutiny order u/s 144/263/143(3)/147 dated 12.03.2015, entire receipt of share capital has been added in the hands of M/s. Honesty Dealers Pvt Ltd. Further, perusal of the Balance-sheet of M/s. Honesty Dealers Pvt. Ltd. as on 31.03.2012 shows that major chunk of the share capital received in AY: 2009-10 has been invested in the shares of the assessee company in AY: 2012-13. Thus, the investments in the shares of assessee company, amounting to Rs.10,52,00,000/- has been out of the share capital raised in AY: 2009-10 and in AY: 2009-10, entire share capital raised by M/s. Honesty Dealers Pvt. Ltd. has been added in the hands of the party. Thus, the creditworthiness of M/s. Honesty Dealers Pvt. Ltd. vis- à-vis the investments in the shares of the assessee company gets established. There is a clear link between raising of share capital in AY: 2009-10 by M/s. Honesty Dealers Pvt. Ltd. and investing a major part of that share capital into the shares of assessee company in AY: 2012-13. As addition has already been made in the hands of M/s. Honesty Dealers Pvt. Ltd. for the amount received as share capital, another addition for the same amount cannot be sustained in the hands of the assessee company when the linkages between the two are apparent from records.

Now coming to the M/s. Seaview Agencies Pvt. Ltd., it is noticed that this company had also raised huge share capital in AY: 2009-10 and the source of investments in the shares of the assessee company in the current year is the share capital raised by M/s. Seaview Agencies Pvt. Ltd. in AY: 2009-10. Although, there was no scrutiny in its case for AY:

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

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

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

8. *On going through the above findings as well as the available records so far as the alleged sum of Rs.10,52,00,000/- received from Honesty Dealers Pvt. Ltd., is concerned, we find that the sum of Rs.14,80,00,000/- was raised by Honesty Dealers Pvt. Ltd., during the financial year 2008-09 towards share capital and share premium. Thereafter, Honesty Dealers Pvt. Ltd., was subjected to scrutiny proceedings and vide order dt. 12/03/2015, passed under section 144/263/143 (3)/147 of the Act, the said sum of Rs.14,80,00,000/- was added. Since the alleged sum has been added in the case of Honesty Dealers Pvt. Ltd., and the sum received by it was invested in the form of loans and advances and investments, during the year under consideration some of the funds have been received backed by Honesty Dealers Pvt. Ltd., and has been utilised for investing in the equity share capital of the assessee company. These details have gone uncontroverted at the end of the revenue*

authorities and it remains an admitted fact that the source of the source stands proved with the details filed before us and, therefore, making an addition again in the hands of the assessee would tantamount to double addition and, therefore, the addition in the year under consideration is not warranted and the ld. CIT(A) has rightly deleted the same.

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

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

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

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

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

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

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

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

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

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

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

- i. Party Wise details of share capital raised during the year,
- ii. Form 2, Form 5 filed with ROC,
- iii. Memorandum and Article of Association,
- iv. Bank Statement for the year,
- v. Share Application Form,
- vi. Form 18 in support of registered office address of the company,
- vii. Audited accounts for the year,

viii. *Relevant Bank Statement for the year,*

ix. *Form 18 in support of registered office address of these companies.*

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

i. *Photo Identity and Address Proof,*

ii. *Narration of all debit and credit entries in relevant Bank statements,*

iii. *Copies of all relevant ROC returns,*

iv. *Sources of funds and utilisation of funds,*

v. *Evidence of creditworthiness along with Income Tax Returns filed and*

vi. *Copies of Audited Accounts and Tax Audit Report for the relevant AY.*

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

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

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

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

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

the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69."

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

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

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

36. *In the result, the appeal of the assessee is allowed."*

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

"30. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source, it shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. the PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record, including that of the directors and share holders of share subscribing entities as discussed supra. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO and confirmed by Ld. CIT(A) are based on conjectures and surmises, so their impugned action cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do allow the appeal of assessee and direct deletion of addition of Rs 16 cr under section 68 of the Act."

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

18. *Therefore, after going through the various details and documents placed before us, we find that assessee has successfully discharged primary onus casted upon it to explain the source of alleged share capital and share premium. Ld. AO did not find any*

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

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

“i) CIT vs. Gagandeep Infrastructure (P) Ltd. 80 taxmann.com 272 (Bombay) wherein it was held by High Court that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as

in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso.

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

iii) CIT vs. Kamdhenu Steel & Alloys Limited [ITA No.972 of 2009] dated 23.12.2011 wherein the Delhi High Court in a batch of 11 appeals was required to adjudicate on the very issue of addition made by the A.O u/s 68 in respect of share application monies received by the assesseees as alleged unexplained cash credit. In all these cases, the Department had alleged that the share application monies were received from persons who were 'entry operators' and the monies received by way of share application was nothing but was routing of unaccounted money of assessee in the form of subscription to share capital. However, in the assessments made the A.Os had not brought on record any

material or evidence to substantiate such finding. Accordingly, on appeal the appellate authorities had deleted the additions made u/s 68 of the Act.

iv) CIT vs. Orissa Corpn (P) Ltd. 159 ITR 78 where the Court held that "In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

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

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

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

"Section 68 of the Income-tax Act, of 1961, deals with cash credits. It states that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers

no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The crucial words in the provision are "the assessee offers no explanation". This would mean that the assessee offers no proper, reasonable and acceptable explanation as regards the amount credited in the books maintained by the assessee. No doubt the Act places the burden of proof on the taxpayer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their confirmations, the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit to be justified in referring to section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee submits the explanation concerning the cash credit, the Assessing Officer should consider it objectively before he decides to accept or reject it. Where the assessee furnishes full details regarding the creditors, it is up to the Department to pursue the matter further to locate those creditors and examine their creditworthiness. While drawing the inference, it cannot be assumed in the absence of any material that there have been some illegalities in the assessee's transaction. Held, dismissing the appeal, that the allegations against the assessee were in respect of thirteen transactions. The Assessing Officer issued a show-cause notice only in respect of one of the lenders. The assessee responded to the show-cause notice and submitted the reply. The documents annexed to the reply were classified under three categories namely: to establish the identity of the lender, to prove the genuineness of the transactions and to establish the creditworthiness of the lender. The Assessing Officer had brushed aside these documents and in a very casual manner had stated that merely filing the permanent account number details, and balance sheet did not absolve the assessee from his responsibility of proving the nature of the transaction. There was no discussion by the Assessing Officer on the correctness of the stand taken by the assessee. Thus, going by the records placed by the assessee, it could be safely held that the assessee had discharged his initial burden and the burden shifted onto the Assessing Officer to enquire further into the matter which he failed to do. In more than one place the Assessing Officer used the expression "money laundering". Such usage was uncalled for as the allegation of money laundering is a very serious allegation and the effect of a case of money laundering under the relevant Act is markedly different. The order passed by the Assessing Officer was utterly

perverse and had been rightly set aside by the Commissioner (Appeals). The Tribunal had rightly deleted the additions under section 68."

14. We, therefore, respectfully following the ratio laid down in the above case laws and consistent with the view taken in the above referred decision of this Tribunal and also observing the fact that since the assessee has successfully proved the three necessary ingredients i.e., identity and creditworthiness of the share applicants and genuineness of the transactions as provided u/s 68 of the Act, are of the view that no interference is called for in the order of the ld. CIT(A) deleting the addition made by the Assessing Officer u/s 68 of the Act and the same is upheld.

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

10. Considering the ratio laid down by the Co-ordinate Bench of this Tribunal in the case of Narsingh Ispat Limited (*supra*), we are satisfied that the same is squarely applicable on the facts of the instant case as before us, assessee has filed complete documentary evidence to explain the identity and creditworthiness of the share applicants and genuineness of the share transactions. We thus set aside the findings of the ld. CIT(A) and delete the impugned addition of Rs.3,59,00,000/- made u/s 68 of the Act and allow the effective grounds of appeal raised by the assessee.

12. In view of the above discussion and following the decisions of this Tribunal in the case of *M/s. Inter Securities Pvt. Ltd. (supra)*, which *inter alia* relied on plethora of judgments including that of the Hon'ble Jurisdictional High Court, we are satisfied that the same is squarely applicable on the facts of the instant case as before us, assessee has filed complete documentary evidence to explain the identity and creditworthiness of the alleged ten share applicants and genuineness of the transactions. We thus set aside the findings of the ld. CIT(A) and delete the impugned addition of Rs.5,86,00,000/- made u/s 68 of the Act

and allow the effective grounds of appeal raised by the assessee.

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

Order pronounced in the Court on 21st February, 2024 at Kolkata.

Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

Sd/-

(DR. MANISH BORAD)
ACCOUNTANT MEMBER

Kolkata, Dated 21/02/2024

SC Sp/2

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

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

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata