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

BEFORE SHRI BR BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T. A. No. 2475/Mum/2021
(**निर्धारण वर्ष** / Assessment Year: 2008-09)

ITO-28(1)(1) Room No. 329, Tower No. 6, 3rd Floor, Vashi Railway Station, Navi Mumbai-400703.	**बनाम** / Vs.	M/s. Gahlot Construction Plot No-28A, Gahlot Complex, Sector-10, Nerul, Navi Mumbai-400703.

Cross Objection No. 82/Mum/2023
Arising out of I.T.A. No.2475/Mum/2021
(**निर्धारण वर्ष** / Assessment Year: 2008-09)

M/s. Gahlot Construction Plot No-28A, Gahlot Complex, Sector-10, Nerul, Navi Mumbai-400703.	**बनाम** / Vs.	ITO-28(1)(1) Room No. 329, Tower No. 6, 3rd Floor, Vashi Railway Station, Navi Mumbai-400703.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAOFM5698J		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Ms. Ritika Agarwal
Revenue by:	Shri Raj Singh Meel (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 30/01/2024
घोषणा की तारीख /Date of Pronouncement: 23/02/2024

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the revenue; and the assessee has filed a Cross Objection (CO) against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi [hereinafter referred to as the "CIT(A)"] dated 30.10.2021 for the AY. 2008-09.

2. The main grievance of the Revenue is against the action of the Ld. CIT(A) deleting the addition of Rs.5 cr which was added by the

AO u/s 68 of the Income Tax Act, 1961 (hereinafter "the Act"). And by preferring the CO, the assessee has assailed the action of the AO to have re-opened the assessment u/s 147 of the Act after expiry of four (4) years from the end of the relevant assessment year, without satisfying the additional requirement of law as stipulated in the first proviso u/s 147 of the Act. According to the assessee, the AO in the first round [*assessment framed u/s 153C/143(3) of the Act framed on 03.11.2010],* has already inquired about the loan taken of Rs. 5 cr from M/s. Mohit International & M/s. Natasha Enterprises, and after having satisfied about the "*nature and source"* of the credit, has not taken any adverse view/addition, while framing the assessment order. In such a scenario, according to the assessee, it cannot be said that there was failure on the part of the assessee to disclose fully and truly or material facts. Further, according to assessee, in the aforesaid circumstances, the action of re-opening and resultant reassessment at best tantamount to *change of opinion;* and moreover, the re-opening of assessment is bad in law for not providing a copy of the approval taken by AO u/s 151 of the Act. Thus, the assessee has raised in its CO the legal issues challenging the re-opening of the assessment u/s 147 of the Act.

3. It was brought to our notice that the Ld. CIT(A) has given relief to the assessee on merits of the addition. Therefore, first of all, we are inclined to examine the action of the Ld. CIT(A) without going into the legal issue raised in the CO.

4. Brief facts are that the assessee firm had filed its original return of income u/s 139 of the Act on 29.09.2008 disclosing income of Rs.10,92,965/-. The AO later on framed an assessment u/s 153C/143(3) of the Act on 03.11.2010 by assessing total income of assessee at Rs.73,16,965/-. Thereafter, the case of the assessee was re-opened u/s 147 of the Act on the reason that the assessee has taken accommodation entry in the form of bogus loans from two concerns i.e. (i) M/s. Mohit International (Rs.2.5 cr) and (ii) M/s. Natasha Enterprises (Rs.2.5 cr) which were managed and controlled by the entry operator Shri Pravin Kumar Jain (hereinafter "Shri P.K. Jain). Therefore, he re-opened the assessment, and noted that the assessee is in the business of Real Estate, [Builder & Developer]. The AO in the course of reassessment, asked the assessee to prove the "*nature & source"* of Rs.5 cr credited in its books. Pursuant to it, the assessee filed the relevant documents to prove that Rs.2.5 cr was received as loan from M/s. Natasha Enterprises and to support such an assertion filed the confirmation from M/s. Natasha Enterprises, ledger account of M/s. Natasha Enterprises in assessee's book as well as confirmation of account which shows that the lender has given loan to the assessee. And the assessee also filed the bank statement as well as proof of payment of interest to M/s. Natasha Enterprises after duly deducting the TDS. In respect of M/s. Mohit International, the assessee filed the confirmation, bank statement, ledger copy and proof of payment of interest on loan after deducting TDS. However, the AO was not convinced. According to him, during the search action u/s 132 of the

Act on 01.10.2013 Shri Pravin Kumar Jain admitted that he was involved in providing accommodation entry to beneficiaries through his thirty (30) odd concerns and has further admitted that he controls these concerns through dummy directors. According to the AO, both (*M/s. Mohit International and M/s. Natasha Enterprises*) are concerns controlled and managed by Shri P K Jain. Further, according to AO, one Shri Dinesh Chaudhary (*broker of accommodation entries*) was also one of the key players and was the dummy director of concerns of Shri P. K. Jain and that his statement was also recorded and he also admitted that Shri P. K. Jain is involved in providing accommodation entries and not carrying out any genuine business. According to the AO, as per the loose papers found from the premises of Shri Nilesh Parmar and Dinesh Chaudhary (*page no. 19 of the loose sheet*), they accepted that contents of this paper shows circular trading between M/s. Mohit International, M/s. Natasha Enterprises and M/s. Josh Trading Company of Rs.2,13,20,000/-. According to the AO, these facts indicate that Shri Dinesh Chaudhary is the broker in respect of accommodation entries taken by M/s. Mohit International and M/s. Natasha Enterprises in active connivance with Shri P K Jain Group. The AO after explaining the modus operandi of Shri P K Jain in providing accommodation entry for beneficiaries, he noted that even though Shri P K Jain and Shri Dinesh Chaudhary has retracted their statements on the ground that the statements were extracted under-duress, however, according to the AO, the retractions after seven (7) months cannot be accepted. The AO on the strength of the statements

recorded of Shri Pravin Kumar Jain and Shri Dinesh Chaudhary was of the view that the assessee failed to satisfy him about the "*nature & source"* of Rs.5 cr collected by assessee. According to the AO, from a perusal of the bank statement of M/s. Mohit International & M/s. Natasha Enterprises, it revealed that prior to debit of the amount to assessee, there are credit entries on the same day from M/s. New Planet and M/s. Ostwal which shows that lender had no creditworthiness and routed money through the concerns run by Shri P. K Jain Group to issue bogus accommodation entries to assessee. Thus, according to the AO, the source of the loan advanced to the assessee by M/s. Mohit International & M/s. Natasha Enterprises has not been established and consequently, the genuineness of the loan of Rs.5 cr taken from these two concerns has not been established. And therefore, he added Rs. 5 cr u/s 68 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A)/NFAC who was pleased to delete the same. Aggrieved, the revenue has filed the appeal against the action of the Ld. CIT(A) and the assessee has filed CO against the action of Ld. CIT(A) summarily rejecting the legal issue.

5. Assailing the action of the Ld. CIT(A) deleting the addition of Rs.5 cr., the Ld. DR submitted that so called lender (*M/s. Mohit International and M/s. Natasha Enterprises*) were both concerns controlled by Shri Pravin Kumar Jain. According to him, Shri P. K Jain has admitted to be providing accommodation entry to beneficiaries like assessee. And Shri P. K. Jain has explained the

modus operandi carried out by him for providing accommodation entry through thirty (30) odd concerns controlled by him or through his dummy directors. According to the Ld. DR, both the lender concerns had given amount of Rs.2.5 cr each to the assessee and they don't have any creditworthiness. According to the Ld. DR, no credence should be given to the retracted statement of Shri Pravin Kumar Jain whose business is only to provide accommodation entries of bogus sale/purchase/loan and advances to many parties through his various concerns. According to him, in the light of the aforesaid facts, the Ld. CIT(A) erred in deleting the addition made by AO of Rs. 5 cr. And therefore, he want us to reverse the order of the Ld. CIT(A) and uphold the action of the AO.

6. Per contra, the Ld. AR appearing for the assessee opposed the submission of the Ld. DR and submitted that the assessee firm had already undergone scrutiny assessment for AY 2008-09 and pointed out that pursuant to search action carried out by Department, the AO issued notice u/s 153C of the Act and on 19.02.2009 the AO had inquired about the loan taken of Rs.5 cr from M/s. Mohit International & M/s. Natasha Enterprises; and after being convinced about the "*nature & source"* of the credit entry has not taken any adverse view while framing the assessment on 03.11.2010 u/s 153/143(3) of the Act but assessed the total income at Rs.73,16,965/- in place of returned income of Rs.10,92,965/-. In such a scenario, according to Ld. AR, the action of the AO to again re-open the assessment was not legally

permissible and the assessee has raised the legal issues which the Ld. CIT(A) has summarily dismissed without passing any speaking order. Therefore, the assessee has preferred the CO.

7. Supporting the action of Ld. CIT(A) in deleting the addition, the Ld. AR submitted that the Ld. CIT(A) has correctly appreciated the facts and the law prevailing in AY 2008-09 to conclude that the assessee had discharged its burden to prove the "*nature & source"* of the loan taken to the tune of Rs.2.5 cr each from M/s. Mohit International & M/s. Natasha Enterprises. According to her, the AO erred in relying on the statement recorded by Shri Pravin Kumar Jain which was admittedly taken by the department behind the back of the assessee. Further, according to the Ld. AR, the AO before relying on such a statement of 3rd party was duty bound to conduct an independent inquiry by summoning Shri Pravin Kumar Jain and ought to have recorded his statement, and thereafter furnished such a statement to assessee; however, in this case, the AO and has neither furnished the complete statement nor has allowed the assessee to cross-examine Shri P. K. Jain or Shri Dinesh Chaudhary. According to the Ld. AR, the assessee or its partners does not know Shri Pravin Kumar Jain or Shri Dinesh Chaudhary or Shri Nilesh Parmar (whose names figures in the assessment order). According to Ld. AR, the AO has not been able to bring any material/evidence to prove the nexus between assessee/partners with any of these persons. According to her, without bringing any material to connect the assessee/partners with

Shri Pravin Kumar Jain/Shri Dinesh Chaudhary/Shri Nilesh Parmar, no adverse view could have taken against the assessee. According to Ld. AR, the statement recorded behind the assessee's back and not tested on the touch-stone of the cross-examination cannot be relied upon by the AO as held by Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE reported in (2015) 281 CTR 241 (SC). Moreover, according to the Ld. AR, the selected extracted statements (reproduced portions *in the assessment order*) does not mention the name of assessee/or its partners and the statements does not show that assessee/partners indulged in any wrong doing or have availed accommodation entry from these persons (entry operators). Therefore, according to her, the Ld. CIT(A) has rightly not given any weightage to the statements of these persons; and has rightly appreciated that assessee when called upon to prove the "*nature & source"* of Rs.2.5 cr each from M/s. Mohit International & M/s. Natasha Enterprises was able to prove that the *nature* of amount in question were *loan* taken from those two concerns, and that assessee has been duly paying interest on it, after deducting TDS, which has been duly shown as income by both lenders i.e. M/s. Mohit International as well as M/s. Natasha Enterprises. She also pointed out that the Ld. CIT(A) has taken note of the Income Tax acknowledgment filed of M/s. Mohit International & M/s. Natasha Enterprises at para no. 7 of his order wherein he has found that copies of return of income of both parties for AY. 2008-09 to AY. 2012-13 were also filed along with copy of bank statements of both parties reflecting relevant entries, copy of

bank statement of the assessee showing the receipt of the money from both the parties, copy of ledger account of both the parties, confirmation from both the parties, and that TDS was deducted on the interest payment of loans and that both the lenders have shown the interest paid to them as income in their respective returns. In the light of the aforesaid relevant evidence brought on record, according to the Ld. AR, the Ld. CIT(A) has rightly found that assessee has discharged the burden to prove the "*nature & source*" of the loan of Rs.5 cr taken from M/s. Mohit International & M/s. Natasha Enterprises. Therefore, she does not want us to interfere with the impugned action of the Ld. CIT(A).

8. We have heard both the parties and perused the records. We note that this is the second round of litigation for AY 2008-09. The assessee had filed return of income u/s 139 of the Act on 29.09.2008 declaring income of Rs.10,92,965/-. Thereafter, pursuant to a search, the assessee had undergone assessment u/s 153C of the Act, wherein the assessee asserted that the AO had inquired on 19.02.2009 about the loan taken from M/s. Mohit International & M/s. Natasha Enterprises to the tune of Rs.5 cr, and since he got convinced with the "*nature & source"* of the credit entry, he did not drew any adverse view about it while framing the assessment on 03.11.2010 u/s 143(3)/153C of the Act. Thereafter, the assessee's case was re-opened u/s 147 of the Act on the reason that the assessee had availed accommodation entry of Rs.5 cr from M/s. Mohit International and M/s. Natasha Enterprises.

When called-upon by AO to prove the "*nature & source"* of the credit entry of Rs.5 cr, the assessee filed the loan confirmation from both the parties along with copies of returns of income of both the parties for the AY. 2008-09 to 2012-13, copy of bank statements of both the parties reflecting the relevant entries, copy of bank statement of the assessee showing the receipt of money from both the parties on various dates, copy of ledger account of both the parties in the books of the assessee, confirmation from both parties that they have given loan to assessee of Rs.2.5 cr each etc. And assessee has shown that interest was paid to both these lenders and before remitting the same, due TDS was deducted and that both the lenders duly showed the interest receipt in their books of account and returned it as their income. In support of these claims, the assessee has filed relevant documents along with its written submission. However, the AO without making any inquiry with M/s. Mohit International & M/s. Natasha Enterprises and without finding any infirmity/deficiency in the relevant documents filed by the assessee has discarded it only on the strength of statement of Shri P. K. Jain and other entry operators. It is noted that the AO has taken note of search operation at the premises of Shri Pravin Kumar Jain wherein his statement was recorded on 01.10.2013. And he admitted to be a provider of accommodation entry in the form of bogus sale/loan through thirty (30) odd concerns managed by him or his dummy directors. The AO also took note of the statements of Shri Dinesh Chaudhary and Shri Nilesh Parmar who were brokers of Shri Pravin Kumar Jain for availing the accommodation entries. According to the

AO, certain loose papers were found from the premises of Shri Dinesh Chaudhary and Shri Nilesh Parmar wherein at page no. 19 of the loose paper details about transaction of total amount of Rs.2,13,20,000/- between M/s. Mohit International and M/s. Natasha Enterprises and M/s. Josh Trading Company were noted therein. And that the AO did not give any credence to the belated retraction made by both Shri P. K. Jain and Shri Dinesh Chaudhary. The AO further noted that the burden to prove the source of credit entry was on assessee and examined the bank statement of the M/s. Mohit International and M/s. Natasha Enterprises and noted (in his words) "*on perusal of the said bank statements, it is seen that loan of Rs.5 cr has been advanced by M/s. Mohit International and M/s. Natasha Enterprises to the assessee on various dates. Just prior to the debit of this amount, there are credit entry on the same day from New Planet and Ostwal and Mohit which shows that lenders has no credit-worthiness*". Thus, he held that both M/s. Mohit International and M/s. Natasha Enterprises didn't had creditworthiness to give loan of Rs.2.5 cr to the assessee. Therefore, according to the AO, the *source of the lenders* could not be proved, therefore, he was of the opinion that the assessee could not satisfy the *nature and source* of the loan of Rs.5 cr. And therefore, the AO made an addition u/s 68 of the Act. On appeal, the Ld. CIT(A) has deleted the addition taking note that the assessee during the re-assessment proceedings had furnished loan confirmation from both the parties along with copies of returns of income of both the parties for the AY. 2008-09 to 2012-13, copy of bank statements of both the parties

reflecting the relevant entries, copy of bank statement of the assessee showing the receipt of money from both the parties on various dates, copy of ledger account of both the parties in the books of the assessee etc. And that TDS was deducted on the interest payment of the loans and both the lenders duly showed the interest receipt in their books of account and return of income. And that loan has been repaid to M/s. Mohit International on 23rd June, 2014 and repaid to M/s. Natasha Enterprises by 01st Aug, 2014. In support of these claims, the assessee has filed necessary documents along with its written submission. And thus according to Ld. CIT(A), the assessee had discharged the burden to prove the "*nature and source"* of the loan taken to the tune of Rs.5 cr from both M/s. Mohit International and M/s. Natasha Enterprises. According to the Ld. CIT(A), the AO failed to find any infirmity/deficiency in these documents produced by assessee and no inquiry has been conducted by AO to find any contrary material. The Ld. CIT(A) noted that the AO has disbelieved the loan taken by assessee from M/s. Mohit International & M/s. Natasha Enterprises based on the statement of Shri Pravin Kumar Jain, Shri Nilesh Parmar and Shri Dinesh Chaudhary which were never allowed to be cross-examined by the assessee, therefore, he has deleted the addition. Before we adjudicate the appeal of revenue, we note that the AO has made u/s 68 of the Act. Let us, look at section 68 of the Act as it stood during AY. 2008-09 which 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. "*

9. 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. The words used by legislature in this section is **not** '***shall*** *be charged to income-tax as the income of the assessee of that previous year*" but, ***may 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.

10. 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 **M/s Orissa Corpn. (P)** Ltd. (supra) 159 ITR 78, 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 usage of word "*may*" in section 68 of the Act. The **Hon'ble Gujarat High Court** in the case of **Dy CIT Vs. Rohini Builders** (2002) 256 ITR 360 had dealt with a similar case and has taken note of the decision of Hon'ble Apex Court in the case of Orrisa Corporation (supra) and the decision of the **Hon'ble Bombay High Court** in the case of **M/s. Orient Trading Co. Ltd V CIT** (1963) 49 ITR 723 (Bom) were taken note by the Hon'ble Gujarat High Court in the case of Dy CIT vs Rohini Builders (supra) wherein the Hon'ble High Court observed at pages 369 and 370 of this order are reproduced hereunder:-

> "Thus it is clear that the assessee had discharged the initial onus which lays on it in terms of section 68 by proving the identity of the creditors by giving their complete addresses, GIR numbers/permanent account numbers and the copies of assessment orders wherever readily available, It has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source as held by the **Bombay High Court in the case of Orient Trading Co, Ltd. v. CIT [1963] 49 TTR 723.** The genuineness of the transaction is

proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the depositors is made by account payee cheques and the interest is also paid by the assessee to the creditors by account payee cheques. 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 an 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*".*

11. 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."

12. Further, in the case of **CIT v. S. Kamaljeet Singh** [2005] 147 Taxman 18(**Allahabad.)** their lordships, on the issue of discharge of

assessee's burden 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."*

13. 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."*

14. 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."

15. 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."*

16. It is gainful to refer to the decision of the **Hon'ble Bombay High Court** in the case of **Mehta** decided by the Hon'ble High Court on 30.06.2016 in Income Tax Appeal No. 58 of 2001 wherein their Lordship held as under: -

> "16: In the instant case although the appellant assessee has called upon us to draw an inference that the burden shifted to the revere in the present case once it was established that the payments were made and repaid by cheque we need not hasten and adopt that view after having given our thought to various Issues raised and the decisions cited by Mr. Tralshawalla and finding that on a very fundamental aspect, the revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT. Quite apart from denial of an opportunity of cross examination, the revenue did not even provide the material on the basis of which the department sought to conduct that the loan was a bogus transaction.

> 17. In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CTT(A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against apart from being permitting him to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity cross-examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view, of the matter we are inclined to allow the appeal on this very issue."

17. In the case of CIT Vs. **Smt. Sushiladevi Khadaria** (2009) 319 ITR 413 (Bom), **Hon'ble Bombay High Court** held that when loans were taken by account payee cheques and the record indicated that there was no cash payment in the account of the borrower prior to the issuance of such cheques, the loans and interest paid on such loans were not includible in the total income of the assessee u/s 68 of the Act.

18. The decision of **Hon'ble Bombay High Court** in the case of CIT Vs. **Creative World Telefilm Ltd** (333 ITR 100) being relevant is reproduced here-under: -

> "Held, dismissing the appeal of revenue that there was no dispute that the assessee had given the details of names and addresses of the share-holders, their PAN/GIR number and had also given the cheque numbers, name of the bankers. The assessing officer ought to have found out the details through PAN cards, bank account details or from their bankers so as to reach the shareholders. Thus, the view taken by Tribunal could not be faulted."

19. Keeping the aforesaid judicial precedents related to section 68 of the Act, we find that the assessee had taken a loan of Rs.2.5 cr from M/s. Mohit International & Rs.2.5 cr from M/s. Natasha Enterprises. And when called upon by the AO to prove the "*nature & source"* of the credit entry of Rs.5 cr, the assessee filed (i) PAN number (ii) Copies of the returns of income of M/s. Mohit International & M/s. Natasha Enterprises for AY 2008-09 to AY 2012-13 (iii) Loan confirmations from both the lenders (iv) Copy of bank statements of both the lenders reflecting the transactions (v) Copy of bank statement of the assessee showing receipt of the money from both parties on various dates (vi) Copy of ledger accounts of both the parties in books of the assessee (vii) Proof of TDS deduction on interest payment while making payment to the lenders and proof of lenders showing the interest receipt in their books of account and reflecting it in the lenders

of income as their income (viii) Proof of repayment of loans to M/s. Mohit International by 23rd June, 2014 and repayment of loan to M/s. Natasha Enterprises by 1st Aug, 2014. From perusal of the aforesaid un-impeached documents, we find that both the loans of Rs.2.5 cr each were received by the assessee through banking channel and repayment of loans have also being made through banking channel along with interest in relation to these two loans. The interest on these loans were credited to their respective accounts after deduction of tax at source. Assessee before the AO also filed loan confirmation statement of these two creditors. By filing their Income Tax Returns & their PAN details the identity of these two lenders cannot be disputed. And as noted the loans were given to assessee through banking channel and assessee has repaid the loans in the year 2014 through banking channel. And the interest on loans has been credited to the accounts of the lenders after deduction of tax at source and the same has been shown by lenders as their business income and offered to tax in their respective return of income. Thus, it is clear that assessee had discharged the initial burden which lays on it in terms of section 68 of the Act by proving the identity of the creditors by giving the AO, the address, PAN details, ITR acknowledgment of two lenders which they filed for AY. 2008-09 to AY. 2012-13. The assessee has also proved the capacity of the creditors by showing that the amounts were received by the assessee through banking channel from their (lenders) respective bank accounts. And the assessee was not expected to prove the genuineness of the amount credited in the bank accounts of those creditors because under

law (*as it stood then*) the assessee can be asked to prove the source of the credits in its books of account but not the source of the source as held by the Hon'ble Bombay High Court in the case of Orient Trading Co. Ltd. 49 ITR 723. The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the lenders/creditors was made through banking channel and the interest was also paid by the assessee to the creditors through banking channel. Merely on the statement of Shri P. K. Jain and other entry operators recorded behind the back of the assessee to the effect that M/s. Mohit International and M/s. Natasha Enterprises were also providing accommodation entries cannot be the sole basis for discarding the primary documents/material furnished by assessee. According to us, when the AO received the adverse information that M/s. Mohit International and M/s. Natasha Enterprises were entry providers, then, it was the starting point to suspect the transaction made by assessee with those two entities. It was a starting point of the investigation. If necessary, the AO ought to have made inquiries with the Assessing Officer by the two entities/lenders and should have summoned Shri P. K. Jain and other entry operators (whom he wishes to rely) and recorded their statements in the presence of the assessee and furnished a copy of the same to the assessee and allowed the assessee (if he wishes) to cross-examine Shri P. K. Jain and other entry operators, if they alleged/imputed any wrong doings on the part of the assessee/partners. Without doing such an exercise, the statements of Shri P. K. Jain or other entry operators could not have been relied upon

by AO to draw adverse view against the assessee as held by the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE (281 CTR 241) (Supreme Court). Moreover, we find that Shri P. K. Jain and Shri Dinesh Chaudhary has retracted their statement [*albeit after seven (7) months*] alleging duress/coercion to extract their statement that they were providing accommodation entries. Therefore, it would be unsafe to rely on the statement/admission of Shri P. K. Jain and other entry operators without being tested on the touch-stone of cross-examination. Even though, the AO has discussed about loose papers at page no. 19 which say about certain trading between M/s. Mohit International and M/s. Natasha Enterprises and M/s. Josh Trading Company there is neither any notings made therein [at page no. 19] to connect the assessee/partners in any wrong doing nor any mention of the amount given as loan to assessee. The AO is noted to have reproduced (in assessment order) certain select portion of the statement recorded by department of Shri P. K. Jain and Shri Dinesh Chaudhary u/s 132(4) of the Act, however, from careful reading of the same, we couldn't find any wrongful acts alleged by them against the assessee/partners and it is noted that Shri P. K. Jain has not alleged that assessee/partners had taken accommodation entry from his concerns. In the given facts and circumstances of the case as discussed (supra), we find that the assessee has discharged the burden laid on it to prove the "*nature & source"* of the loan taken to the tune of Rs.2.5 cr from M/s. Mohit International and Rs.2.5 cr from M/s. Natasha Enterprises. Therefore, we find that the Ld. CIT(A) has rightly appreciated the facts

and the law and has rightly deleted the addition which does not warrant any interference from our side. Therefore, we confirm the action of the Ld. CIT(A) and dismiss the appeal of the revenue. Since we have dismissed the appeal of the revenue, the legal issues raised by the assessee in its CO are academic/left open and stands dismissed.

20. In the result, the appeal of the revenue & CO of the assessee is dismissed.

Order pronounced in the open court on this 23/02/2024.

Sd/-	Sd/-
(BR BASKARAN)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 23/02/2024.
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**