

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.47/Nag./2019
(Assessment Year : 2012-13)

Income Tax Officer
Ward-1(1), Nagpur

..... Appellant

v/s

M/s. Axykno Enterprises Pvt. Ltd.
Level-3, Leela Vista, West High Court Road
Bajaj Nagar, Nagpur 440 010
PAN – AAJCA2942B

..... Respondent

Assessee by : Shri Kapil Hirani a/w
Shri Mukesh Agrawal

Revenue by : Shri Kailash C. Kanojiya

Date of Hearing – 05/08/2024

Date of Order – 02/09/2024

ORDER

PER K.M. ROY, A.M.

The Revenue has filed the captioned appeal challenging the impugned order dated 28/12/2018, passed by the learned Commissioner of Income Tax (Appeals)-1, Nagpur, [*learned CIT(A)*], for the assessment year 2012-13.

2. Following grounds have been raised by the Revenue:-

"a. On the facts and circumstances of the case, the Ld. CIT(Appeals) has erred in deleting the addition by stating that there is no specific incriminating document linking investor to the appellant. However, in statement of Shri Praveen Kumar Jain on such company M/s. Viraj Mercantile Pvt Ltd is a share applicant in the case of Assessee Company.

b. Ld. CIT (Appeals) erred in deleting the addition on the basis of conclusion drawn of not following principles of natural justice by not

providing opportunity of cross examination, whereas the addition was not merely based on statement of Shri Praveen Kumar Jain.

c. Ld. CIT (Appeals) erred in appreciating the facts mentioned by AO in Para 7 that in normal human probability, no company will invest with such hefty premium and his reliance on case of jurisdictional High Court In Major Metals Pvt Ltd Vs. Union of India 207 Taxmann 185 in support of his contention.

d. Ld. CIT (Appeals) erred in appreciating the AO's point of view regarding furnishing of corroborative evidences during assessment proceedings and further, during appellate proceedings, which has already been covered by AO in his order, wherein AO has laid emphasis on Hon'ble Supreme Court as quoted in Novoday Castle Pvt Ltd. 56 Taxmann.com 18.

e. Any other ground which may be taken with the permission of the Hon'ble Tribunal."

3. Facts in Brief:– In the present case, the assessee is a Limited Company engaged in the activity of consulting in sectors like infrastructure, energy and natural resources, Railways etc., rendering host of specialised services. The assessee filed its original return of income for the year under consideration on 30/9/2012, declaring total income of ₹ 3,42,140. The case of the assessee was first assessed under section 143(3) of the Income Tax Act, 1961 ("the Act"), vide order dated 26/3/2015, assessing the total income at ₹ 4,26,805. It is the case of the Department that the Assessing Officer after completing the assessment under section 143(3) of the Act came in possession of the statement of one Shri Praveen Kumar Jain, which was recorded under section 132(4) of the Act on 01/10/2013, during the search proceedings carried out by the Director of Income Tax (Inv), Income Tax Department, Mumbai. It is the further case of the Department that Shri Praveen Kumar Jain, conceded in the statement that he provided hawala entries to the interested persons in the garb of share application money and purchase bills and that the assessee

is one of the many beneficiaries of the business of accommodation entries run by Shri Praveen Kumar Jain. In view of this, a proposal under section 263 of the Act was sent by the Assessing Officer to the learned Principal Commissioner of Income Tax-1, Nagpur, ("*the learned PCIT*") proposing to revise the order so passed under section 143(3) of the Act holding it to be erroneous and prejudicial to the interests of the Revenue, and pursuant to which the pcit learned PCIT passed the order under section 263 on 14/03/2017, directing the Assessing Officer to pass a fresh assessment order in view of the findings of Shri Praveen Kumar Jain.

4. The Assessing Officer, pursuant to the order so passed under section 263 of the Act, passed order under section 143(3) r/w section 263 of the Act on 29/12/2017, making an addition of ₹ 1,58,50,000, representing share capital received by the assessee during the year from various companies mentioned hereunder holding the same to be not genuine and consequently making the addition under section 68 of the Act. The assessee had during the year received share application money amounting to ₹ 1,58,50,000, from the following companies:-

i)	M/s Viraj Mercantile Pvt. Ltd.	₹ 16,50,000
ii)	M/s Aatharva Business Pvt. Ltd.	₹ 37,00,000
iii)	M/s Aditya Fashions Pvt. Ltd.	₹ 15,00,000
iv)	M/s Kavya Shares and Securities Pvt. Ltd.	₹ 50,00,000
v)	M/s Koina Trading Pvt. Ltd.	₹ 25,00,000
vi)	M/s Wonder Procon Pvt. Ltd.	₹ 15,00,000

5. Against the addition so made by the Assessing Officer, the assessee preferred appeal before the first appellate authority.

6. The learned CIT(A), vide order dated 28/12/2018, deleted the entire addition made by the Assessing Officer amounted to ₹ 1,58,50,000, justifying the deletion of addition so made by the Assessing Officer which is reproduced herein below:-

"4.3 I have gone through the assessment order, the grounds of appeal and submission made by the appellant. During the year under consideration, the appellant company has received a sum of Rs. 1,58,50,000/- from the companies named Atharva Business Pvt. Ltd; Aditya Fashions Pvt. Ltd; Kavya Shares & Securities Pvt. Ltd; Koina trading Pvt. Ltd; Wonder Procon Pvt. Ltd; and Viraj Mercantile Pvt. Ltd, on account of share application money. Allotment of shares was done in subsequent year at premium of Rs. 490/- per share. The AO has treated it as bogus credits and added the same by invoking section 68 of IT Act, 1961.

4.3.1 The AO has dealt the issue relating to unexplained credits on account of share application money at para 10 of the assessment order. The AO has noticed that during the course of search proceedings in the case of Shri Praveen Kumar Jain his statement was recorded u/s 132(4) of the Act in which he has stated that he is providing accommodation entries to interested persons. On the basis of this statement the AO has referred the case to Pr.CIT 1, Nagpur and the case was set aside u/s 263 of the Act. In fresh assessment proceeding the appellant has furnished confirmation letter from creditor companies, their ITR, Balance Sheet, Undertaking and term Sheet with the creditor companies however the AO has relied upon confessional statement of Shri Praveen Kumar Jain and held the share application money as bogus and made addition u/s 68 of the Act,

4.3.2 The appellant has made point-wise detailed submission to the issues raised by the AO. During the course of assessment proceedings as well as appellate proceeding the appellant has submitted following documents-

- A. Confirmation letters from creditor companies.*
- B. Bank Statements of creditor companies.*
- C. Balance Sheet and ITR's of creditor companies.*
- D. Undertaking/Declaration of creditor companies.*
- E. Term Sheet with creditor companies.*

The above documents prove identity of the creditor companies, their creditworthiness and genuineness of the transaction. In the assessment order

the AO has relied on statement of Shri Praveen Kumar Jain however in the entire statement there is no reference of the appellant company.

It is also noted that there is nothing asked nor confirmed to link the investor companies in this case to Shri Praveen Jain, much, less link it to the appellant company. There are no evidences to show that there is any cash trail in respect of the amounts received by the appellant company from the investors. The fact remains that the investor companies are assessed to tax and have filed their returns of income. The investor companies have also confirmed of giving share application money to the appellant company. Copy of bank statement, ledger account, tend sheet and undertaking/declaration of creditor companies Income tax return and audited accounts of the investor companies have been filed before the assessing officer and also in the appellate proceedings. The documents furnished by the appellant have not been doubted by the AO.

4.3.3 It can be seen from the observation of the Assessing Officer that he has only referred to the information related to the outcome of search in the case of Shri Pravin Kumar Jain who was providing accommodation entries but the Assessing Officer has failed to demonstrate any such evidence that the appellant has in reality obtained any accommodation entries. There is no direct specific mention of the appellant by the director or key persons of the investor company. There is no evidence of cash deposits linked to the investors. The assessing officer did not bring specific Incriminating evidence linking the investor to the appellant. The only link is that the investors have invested in appellant company. Opportunity for cross examination was not provided to the appellant even though specifically asked for by the appellant Further Shri Praveen Kumar Jain has retracted his statement by filing an affidavit. The retraction may be rejected as motivated, but the same can be considered only against the person who has retracted in his assessment. Such statement in the case of another person loses its sanctity unless opportunity of cross examination is granted and/or is corroborated with other evidences. In the present case even the basic premise that the investor companies belong to Praveen Jain is not shown. When the investor company is filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possession. Over such issue there are plethora of judgements to support the appellant. Some of them are discussed here below: -

(i) The Hon'ble Supreme Court in the case of CIT V/s Lovely Exports 6 DTR 308 has held as under:

If the share application money is received by the assessee company from alleged bogus shareholders who's name are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company".

(ii) The Hon'ble Bombay High Court in the case of CIT v/s Creative World Telefilms Ltd 333 ITR 100 has held as under.

"If the share application money is- received by the assessee company from alleged bogus shareholders who's name are given to the Assessing Officer then

the department can always proceed against them and if necessary, reopen their individual assessments.

iii) The Hon'ble Supreme Court of India in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC) has held as under:

"That in this case the respondent 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 assessee's. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, 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 are creditworthy. There was no effort made to pursue the so-called alleged creditors in those circumstances, the respondent could not do anything further the premises, if the Tribunal came to the conclusion that the Respondent had discharged the burden that lay on it, then, it could not be said that such a conclusion was unreasonable or perverse or based on no evidence".

4.3.4 I find that the facts of appellant's case are identical to its own case for AY 2011-12 wherein under similar facts the Hon'ble ITAT, Nagpur bench vide order in ITA No.154/Nag/2017 dated 24.10.2018 has held as under-

"13. We have heard rival contentions and perused the material available on record. The Assessing Officer has made impugned addition under section 68 of the Act, on the ground that although the assessee proved identity of the subscribers, but failed to prove the genuineness of transaction and creditworthiness of the parties. The Assessing Officer has taken support from the statement of Shri Praveen Kumar Jain, which was given under section 132 (4) of the Act at the time of search. Shri Praveen Kumar Jain, had also admitted that he was involved in issuing accommodation entries. Except this, the Assessing Officer has not carried out any independent enquiries in order to verify the genuineness of transaction in respect of alleged share application money received from three companies. The statement given by Shri Praveen Kumar Jain, has been subsequently retracted by filing an affidavit before respective Income Tax Authorities. Under these facts, one has to examine whether the assessee has discharged its initial burden cast upon under section 68 of the Act to prove the identity, genuineness of transaction and creditworthiness of the parties. Under the provisions of section 68 of the Act, the assessee has to discharge initial burden by filing necessary documents to prove the identity of the creditors, the creditworthiness of the creditors and genuineness of transaction. Once the assessee has discharged initial burden by filing necessary evidences, then, the burden shifts on the Assessing Officer to prove that the impugned credit comes within the ambit of provisions of section 68 of the Act. In this case, the assessee has filed complete details of identity of the creditors including their PAN details, financial statement, bank statement and confirmation from the parties. The assessee also proved the genuineness of the transaction by filing the bank statement to prove that the money has been transacted through proper banking channel. The assessee also filed the financial statement of the creditors to prove their creditworthiness as per which the companies are having capacity to explain source of investment in share application money. Once the assessee has filed complete details of identity and their creditworthiness, then it is for the Assessing Officer to carry out necessary independent enquiries to disbelieve the documents filed by the assessee in order to make additions under section 68 of the Act towards share application money. In this case, on a perusal of the facts, we find that the Assessing Officer did not carry out any independent enquiry in order to ascertain the genuineness of transaction and creditworthiness of the parties. The Assessing

Officer made additions merely on the basis of statement of Shri Praveen Kumar Jain, ignoring the fact that the said statement has been subsequently retracted by filing affidavit. In the absence of any independent enquiry by the Assessing Officer, the documents filed by the assessee to prove the transaction cannot be disbelieve to make additions under section 68 of the Act.

14. Coming to the issue of share premium charged by the assessee, the Assessing Officer has doubted the genuineness of transactions of the basis of share premium charged by the assessee. According to the Assessing Officer, the assessee has not justified issue of share at a huge premium of Rs.490/- per share when there is no business activities and asset base. We do not find any merit in the finding of the Assessing Officer for the reason that the provisions to section 68 of the Act has been inserted by the Finance Act, 2012, w.e.f. 1 April 2013, to treat share capital and share premium within the ambit of provisions of section 68 of the Act. Prior to Insertion of provisions of section 68 of the Act, the question of establishing the source of source in respect of share capital and share premium did not arise. This fact has been supported by the decision of the Hon'ble Jurisdictional High Court in CIT v/s Gagandeep Infrastructures Pvt. Ltd., [2017] 394 ITR 680 (Bom.). Prior to insertion of provisions, as per the decision of the Hon'ble Supreme Court in Lovely Exports (supra), if the Assessing Officer regards the share premium as bogus, he has to assessee the shareholders but cannot assess the same as the unexplained cash credit of the company issuing share capital.

15. The assessee has relied upon plethora of decisions in support of its arguments. The case laws relied upon by the assessee are summarized below:-

"10.4. The Appellant places reliance on ITO Vs. Wiz-Tech Solutions Pvt. Ltd. (ITAT Kolkata) (ITA No. 1162/Kol/2015) wherein the Hon'ble Tribunal has held in respect of addition made on account of share premium that Creditworthiness of the subscriber cannot be disputed by the AO of the assessee but by the AO of the subscriber. If the assessee has discharged its onus to prove identity, creditworthiness & genuineness of the share applicants, the onus shifts to AO to disprove the documents furnished by assessee. In absence of any investigation, much less gathering of evidence by the AO, an addition cannot be sustained merely based on inferences drawn by circumstance.

10.5. The Appellant further place reliance on DCIT Vs. Alcon Biosciences Pvt. Ltd. (ITAT Mumbai) (ITA NO. 1946/Mum/2016) wherein the Hon'ble Tribunal has held that the fact that a private limited company issued shares at an exorbitant premium is irrelevant if the assessee has proved the genuineness of the transaction. If the assessee has furnished necessary evidence to prove the identity of the share applicants and their PAN details, the department is free to proceed to reopen the individual assessments of the share applicants but it cannot be regarded as undisclosed income of the assessee U/s 68.

10.6. Reliance further placed on Umbrella Projects Pvt. Ltd. vs. ITO (ITA No. 5955/Del/2014) wherein it has been held that if the assessee has discharged the initial onus regarding the identity, creditworthiness and genuineness, the onus shifts to the AO to bring material or evidence to discredit the same. Further there must be material to implicate the assessee in a collusive arrangement with person who are accommodation entry providers.

10.7. Reliance further placed on PCIT Vs. Paradise Inland Shipping Pvt. Ltd. (Bombay HC) (ITA No. 66 of 2016) wherein it has been held that Companies which invest share capital cannot be treated as bogus if

they are registered and have been assessed. Once the assessee has produced documentary evidence to establish the existence of such companies, the burden shifts to the Revenue to establish their case. Reliance on statements of third parties who have not been subjected to cross examination is not permissible. Voluminous documents produced by the assessee cannot be discarded merely on the basis of statements of individuals contrary to such public documents.

10.8. Reliance further placed on CIT vs. Laxman Industrial Resources Pvt. Ltd. (Delhi HC) (2017) 397 ITR 106 wherein it has been held that the fact that the investigation wing's report alleged that the assessee was beneficiary to bogus transactions and that the identity of shareholders, genuineness etc was suspect is not sufficient. The AO is bound to conduct scrutiny of documents produced by the assessee and cannot rest content by placing reliance on the report of the investigation wing.

10.9. Reliance further placed on CIT Vs. Gagandeep Infrastructure Pvt. Ltd. (2017) 394 ITR 680 (Bombay HC) wherein it has been held that the proviso to s 68 (which creates an obligation on the issuing Co. To explain the source of share capital & premium) has been introduced by the Finance Act 2012 with effect from 01.04.2013 and does not have retrospective effect. Prior thereto, as per Lovely Exports 317 ITR 218 (SC), if the AO regards the share premium as bogus, he has to assess the shareholders but cannot assess the same as the issuing company's unexplained cash credit."

16. In this view of the matter and considering the ratio of the case laws discussed above, we are of the considered view that the assessee has proved the share application money received from three companies by necessary documents in respect of identity, genuineness of transactions and creditworthiness of the parties Therefore, we are of the considered view that the Assessing Officer has erred in making additions towards share application money under section 68 of the Act. The learned Commissioner (Appeals) without appreciating the facts simply confirmed the additions made by the Assessing Officer. Consequently, we set aside the order passed by the learned Commissioner (Appeals) and direct the Assessing Officer to delete the additions made on account of share capital under section 68 of the Act.

17. In the result, Assessee's appeal is allowed."

4.3.5 It is noted that no specific incriminating material linking investor to the appellant or showing the investment to be bogus is provided. Also opportunity for cross examination was not provided. The assessing officer has not been able to bring on record any direct or corroborative evidence that the share application money received is unexplained as covered u/s 68. No statement of Shri Praveen Jain names the appellant specifically. In any case, it is cardinal principle of natural justice, that before conclusions are drawn against a person based on statement of a third party, he must be allowed an opportunity for cross examination. This has not been provided. In this fact matrix, and the judicial decisions covering the scope of section 68, and following the judgement of Hon'ble ITAT, Nagpur bench in appellant's own case for AY 2011-12, the addition made of Rs.1,58,50,000/- u/s 68 in the case of the appellant is deleted. The grounds of appeal are allowed.

5.0 In the result, the appeal is allowed."

7. Being aggrieved by the order passed by the learned CIT(A), the Revenue is in appeal before the Tribunal.

8. Before us, during the course of hearing the learned Departmental Representative (*"the learned DR"*) vehemently argued and supported the order passed by the Assessing Officer and held that the entire addition, as made by the Assessing Officer, deserves to be confirmed especially considering the fact that the entire addition has been made by the Assessing Officer not only on the statement of Shri Praveen Kumar Jain, but also on the facts and circumstances of the case which does not justify offer of shares at such huge premium of ₹ 490, against a face value of ₹ 10.

9. The learned A.R. appearing for the Assessee vehemently contested addition as made by the Assessing Officer and supported the order of the learned CIT(A) and submitted that the entire addition, as made by the Assessing Officer, is merely on conjecture and surmises, ignoring the evidence filed on record as well as grossly in violation of the principles of natural justice inasmuch as the statement of Shri Praveen Kumar Jain, was never accorded for cross examination. The learned A.R. invited our attention to Page-216 of the paper book wherein the assessee has enclosed a detailed chart showing share capital issued during the year wherein it is very clear that the amount of share capital issued to Wonder Procon Pvt. Ltd. of ₹ 15,00,000, was against investment in equity shares and not in cash as wrongly assumed by the Assessing Officer. Hence, the provisions of section 68 of the Act are not applicable. The learned A.R. further invited attention to the fact that the statement of Shri Praveen Kumar Jain, which is at the centre

of the impugned proceedings and which forms the basis for the 263 proceedings pursuant to which the assessment has been completed against which the Department is in appeal before the Tribunal, has in fact been retracted in an Affidavit by Shri Praveen Kumar Jain, sworn on 15/05/2014, which is placed at Pages-209 to 213 of the paper book. The learned A.R. further submitted that on a perusal of the affidavit so filed, it is clear that Shri Jain retracted his statement within 8 months of the statement having been recorded and this is an undisputed fact. The learned A.R. accordingly submitted that the statement of Shri Praveen Kumar Jain, having already been withdrawn, the same cannot form the basis of any addition as illegally made by the Assessing Officer and which has rightly been deleted by the learned CIT(A). The learned A.R. further strongly contended that this statement of Shri Praveen Kumar Jain, so relied upon by the Assessing Officer, as evident from the assessment order, was never provided to the assessee for cross-examination in accordance with the principles of natural justice. The learned A.R. invited our attention to Para-10 of the assessment order, wherein the Assessing Officer has categorically admitted that cross-examination of Shri Praveen Kumar Jain, has not been provided to the assessee despite the assessee having requested for the same. The learned A.R. further submitted that even otherwise the assessee during the course of assessment proceedings and appellate proceedings furnished every detail as desired therein to prove the identity, genuineness and creditworthiness of the share applicants thereby discharging the onus cast upon it under section 68 of the Act. He further emphasised on the fact that the impugned appeal pertains to the assessment year 2012-13 which is prior to the period wherein the

proviso has been introduced section 68 of the Act. The learned A.R. further invited attention of the Bench to the observation of the Assessing Officer at Page-6 of the assessment order, wherein the Assessing Officer has categorically accepted that the assessee company has furnished confirmation letters, bank statements, return of income of the share applicants and further invited the attention to Pages-1 to 5 of the paper book wherein the confirmations by the share applicants have also been filed before the learned CIT(A) for the second time during the appellate proceedings thus emphasising the fact that the share applicants have independently confirmed the transaction of subscribing to share capital of the Assessee company. The learned A.R. further invited attention of the Bench to the copies of the audited financial statements of the share applicants forming part of the paper book and duly submitted before the Assessing Officer wherein the share applicants have more than sufficient capital and net worth to justify the creditworthiness to invest the sums with the Assessee. The learned A.R. further invited our attention of the Bench to the fact that in identical circumstances, the additions were also made in the hands of the Assessee, albeit pertaining to some other share applicants in the immediately preceding assessment year 2011-12 and which were deleted by the Co-ordinate Bench of the Tribunal, Nagpur Bench, Nagpur, in ITA No.154/Nag./2017, vide order dated 26/10/2018. The learned A.R. on a conspectus of the above facts submitted before us that the addition so made by the Assessing Officer has been rightly deleted by the learned CIT(A) and prayed that the appeal filed by the Revenue deserves to be dismissed.

10. The learned D.R., in response, apart from supporting the order of the Assessing Officer, further filed before us a copy of the order 19/01/2023, passed by the Co-ordinate Bench of the Tribunal, Nagpur Bench, in Praveen Kumar Jain v/s DCIT, etc., ITA no.7191/Mum./2018, for the assessment year 2008-09, etc., wherein Shri Praveen Kumar Jain, has been assessed as an entry operator.

11. The learned A.R. in response, submitted that any evidence relating to Shri Praveen Kumar Jain, is inadmissible in light of the fact that he or his statement has not been accorded for cross-examination which renders any evidence relating to him inadmissible under law. He further contended that even considering the decision of the of the Tribunal, Mumbai Benches, cited supra, still no adverse inference can be drawn against the assessee, as there is absolutely no direct nexus by the Assessing Officer linking the share applicants of the assessee with Shri Praveen Kumar Jain, and further there being absolutely no evidence whatsoever wherein Shri Praveen Kumar Jain, has in any manner implicated the assessee to be a beneficiary of the so-called bogus transactions.

12. We have heard the rival arguments, perused the material available on record and gone through the orders of the authorities below. It is an undisputed fact that the entire basis for revisiting the completed assessment under section 143(3) of the Act was the statement of Shri Praveen Kumar Jain, and based on which order was passed under section 263 of the Act and also the Assessing Officer completed the assessment under section 143(3) r/w section 263 of the Act. It is incomprehensible to believe that the additions

as made by the Assessing Officer did not have any nexus to the statement of Shri Praveen Kumar Jain, as suggested by the Assessing Officer in his assessment order and supported by the learned D.R. before us. Had no weightage been accorded to the said statement then, the additions ought to have been made during the course of original assessment proceedings under section 143(3) of the Act which were not made and wherein the amount received towards share application were held to be genuine and proper. It is only on the basis of the statement of Shri Praveen Kumar Jain, that the learned PCIT, firstly, under the powers, as conferred under section 263 of the Act, held the order passed by the Assessing Officer under section 143(3) of the Act to be erroneous as well as prejudicial to the interests of the Revenue and pursuant to the order so passed under section 263 of the Act, the Assessing Officer then in the ensuing assessment proceedings held the amount received towards share application to be not genuine. The statement of Shri Praveen Kumar Jain, thus assumes significant importance in the facts and circumstance of the case and in the Assessing Officer coming to the conclusion that the amount so received were not genuine. We are in agreement with the submissions, as made by the learned A.R. inasmuch as the statement of Shri Praveen Kumar Jain, having been retracted does not hold evidentiary value so as to form the basis of any addition as illegally done in the case of the assessee. Further, it is an accepted fact that the said statement was never provided to the assessee for cross-examination which has grossly violated the principles of natural justice which resulted in vitiating the addition made by the Assessing Officer. We are further in agreement with the learned A.R. that the assessee having submitted all the details during the

course of assessment proceedings and appellate proceedings with respect to the share applicants including confirmation letters, audited financial statements, bank statements etc., the assessee duly discharged its obligation as cast under section 68 of the Act. It is very important to note that the share applicants have independently confirmed having undertaken the impugned transactions with the assessee. We are further in agreement that the financial statements of the share applicants show sufficient funds justifying their creditworthiness to invest the sums with the assessee. We are further in agreement that there is absolutely no link of the share applicants companies to Shri Praveen Kumar Jain, as alleged by the Assessing Officer. The Assessing Officer in his assessment order has, except with respect to Viraj Mercantile Pvt. Ltd., which the Assessing Officer has alleged to be managed directly by Shri Praveen Kumar Jain, has not brought on record nor alleged that the rest of the share applicants were in any way connected with Shri Praveen Kumar Jain, other than making a bland statement that the rest of the share applicants were indirectly being managed by Shri Praveen Kumar Jain, which, in our opinion, does not hold any water. Even with respect to Viraj Mercantile Pvt. Ltd., the learned A.R. was confronted during the course of hearing that a bare perusal of the audited financial statements so filed before us of Viraj Mercantile Pvt. Ltd. does not show Shri Praveen Kumar Jain, as the director, to come to the conclusion that he was in any way connected with the said company, as alleged by the Assessing Officer. We are further in agreement with the arguments made by the learned A.R. that the provisions of section 68 of the Act have been inserted by Finance Act, 2012, w.e.f 1st April 2013, to treat share capital in share premium within the ambit of

provisions of section 68 of the Act. Prior to insertion of provisions of section 68 of the Act, the question of establishing the source of source in respect of share capital and share premium did not arise and which has been supported by the decision of the Hon'ble jurisdictional High Court in CIT v/s Gagandeep Infrastructures Pvt. Ltd., [2017] 394 ITR 680 (Bom.). Prior to the insertion of provisions, as per the decision of the Hon'ble Supreme Court in M/s. Lovely Exports, [2009] 317 ITR 218 (SC), if the Assessing Officer regards the share premium as bogus, he has to examine the shareholders but cannot assess the same as unexplained cash credit of the company issuing share capital. The decision of the Tribunal, Mumbai Benche, in Shri Praveen Kumar Jain (supra), as relied upon by the learned A.R. also does not support the case of the Revenue inasmuch as the same being part and parcel of evidence relating to Shri Praveen Kumar Jain, which is mentioned herein above was not afforded cross-examination and not providing a copy of statement for its rebuttal to the assessee, cannot be held to be against the assessee so as to implicate the assessee in any manner. Further it is clear from Para-7 of the order wherein it is specified that the transaction forming part of the appeal pertain to one Spanco Group, which is in no way connected with the assessee making the findings therein distinct and inapplicable to the present case. In case, any reliance is to be accorded to the statement or evidence of Shri Praveen Kumar Jain, then too, no adverse inference or addition can be sustained in the hands of the assessee following the ratio of the decision of the Tribunal, Nagpur Bench, in assessee's case itself for the immediately preceding year being assessment year 2011-12 in passed in Axykno Enterprises Pvt. Ltd. v/s ITO,

ITA No.154/Nag./2017, vide order dated 26/10/2018, wherein the Tribunal has held as under:-

"11. Coming to the merits of the issue on hand, the learned Authorised Representative for the assessee submitted that the Assessing Officer was erred in making additions towards share application money under section 68 of the Act, ignoring evidence filed by the assessee to prove identity, genuineness of transaction and creditworthiness of the parties. The learned Authorised Representative further submitted that the assessee has filed confirmation letters, bank statement, financial statements and other details of the companies from whom share application money has been received. The Assessing Officer has made additions only on the basis of statement of Shri Praveen Kumar Jain, which was subsequently retracted by filing an affidavit. The Assessing Officer never carried out any independent enquiry by calling for necessary details from the subscribers by issuing notice under section 133(6) of the Act. The Assessing Officer has also not furnished the statement of Shri Praveen Kumar Jain, to the assessee for his comments. Without carrying out necessary enquiries in respect of genuineness of transaction, he has made additions merely on the basis of information received from DGIT (Inv.) and statement of Shri Praveen Kumar Jain. The learned Authorised Representative further submitted that the subscriber to the share capital have enough source of income to prove the source of amount invested in assessee's company. The Assessing Officer never doubted the identity which is evident from the fact that the Assessing Officer has accepted the identity at the time of assessment, but disputed the genuineness of the transactions without recording any reasons as to why the documents furnished by the assessee are not sufficient to prove the genuineness of transactions. The learned Authorised Representative further submitted that once the assessee filed necessary evidences to prove identity, genuineness of the transaction, then, the Assessing Officer cannot question the source of source. In this regard, he relied upon various judicial precedents including the decision of the Hon'ble Supreme Court in CIT v/s Lovely Exports, 317 ITR 218 (SC). The assessee relied upon the following case laws: -

- i) ITO Vs. Wiz-Tech Solutions Pvt. Ltd. (ITAT Kolkata) (ITA No. 1162/Kol/2015);
- ii) DCIT VS. Alkon Biosciences Pvt Ltd. (ITAT Mumbai) (ITA No 1946/Mum/2016);
- iii) Umbrella Projects Pvt. Ltd. Vs. ITO (ITA No. 5955/Del/2014);
- iv) PCIT VS. Paradise Inland Shipping Pvt. Ltd. (Bombay HC) (ITA No. 66 of 2016);
- v) CIT Vs. Laxman Industrial Resources Pvt. Ltd. (Delhi HC) (2017) 397 ITR 106; and
- vi) CIT Vs. Gagandeep Infrastructure Pvt Ltd. (2017) 394 ITR 650 (Bombay HC).

12. On the other hand, the learned Departmental Representative strongly supporting the order of the learned Commissioner (Appeals), submitted that mere furnishing identity and bank statement does not prove the genuineness of transaction. It is not in dispute that the Assessing Officer has accepted the identity, but the assessee failed to prove the genuineness of the transaction in the backdrop of clear finding of the Assessing Officer on the basis of statement of Shri Praveen Kumar Jain, and information received from DGIT (Inv.). The learned Commissioner (Appeals) has rightly appreciated the facts as the assessee has not even justified issuance of share at a huge premium of 490 per share when there is no business activities and asset base in the company.

13. We have heard rival contentions and perused the material available on record. The Assessing Officer has made impugned addition under section 68 of the Act, on the ground that although the assessee proved identity of the subscribers, but failed to prove the genuineness of transaction and creditworthiness of the parties. The Assessing Officer has taken support from the statement of Shri Praveen Kumar Jain, which was given under section 132(4) of the Act at the time of search. Shri Praveen Kumar Jain, had also admitted that he was involved in issuing accommodation entries. Except this, the Assessing Officer has not carried out any independent enquiries in order to verify the genuineness of transaction in respect of alleged share application money received from three companies. The statement given by Shri Praveen Kumar Jain, has been subsequently retracted by filing an affidavit before respective Income Tax Authorities. Under these facts, one has to examine whether the assessee has discharged its initial burden cast upon under section 68 of the Act to prove the identity, genuineness of transaction and creditworthiness of the parties. Under the provisions of section 68 of the Act, the assessee has to discharge initial burden by filing necessary documents to prove the identity of the creditors, the creditworthiness of the creditors and genuineness of transaction. Once the assessee has discharged initial burden by filing necessary evidences, then, the burden shifts on the Assessing Officer to prove that the impugned credit comes within the ambit of provisions of section 68 of the Act. In this case, the assessee has filed complete details of identity of the creditors including their PAN details, financial statement, bank statement and confirmation from the parties. The assessee also proved the genuineness of the transaction by filing the bank statement to prove that the money has been transacted through proper banking channel. The assessee also filed the financial statement of the creditors to prove their creditworthiness as per which the companies are having capacity to explain source of investment share application money. Once the assessee has filed complete detail of identity and their creditworthiness, then it is for the Assessing Officer to carry out necessary independent enquiries to disbelieve the documents filed by the assessee in order to make additions under section 68 of the Act towards share application money. In this case, a perusal of the facts, we find that the Assessing Officer did not carry out any independent enquiry in order to ascertain the genuineness transaction and creditworthiness of the parties. The Assessing Office made additions merely on the basis of statement of Shri Praveen Kumar Jain, ignoring the fact that the said statement has been subsequently retracted by filing affidavit. In the absence of any independent enquiry by the Assessing Officer, the documents filed by the assessee to prove the transaction cannot be disbelieve to make additions under section 68 of the Act.

14. Coming to the issue of share premium charged by the assessee, the Assessing Officer has doubted the genuineness of transactions on the basis of share premium charged by the assessee. According to the Assessing Officer, the assessee has not justified issue of share at a huge premium of 490 per share when there is no business activities and asset base. We do not find any merit in the finding of the Assessing Officer for the reason that the provisions to section 68 of the Act has been inserted by the Finance Act, 2012, w.e.f. 1 April 2013, to treat share capital and share premium within the ambit of provisions of section 68 of the Act. Prior to insertion of provisions of section 68 of the Act, the question of establishing the source of source in respect of share capital and share premium did not arise. This fact has been supported by the decision of the Hon'ble Jurisdictional High Court in CIT v/s Gagandeep Infrastructures Pvt. Ltd., [2017] 394 ITR 680 (Bom.). Prior to insertion of provisions, as per the decision of the Hon'ble Supreme Court in Lovely Exports (supra), if the Assessing Officer regards the share premium as bogus, he has to assessee the shareholders but cannot assess the same as the unexplained cag credit of the company issuing share capital.

15. The assessee has relied upon plethora of decisions in support of Its arguments. The case laws relied upon by the assessee are summarized below:-

"10.4. The Appellant places reliance on ITO Vs. Wiz-Tech Solutions Pvt. Ltd. (ITAT Kolkata) (ITA No. 1162/Kol/2015) wherein the Hon'ble Tribunal has held in respect of addition made on account of share premium that Creditworthiness of the subscriber cannot be disputed by the AO of the assessee but by the AO of the subscriber. If the assessee has discharged its onus to prove identity, creditworthiness & genuineness of the share applicants, the onus shifts to AO to disprove the documents furnished by assessee. In absence of any investigation, much less gathering of evidence by the AO, an addition cannot be sustained merely based on inferences drawn by circumstance.

10.5. The Appellant further places reliance on DCIT Vs. Alcon Biosciences Pvt Ltd. (ITAT Mumbai) (ITA No. 1946/Mum/2016) wherein the Hon'ble Tribunal has held that the fact that a private limited company issued shares at an exorbitant premium is irrelevant if the assessee has proved the genuineness of the transaction. If the assessee has furnished necessary evidence to prove the identity of the share applicants and their PAN details, the department is free to proceed to reopen the individual assessments of the share applicants but it cannot be regarded as undisclosed income of the assessee U/s 68.

10.6. Reliance further placed on Umbrella Projects Pvt. Ltd. Vs. ITO (ITA No. 5955/Del/2014) wherein it has been held that if the assessee has discharged the initial onus regarding the identity, creditworthiness and genuineness, the onus shifts to the AO to bring material or evidence to discredit the same. Further there must be material to implicate the assessee in a collusive arrangement with person who are accommodation entry providers.

10.7. Reliance further placed on PCIT Vs. Paradise Inland Shipping Pvt. Ltd. (Bombay HC) (ITA No. 66 of 2016) wherein it has been held that Companies which invest share capital cannot be treated as bogus if they are registered and have been assessed. Once the assessee has produced documentary evidence to establish the existence of such companies, the burden shifts to the Revenue to establish their case. Reliance on statements of third parties who have not been subjected to cross examination is not permissible. Voluminous documents

produced by the assessee cannot be discarded merely on the basis of statements of individuals contrary to such public documents.

10.8. Reliance further placed on CIT Vs. Laxman Industrial Resources Pvt. Ltd. (Delhi HC) (2017) 397 ITR 106 wherein it has been held that the fact that the investigation wing's report alleged that the assessee was beneficiary to bogus transactions and that the identity of shareholders, genuineness etc was suspect is not sufficient. The AO is bound to conduct scrutiny of documents produced by the assessee and cannot rest content by placing reliance on the report of the investigation wing.

10.9. Reliance further placed on CIT Vs. Gagandeep Infrastructure Pvt Ltd. (2017) 394 ITR 680 (Bombay HC) wherein it has been held that the proviso to s. 68 (which creates an obligation on the issuing Co. to explain the source of share capital & premium) has been introduced by the Finance Act 2012 with effect from 01.04.2013 and does not have retrospective effect. Prior thereto, as per Lovely Exports 317 ITR 218 (SC), if the AO regards the share premium as bogus, he has to assess the shareholders but cannot assess the same as the issuing company's unexplained cash credit."

16. In this view of the matter and considering the ratio of the case laws discussed above, we are of the considered view that the assessee has proved the share application money received from three companies by necessary documents in respect of identity, genuineness of transactions and creditworthiness of the parties. Therefore, we are of the considered view that the Assessing Officer has erred in making additions towards share application money under section 68 of the Act. The learned Commissioner (Appeals) without appreciating the facts simply confirmed the additions made by the Assessing Officer. Consequently, we set aside the order passed by the learned Commissioner (Appeals) and direct the Assessing Officer to delete the additions made on account of share capital under section 68 of the Act.

17. In the result, assessee's appeal is allowed."

13. The learned A.R. has also submitted a plethora of decisions wherein the different Benches of the Tribunal, in various cases have deleted additions made with respect to in connection with Shri Praveen Kumar Jain, some of which are as under:–

- a) *Komal Agrotech Pvt. Ltd. Vs. ITO (ITAT Hyderabad);*
- b) *DCIT Vs. Bairagra Builders Pvt. Ltd. (ITAT Mumbai);*
- c) *ITO Vs. Khushboo Exports Pvt. Ltd. (ITAT Mumbai);*
- d) *ITO Vs. Shreedharan Construction Pvt. Ltd. (ITAT Mumbai);*
- e) *ACIT Vs. Ramesh Ramswarupdas Jindal (ITA 3091 to 3096/Mum/2017);*

- f) *ACIT Vs. Hetali Enterprises (ITAT Mumbai) ITA 421/Mum/2048;*
- g) *ACIT Vs. Calvin Properties (ITAT Mumbai) ITA 6561, 6562 & 6564/Mum/2017;*
- h) *Everframe Construction Pvt. Ltd. Vs. ITO (ITAT Mumbai) ITA No. 256/Mum/2019);*
- i) *ITO Vs. Rajlaxmi Buildtech Pvt. Ltd. (ITAT Mumbai) – ITA Nos. 4117, 4118 & 4123/M/2017;*
- j) *ITO Vs. Shephali Hotels & Resorts Pvt. Ltd. (ITAT Jaipur) – ITA No. 1224/Jp/2018; and*
- k) *Stork Realtors Pvt. Ltd. Vs. DCIT (ITAT Mumbai) – ITA No. 7658/M/2019.*

14. On a conspectus of the facts and circumstance of the case as mentioned hereinabove, we are of the considered view that the assessee has proved the share application money are received from the share applicants companies by necessary documents justifying the identity, genuineness and creditworthiness of the said parties and accordingly are of the considered view that the Assessing Officer grossly erred in making the additions to share application money under section 68 of the Act and which was rightly deleted by the learned CIT(A). Consequently, we decline to interfere with the order passed by the learned CIT(A) and dismiss the grounds of appeal raised by the Revenue.

15. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 02/09/2024

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED: 02/09/2024

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Nagpur; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur