

**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, KOLKATA**

**Before**

**Shri Rajpal Yadav, Vice President**

**&**

**Dr. Manish Borad, Accountant Member**

**I.T.A. No.986/KOL/2024**

**Assessment Year: 2008-09**

**Goodview Marketing Pvt. Ltd.** ..... **Appellant**  
**255, Canal Street, Shree Bhumi,**  
**Brijdham Housing Complex,**  
**Kolkata-700048.**  
**(PAN: AADCG0582H)**

**Vs.**

**Income Tax Officer** ..... **Respondent**  
**Ward-6(2), Kolkata.**

**Appearances by:**

*Shri S. K. Tulsian, Advocate & Ms. Puja Somani, AR appeared for Appellant*

*Shri Subhendu Datta, CIT, DR appeared for Respondent*

Date of concluding the hearing : 23.09.2024

Date of pronouncing the order : 16.10.2024

**ORDER**

**Per Dr. Manish Borad, Accountant Member:**

The appeal filed at the instance of the assessee pertaining to the Assessment Year (in short “AY”) 2008-09 is directed against the order passed u/s 250 of the Income Tax Act, 1961 in short the “Act”) by Ld. Commissioner of Income-tax, (Appeals), National Faceless Appeal Centre (NFAC), Delhi [in short Ld. “CIT(A)”] dated 15.03.2024 arising out of the assessment order framed u/s. 144/263 of the Act by ITO, Ward-6(2), Kolkata dated 19.03.2014.

2. Grounds of appeal raised by the assessee are reproduced as under:

*“1. That on the facts and in the circumstances of the case, the impugned proceedings for assessment having being initiated post the order of the learned PCIT u/s. 263 of the Act, the jurisdiction of AO was circumscribed by the jurisdiction vested in him in the 263 order.*

*2. That on the facts and in the circumstances of the case, in the original assessment, the learned AO having conducted enquiries from the subscribers to the share capital and was satisfied with the identity, creditworthiness and genuineness of the transactions, further enquiries in that regard was only subject of order u/s. 263 of the Act which AO failed to do.*

*3. That on the facts and in the circumstances of the case, mere statement of the learned AO that notices were unserved on the parties is contrary to the material on record and therefore cannot be held against the assessee.*

*4. That on the facts and in the circumstances of the case, the learned AO having collected no negative material in the course of assessment, erred in treating the amount of share capital received during the year amounting to Rs.7,97,00,000/- as unexplained cash credit under section 68 of the Act and the Ld. CIT(A) erred in upholding the same.*

*5. That on the facts and in law, the reopening u/s 147 of the Act having being done for escapement of income in relation to consultancy fees, the scope of assessment could not have been expanded u/s 263 of the Act unless provided in law.*

*6. That on the facts and in the circumstances of the case, the order of the learned AO dated 19-03-2014 and the order of the learned CIT(A) dated 15.03.2014 should be quashed and the assessment order dated 12.05.2010 passed u/s. 147/143(3) of the Act should be restored.*

*7. That the appellant craves to leave to add/alter and/or delete any of the grounds of appeal on or before the date of hearing.”*

3. Brief facts of the case are that the assessee is a private limited company. Return of income for AY 2008-09 furnished on 25.03.2009 declaring income of Rs. Nil. Return was duly processed u/s. 143(1) of the Act. Thereafter, based on information that an amount of Rs.80,280/- towards income from consultancy charges has not been considered in the books of account and the income has escaped assessment, notice u/s. 148 of the Act was issued and reassessment proceedings were carried out. During the course of the reassessment proceedings apart from examining the issue of escapement of income of Rs.80,280/-, Ld. AO in view of Explanation (3) to sec. 147 of the

Act also asked the assessee to explain the nature and source of share capital and share premium totalling to Rs.7.97 Cr. received during the year in light of sec. 68 of the Act. Detailed enquiry was conducted and the assessee filed necessary details. Information u/s. 133(6) of the Act as called from the share subscribers was duly received. Finally, the reassessment order was framed on 12.05.2010 assessing income at Rs.96,163/- after making addition for undisclosed consultancy fee Rs.82,280/- and preliminary expensed written off Rs.16,200/-.

4. Thereafter, the reassessment records were examined by Ld. Pr. CIT within the powers provided u/s. 263 of the Act and after examining the records revisionary order was framed on 30.03.2013 setting aside the reassessment order holding it to be erroneous and prejudicial to the interest of the revenue and directing the AO to again carry out assessment proceedings after making complete and full enquiry about the details of share application and share premium of Rs.7.97 Cr. received during the year. Though the assessee challenged the order passed u/s. 263 of the Act before this Tribunal, however, the appeal of the assessee was dismissed by this Tribunal vide a common order dated 10.08.2015. Order of this Tribunal dated 10.08.2015 was *ex parte qua* the assessee and the same was part of the batch of appeals relating to 23 assesseees. The assessee failed to challenge the order of this Tribunal dated 10.08.2015 before the Hon'ble jurisdictional High Court and, therefore, the order of this Tribunal dated 10.08.2015 attained finality so far as the case of assessee is concerned.

5. Subsequently, in direction to the revisionary order passed u/s. 263 of the Act, ld. AO carried out the second round of assessment proceedings so as to examine the genuineness and source of share capital, conducting independent enquiry, examine the directors and examine the source of realisation from the liquidation of assets. The assessee could not comply to the notice of hearing and reassessment proceedings were completed by way of a best judgment assessment u/s. 144 r.w.s. 263 of the Act on 19.03.2014 making addition of Rs.7.97 Cr. on account of unexplained share capital and share premium u/s. 68 of the Act.

6. Aggrieved, assessee preferred appeal before the Ld. CIT(A) and furnished detailed submission along with placing reliance on plethora of judgment in support of its contention that the detailed enquiry was conducted in the first round of revisional proceedings and the AO was satisfied with those details and did not invoke sec. 68 of the Act. In the second round of reassessment proceedings, which was carried out for after a long period, Ld. AO has not carried out the proceeding as per the direction given by the Ld. Pr. CIT and has merely test checked some of the share subscribers. Ld. CIT(A), however, decided against the assessee making a reference to few judgments and also observing that merely filing of ITR, ROC document do not prove the genuineness of the transaction or creditworthiness. Aggrieved, assessee is now in appeal before this Tribunal.

7. Ld. Counsel for the assessee firstly referred to the written submissions running into 17 pages filed at the time of hearing

and also took us through the paper book dated 17.09.2024 containing details filed during the first round of assessment proceedings, order sheet note of the first round of the assessment proceedings etc. Placing heavy reliance on the recent decision of this Tribunal in the case of *M/s. Aastha Vincom Pvt. Ltd. Vs. DCIT, ITA No. 123/Kol/2015 for AY 2008-09 dated 26.08.2022* wherein almost on identical facts, the addition u/s. 68 of the Act was deleted and further, revenue failed succeed before the Hon'ble jurisdictional High Court, which vide order *dated 21.06.2023 in ITA 77/2023* held that the Tribunal has carried out a thorough factual examination and there is no question of law much less substantial question of law is arising for consideration. Ld. Counsel for the assessee firstly contended that in the first round of reassessment proceedings itself, the issue of share capital and share premium was fully examined by the AO, therefore, the revisionary proceedings u/s. 263 of the Act were beyond jurisdiction and, therefore, all the subsequent proceedings are also bad in law. Further referring to the merits of the case he submitted that the Ld. AO has not carried out the enquiries in direction given by Ld. Pr. CIT and even though out of 18 share applicants, only 5 share applicants could not be served that too having common address which may have changed due to long time gap. Address of the director was provided by assessee to the AO but he did not conduct further enquiry. Ld. AO failed to take note that out of 18 share applicants 13 have duly replied the AO. He also submitted that merely for non-appearance to the issue of notice cannot be fatal for the assessee considering the ratio laid down by the Hon'ble Delhi High Court in the case of *CIT*

*Vs. Orissa Corporation Pvt. Ltd. (1986) 159 ITR 78 (Del).* He further submitted that all the share applicants are duly assessed to tax, regularly filing the income tax returns, have also passed through the scrutiny proceedings, duly filing annual returns with the Registrar of Companies and having sufficient net worth to explain the source of investment in equity of the assessee company.

8. On the other hand, ld. DR vehemently argued supporting the orders of the lower authorities and stated that when the assessee has not challenged the order of this Tribunal confirming the revisionary orders, then at this stage Ld. Counsel for the assessee cannot take the plea that revisionary proceedings were bad in law. As far as the merits of the case are concerned, it is submitted that the alleged share applicant companies are of the nature of paper/shell companies which are used for the purpose of taking accommodation entry in the form of bogus share capital. Reliance placed on the judgment of *Hon'ble Apex Court in the case of PCIT Vs. NRI Iron & Steel Pvt. Ltd. [2019] 412 ITR 161* and that of Hon'ble Delhi High Court in the case of *CIT Vs. Oasis Hospitality Pvt. Ltd. [2011] 9 taxmann.com 179*.

9. We have heard rival contentions and perused the material placed before us. The assessee is aggrieved with the finding of the Ld. CIT(A) confirming the addition of unexplained cash credit u/s. 68 of the Act amounting to Rs.7.97 Cr. which the assessee has received from 18 share applicants which are Private Limited Company against allotment of 3,98,500 equity shares of face value of Rs. 10/- and share premium of Rs. 190/- per share charged thereon. Before us, first issue of legal nature has been

raised by Ld. Counsel for the assessee stating that when the issue of share capital was thoroughly examined in the first round of reassessment proceedings, the scope of assessment could not be enlarged u/s. 263 of the Act. This issue has been raised by the assessee in ground nos. 5 and 6 praying for the restoration of the reassessment order carried out in the first round framed on 12.05.2010. We observe that the revisionary order passed by Ld. Pr. CIT dated 30.03.2013 was affirmed by this Tribunal vide its order dated 10.08.2015 *ex parte qua* the assessee and other 22 assesseees. The assessee failed to challenge this order of the Tribunal dated 10.08.2015 before the Hon'ble jurisdictional High Court. The second round of reassessment proceedings have been carried out in pursuance to the directions given by the Ld. Pr. CIT in its revisionary order. Now before us, Ld. Counsel for the assessee is challenging the jurisdiction of the revisionary proceedings stating that in the first round of reassessment proceedings the issue has already been examined and, therefore, Ld. Pr. CIT erred in giving direction for further enquiries on the same issue. We find that the similar issue came before this Tribunal in the case of *Astha Vincom Pvt. Ltd. (supra)* and this Tribunal did not admit the additional ground raising similar grievance observing as follows:

*"7. In so far as the additional grounds raised by the assessee are concerned, we are of the considered view that the assessee is not challenging the jurisdiction of Ld. Pr. CIT u/s. 263 of the Act to pass the reassessment order, it is undisputed fact that assessee has not challenged the order before the Tribunal. We are therefore of the considered view that the assessee has not challenged the revisionary order passed under section 263 by the Ld. Pr. CIT dated 07.03.2013 before the Tribunal and therefore it has attained finality, nonetheless we have observed that in the original assessment proceedings under section 147 of the Act, the ld. Assessing Officer has carried out the investigations into the share subscription/investments into the share capital and premium to the extent of Rs.7,86,50,000/- by issuing notices under*

*section 133(6) of the Act to five share applicants, which were duly complied with by the share applicants by filing the necessary details as called for by the Ld. Assessing Officer and the ld. Assessing Officer has accepted the genuineness of the investments after examining all these details/evidences. Besides the Ld. Assessing Officer has called for the details from the company in respect of all the eight investors which were duly filed and furnished by the company. But despite at this stage, the assessee cannot be allowed to raise the issue of validity of jurisdiction of Ld. Pr. CIT under section 263 of the Act in revising assessment order as the same has attained finality and the assessee has missed the bus by not filling appeal before the Tribunal challenging the said revisionary order. At this stage we can only examine the validity of addition in the assessment order under section 143(3) read with section 147/148/263 of the Act dated 31.03.2014. Considering these facts and circumstances, we are not admitting the additional grounds and are dismissed at the preliminary stage.”*

10. In view of the above finding of this Tribunal which is squarely applicable on the legal issue raised before us, we are of the considered view that at this stage assessee cannot challenge the validity of the revisionary order u/s. 263 of the Act and the directions given therein since the same has attained finality in view of the order of this Tribunal which has subsequently not been challenged by the assessee before the higher forum.

11. Now, we take up the merits of the case as to whether Ld. CIT(A) was justified in confirming the action of the AO of making the addition on unexplained cash credit u/s. 68 of the Act for the share capital and share premium totalling to Rs. 7.97 Cr. received from 18 private limited share applicants. Before dealing with the facts of the instant case, we would like to go through the position of law discussed by this Tribunal in case of *Astha Vincom Pvt. Ltd. (supra)* wherein also similar issue of challenging the addition u/s. 68 of the Act came for adjudication which was made by Ld. AO during the course of assessment proceeding carried out in direction to order u/s. 263 of the Act giving

direction to AO to examine the nature and source of share capital and share premium which is explained as under:

No.	Facts of M/s Aastha Vincom Pvt. Ltd	Facts of the present case
1	<p>The case of the assessee was reopened u/s 148 of the Act for the reason that data processing charges as per the Profit and Loss A/c differs from that shown in the return of income. This has led to escapement of income within the meaning of section 147 of the Act.</p> <p><b>(Page 2 of the order)</b></p>	<p>The present case of the assessee was reopened u/s 147 of the Act for the reason that an amount of Rs.80,280/- in the nature of consultancy fees was not considered in the return of income and thus this income has escaped assessment.</p>
2	<p>In the course of assessment proceedings u/s 147 of the Act, the learned AO apart from issues covered in reasons recorded, also noted that the assessee has raised share capital of Rs.40,27,500/- and share premium of Rs.7,46,22,500/- during the year and invoked Explanation 3 to section 148 of the Act and raised queries in this regard.</p> <p><b>(Page 2-3 of the order)</b></p>	<p>In the present case also, the learned AO invoked Explanation 3 to section 148 of the Act and examined the issue of share capital</p>
3	<p>The learned AO conducted his own independent enquiries with the share applicants and issued notices u/s 133(6) of the Act to them. Replies were filed by the share applicants to whom notice u/s 133(6) of the Act was issued and the same was kept in records.</p> <p><b>(Page 3 of the order)</b></p>	<p>In the present case also, the learned AO conducted his own independent enquiries with the share applicants and issued notices u/s 133(6) of the Act to all the share applicants. Replies were filed by all the share applicants and the same was kept on record.</p>
4	<p>On examination of the documents produced by the assessee and the share applicants, the learned AO was satisfied with the identity, creditworthiness of the parties and the genuineness of the transactions and he concluded that no addition is warranted u/s 68 of the Act</p> <p><b>(Page 3 of the order)</b></p>	<p>In the present case also, on examination of the documents produced by the assessee and the share applicants, the learned AO was satisfied with the identity, creditworthiness of the parties and the genuineness of the transactions and he concluded that no addition is warranted u/s 68 of the Act</p>

5	<p>Subsequently, on perusal of assessment records, the learned PCIT-1, Kolkata noted that the order passed u/s 147/143(3) of the Act is erroneous and prejudicial to the interest of the revenue since the AO failed to make complete and full enquiries into the subscription to the share capital and set aside the order passed u/s 147/143(3) of the Act to be framed de-novo as per the directions contained in the said order.</p> <p><b>(Page 4 of the order)</b></p>	<p>In the present case also, the learned CIT-II, Kolkata noted that the order passed u/s 147/143(3) of the Act is erroneous and prejudicial to the interest of the revenue since the AO failed to make complete and full enquiries into the subscription to the share capital and set aside the order passed u/s 147/143(3) of the Act to be framed de-novo as per the directions contained in the said order.</p>
6	<p>The directions of the PCIT were not followed by the learned AO in the proceedings initiated after 263 order.</p> <p><b>(Page 35 of the order)</b></p>	<p>In the present case also, the assessee has demonstrated that the directions of the PCIT were not followed by the second learned AO in the proceedings initiated after 263 order.</p>

12. The finding of this Tribunal in case of *Astha Vincom (P) Ltd.* (*supra*) discussing the legal aspects and other judgments of the Hon'ble Court reads as under:

*"8. We have duly considered rival contentions and gone through the record carefully. Before we embark upon an inquiry on the facts of the present appeal, in order to find out whether the share capital and share premium money received by the assessee during the year is required to be treated as its unexplained credit and deserves to be added under section 68 of the Income Tax Act, 1961. We deem it appropriate to bear in mind ITA No. 123/KOL/2015 Assessment Year : 2008-2009 M/s. Aastha Vincom Pvt. Limited 6 certain basic principles/tests propounded in various authoritative pronouncements of the Hon'ble High Courts and Hon'ble Supreme Court. It is also pertinent to observe that both the sides have made reference to a large number of decisions. We do not deem it necessary to recite and recapitulate them because that would make this order repetitive and bulky. We take cognizance of some of them. It is pertinent to observe that in so far as companies incorporated under Indian Companies Act are concerned, whether private limited or public limited companies, they raise their share capital, through shares though manner of raising share capital in private limited company on one hand and public limited company on other hand, would be different. The share capital and share premium are basically irreversible receipts or credits in the hands of the companies. Share capital is considered to be cost of shares on equivalent amount issued and premium is considered as extra amount charged by the company for issue of that capital. In the case of private limited company, normally shares are subscribed by family members or persons known/close to the promoters. Public limited company, on the other hand,*

generally raised by public issue inviting general public at large for subscription of these shares. Yet, it is also possible that in the case of public limited company, the share capital is issued in close-circuit. When companies incorporated under the Companies Act raise their capital through shares, various persons would apply for shares and then give share application money. This amount received from such share holder would naturally be credited in the books of accounts of the assessee. Once the alleged share capital is credited to the accounts of the assessee, then role of section 68 would come. It is pertinent to take note of this section. It reads as under:

“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 officer, satisfactory the sum so credited may be charged to income tax as the income of the assessee of that previous year. ”

9. A perusal of the section would indicate that basically this section contemplates three conditions required to be fulfilled by an assessee. In other words, the assessee is required to give explanation which will exhibit nature of transaction and also explain the source of such credit. The explanation should be to the satisfaction of the AO. In order to give such type of explanation which could satisfy the AO, the assessee should fulfill three ingredients viz. (a) identity of the share applicants, (b) genuineness of the transaction, and (c) credit-worthiness of share applicants. As far as construction of section 68 and to understand its meaning is concerned, there is no much difficulty. Difficulty arises when we apply the conditions formulated in this section on the given facts and circumstances. In other words, it has been propounded in various decisions that section 68 contemplates that there should be a credit of amounts in the books of an assessee maintained by the assessee, (b) such amount has to be a sum received during the previous year, (c) the assessee offers no explanation about the nature and source of such credit found in the books, or (d) the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory. The Hon'ble Delhi High Court in the case of CIT v. Novadaya Castles (P.) Ltd. 367 ITR 306 has considered a large number of decisions including the decision of Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad [1971] 82 ITR 540 (SC). According to the Hon'ble Delhi High Court basically there are two sets of judgments. In one set of case, the assessee produced necessary documents/evidence to show and establish identity of the share-holder and bank account from which payment was made. The fact that payment was received through bank channels, filed necessary affidavit of the shareholders or confirmations of the directors of the shareholder company. But thereafter no further inquiry was made by the AO. The second set of cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances.

10. Let us take into consideration observations made by the Hon'ble Delhi High Court in the case of Softline Creations P.Ltd. (supra) while taking note of judgment of Hon'ble Delhi High court in the case of CIT Vs. Fair Finvest Ltd., 357 ITR 146 (Delhi). Hon'ble Delhi High Court made following observations:

“.....This court has considered the concurrent order of the Commissioner of Income-tax (Appeals) as well as the Income-tax Appellate Tribunal. Both these authorities primarily went by the fact that the assessee had provided sufficient indication by way of permanent account numbers, to highlight the identity of the share applicants, as well as produced the affidavits of the directors. Furthermore, the bank details of the share applicants too had been provided. In the circumstances, it was held that the assessee had established the identity of the share applicants, the genuineness of transactions and their creditworthiness; The Assessing Officer chose to proceed no further but merely added the amounts because of the absence of the directors to physically present themselves before him.

The Income-tax Appellate Tribunal has relied upon a decision of this court in *CIT v. fair Finvest Ltd.* [2013] 357 ITR 146 (Delhi), where in somewhat similar circumstances, it was stated as follows (page 152):

"This court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income-tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the directors, Form 2 filed with the Registrar of Companies by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing Officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of section 68.

Having regard to the entirety of facts and circumstances, the court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in *Lovely Exports (supra)* ”

11. We also deem it appropriate to take note of some of observations of the Hon'ble Delhi High Court from the decision of *Fair Finvest Ltd. (supra)*. The Hon'ble Court has noticed proposition laid down by the Hon'ble Delhi High Court in the case of *CIT Vs. Victor Electrodes Ltd., 329 ITR 271 (Delhi)* regarding non-production of share applicants before the AO. The following observations are worth to note

“...In this connection the observation of the jurisdictional High Court in case of *Dwarkadhish Investment (Supra)* are quite relevant where the court has observed that it is the revenue which has all the power and wherewithal to trace any person. Further in the case of *CIT vs. Victor Electrodes Ltd. 329 ITR 271* it has been held that there is no legal obligation on the assessee to produce some Director or other representative of the Director or other representative of the applicant

companies before the A.O. Therefore failure on part of the assessee to produce the Directors of the share applicant companies could not by itself have justified the additions made by the AO particularly when the seven share applicant companies through their present Directors have now again filed fresh affidavits confirming the application and allotment of shares with respect to the total amount of Rs. 45 Lacs. It is observed that no attempt was made by the AO to summon the Directors of the share applicant companies. Moreover, it is settled law that the assessee need not prove the "source of source". Accordingly it was incumbent upon the department to have enforced attendance of Shri Mahesh Garg or the erstwhile Directors of the share applicant companies and confronted them with the evidences & affidavits relied upon by the appellant and thereupon given opportunity to the assessee to cross examine these applicants".

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19. Having considered the aforesaid facts and observations of the ld. CIT(Appeals) and the extent of verification done by the ld. Assessing Officer in the proceedings under section 147 of the Act, we observe that the ld. Assessing Officer has carried out full investigation into the share capital/share premium in the assessment proceedings under section 147 of the Act by issuing notices u/s 133(6) of the Act, which were duly supplied by the said investors. Besides we note that the assessee has fully furnished all the details before the ld. Assessing Officer to prove the identity, creditworthiness (source of money) of the investors and the genuineness of these transactions. But in the set assessment proceedings, the Assessing Officer has not carried out any investigation and harped on the fact that the assessee has failed to discharge its onus to prove the identity, creditworthiness and genuineness of the transactions by ignoring and overlooking the facts available on record. We note that the ld. Assessing Officer has all the records before him on the basis of which in the first assessment proceedings, the ld. Assessing Officer held the investments in share capital/share premium as genuine, whereas in the set aside proceedings, the ld. Assessing Officer has treated the same investments as bogus and non-genuine without carrying out any investigation by merely relying on the fact that summons issued under section 133(6) were served but not responded by the investors and also former and present Directors of the assessee company did not comply with summons issued u/s 131 of the Act except one Shri Rakesh Kumar Choubey. In our view, the action of the ld. Assessing Officer in making addition without complying the direction issued by the ld. Pr. CIT specifically in paragraph 19 of the order as reproduced hereinabove cannot be sustained. The addition was made simply for the reason that ld. Pr. CIT has exercised his jurisdiction under section 263 of the Act setting aside the original assessment. We also note that the ld. Assessing Officer has ignored the facts, documents, confirmations and evidences, which were available on record on the assessment folder. In our opinion, there is no bar in the Act to issue of shares at a premium as it is the prerogative of the Board of Directors to decide the premium amount and the assessee was not required to prove the purpose or justification for charging premium on shares. The ld. Counsel for the assessee to buttress the contentions in favour of the assessee placed reliance is placed on the judgment of the Hon'ble Mumbai Tribunal in the case of ACIT -vs.- Gagandeep Infrastructure Pvt. Limited (2014) 40 CCH 0128. The operating part is extracted as under:-

*“We have carefully perused the orders of the lower authorities. In our considered view, the issue of shares at premium is always a commercial decision which does not require any justification. Further the premium is a capital receipt which has to be dealt with in accordance with Sec. 78 of the Companies Act, 1956. Further, the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature in a capital receipts and is not income for its ordinary sense. It is not in dispute that the assessee had filed all the requisite details/documents which are required to explain credits in the books of accounts by the provisions of Sec. 68 of the Act. The assessee has successfully established the identity of the companies who have purchased shares at a premium. The assessee has also filed bank details to explain the source of the shareholders and the genuineness of the transaction was also established by filing copies of share application forms and Form No. 2 filed with the Registrar of Companies. The entire dispute revolves around the fact that the assessee has charged a premium of Rs. 190/- per share. No doubt a non-est company or a zero balance sheet company asking for Rs.190/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such huge premium without any bar from any legislated law of the land. The amendment has been brought in the Income Tax Act under the head “Income from other sources” by inserting Clause (viib) to Sec. 56 of the Act wherein it has been provided that any consideration for issue of shares, that exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be treated as the income of the assessee but the legislature in its wisdom has made this provision applicable w.e.f. 1.4.2013 i.e. on and from A. Y. 2013-14. In so far as the year under consideration is concerned, the transaction has to be considered in the light of the provisions of Sec. 68 of the Act. There is no dispute that the assessee has given details of names and addresses of the share holders, their PAN Nos, the bank details and the confirmatory letters.”*

20. The above decision of the Tribunal has been affirmed by the Hon’ble Bombay High Court by dismissing the appeal of the Revenue reported in (2017) 394 ITR 680 (Bombay.). The case of the assessee also finds support from the another decision of the Hon’ble Madhya Pradesh High Court in the case of CIT –vs.- Chain House International (P) Ltd. reported in 98 taxmann.com 47, wherein the Hon’ble Court has held as under:-

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

21. Therefore, the issue of share at premium cannot be a ground for making addition. We also note that the allegation of the authorities below that the share applicants did not respond to the notices issued under section 136 of the Act, whereas this is not the allegation that notices were not served upon the share applicants. We note that the information /details/evidences of all these share applicants were available with the ld. Assessing Officer such as PANs, addresses, copies of bank statement, annual audited accounts, etc. Admittedly and undeniable, the initial burden of proof lies on the assessee but once he proves the identity of the share applicants by either furnishing PAN or income tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee or by draft or any other mode, then the onus of proof would shift to the revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the revenue the right to invoke section 68 of the Act. One must not lose sight of the fact that it is the revenue which has all the powers to trace any person and is also settled law that the assessee need not to prove the source of source. The case of the assessee finds support from the decision of the Hon'ble Delhi High Court in the case of CIT -vs.- Orissa Corporation Pvt. Limited (1986) 159 ITR 78 (Del.), wherein it has been held as under:-

“The assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the allowed loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises. It cannot, therefore, be said that any question of law arose in these cases. The High Court was, therefore, right in refusing to refer the questions sought for”.

22. The above decision of the Hon'ble Delhi High Court has been affirmed by the Hon'ble Apex Court in (1986) 159 ITR 78. Therefore, we observe that non-compliance of notice by the share applicants in the second round of assessment proceedings cannot be used to draw adverse inference against the assessee as the Revenue was having all the necessary evidences/documents which were filed by the share applicants in the first round of assessment in response to the notices issued under section 133(6) of the Act.

23. On the issue of share applicants, they are not having any business activity and their net worth was also very meagre. We note that the share application was received through Banking channel out of own funds of investing companies as is clear from the audited annual accounts and that it is not necessary that source of investment is to be out of taxable income. The assessee's case finds support from the decision of Ami Industries (India) Pvt. Limited (ITA 1231 of 2017) passed by the Hon'ble Bombay High Court, wherein the Hon'ble Court has observed as under:-

*“It was not necessary that share application money should be invested out of taxable income only”.*

*24. On the third issue that summons issued under section 131 fo the Act to the erstwhile and present Directors returned un-served except Mr. Rakesh Kumar Choubey, who was erstwhile Director and appeared to comply with the summons. We note that according to the ld. Assessing Officer, he was not assessed to tax and he was not having any PAN and he was working as a Peon to M/s. Khaitan & Associates. We note that the observations of the ld. Assessing Officer are not correct as Shri Rakesh Kumar Choubey is holding PAN and also assessed to tax and filing his return of income under the charge of ITO, Ward-37(1), Kolkata. We also note from the reasons before us that the statement given under section 131 was retracted just after two days recording. We note that in the first round of assessment, the transactions were examined and verified completely and accepted by the ld. Assessing Officer, then what new facts have come on record prompting the ld. Assessing Officer to take a contrary view. The ld. Assessing Officer has not recorded any finding as to how the share capital/share premium received by the assessee were bogus and unexplained or his own money was converted in the form of share capital/share premium. Thus no adverse material/evidences were brought on record and documents already on record remained ITA No. 123/KOL/2015 Assessment Year : 2008-2009 M/s. Aastha Vincom Pvt. Limited 42 uncontroverted. Under these facts and circumstances, the ld. Assessing Officer cannot be allowed to disturb the satisfaction recorded by the first ld. Assessing Officer in the first round based upon evidences available on record that too just on the surmises and conjectures.”*

13. Now, in the light of the above decision of this Tribunal, we move on to deal with the facts of the instant case. We observe that in the first round of reassessment proceedings carried out vide assessment order dated 12.05.2010, the Ld. AO in light of Explanation (3) to sec. 147 of the Act went on to examine other issues which came to his notice during the course of assessment proceedings. Ld. AO observed that the assessee received share capital and share premium to the tune of rs.7.97 Cr. In the annexure to the notice annexed to notice u/s. 142(1) of the Act dated 19.09.2010 at point no. 4 the assessee was asked to provide the details of name, current address, PAN of share applicants, including number of shares applied, amounts involved, inward cheque details including cheque no., bank's name and branch address. The assessee duly replied to these queries and furnished all the details before the AO in the form of audited financial statement, ITR confirmation, bank statement etc. in order to explain

the nature and source of the alleged sum. During the course of first round of reassessment proceedings on 23.04.2010 when the Ld. AR of the assessee appeared and filed details the same were examined, books of accounts along with the confirmations were received and the same was followed by issuing of notice u/s. 133(6) of the Act which were duly replied by the share applicants. We thus, find that the adequate and independent enquiry was made by the Ld. AO during the course of the reassessment proceedings with respect to the issue of share capital and share premium of Rs.7.97 Cr. raised during the year. The documents submitted by the assessee and the share applicants were carefully looked into and properly examined by the Ld. AO and after due application of mind, he was satisfied that assessee has explained the nature and source of alleged sum and no addition u/s. 68 of the Act is warranted.

14. Thereafter, subsequently, when the ld. Pr. CIT gave the direction to the AO to again carry out the assessment proceedings so as to examine the share capital and share premium received during the year, we on perusal of the assessment order observe that Ld. AO has not conducted the enquiry in the manner the directions were given. Ld. Counsel for the assessee has furnished the details about the directions of the Ld. Pr. CIT, action by the AO and the remarks to this effect and the same are reproduced below:-

Sr No.	Direction of PCIT	Action by AO	Our Remarks
1	<p><i>Examine the genuineness and source of share capital, not on a test check basis, but in respect of each and every shareholder by conducting independent enquiry not through the assessee. The bank account for the entire period should be examined in the course of verification to find out the money trail of the share capital</i></p>	<p>The second learned AO issued notice u/s 133(6) of the Act to all the 18 share applicant companies.</p> <p>Apart from issuing notice u/s 133(6) of the Act to the share applicants, no further action was taken by him with the share applicant companies.</p> <p>Summon dated 26-02-2014 was issued to the assessee company in its PAN and address u/s 131 of the Act as 'PAN:AADCG0582H To, The Director, M/s Goodview Marketing Pvt Limited, 28, Armenian Street, 1<sup>st</sup> Floor, Kolkata - 700001' on 26-02-2014.</p> <p>Refer <b>page 4</b> of the assessment order.</p>	<p>The second learned AO in the assessment order stated that he had issued notice u/s 133(6) of the Act to all the 18 share applicant companies. The second learned AO observed that out of 18 share applicants, notice could not be served to 5 share applicants.</p> <p>On perusal of the details of these five share applicants to whom notice could not served, it may be seen that all these share applicants had a common address i.e 4, Raja Woodmunt Street, Kolkata – 700 001. It appears that the Post Office personnel/Inspector were not able to locate this one address. The assessee gave the address as available with it. Since there was a time gap in the year the share application money was received and the second assessment, it might so happen that the addresses have been changed. All these 5 share applicants were regular income tax assessees. The second learned AO could have himself traced their new address, in case the address were changed, since an AO has been vested with all the powers to trace an income tax assessee.</p> <p>Reliance is placed on the judgment of the Hon'ble Delhi High Court in the case of <b>CIT vs Orissa Corporation Pvt Ltd (1986) 159 ITR 0078</b> (Del) wherein it was held that,</p> <p><i>“The assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the allowed loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further.”</i></p> <p>Here, reliance is also placed on the judgment of the Delhi High Court in the case of <b>CIT vs</b></p>

			<p><i>Dwarkadhish Investment (P)Ltd.</i> (330 ITR 298)(Del) wherein it was held that,</p> <p><i>“ Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "source of source".</i></p> <p>Here, it may be noted that the learned PCIT specifically directed the learned AO to conduct enquiries independently and not through the assessee. As per the Black’s Law dictionary the meaning of ‘independent’ is “1. <i>Not subject to the control or influence of another &lt;independent investigation&gt;.</i> 2. <i>Not associated with another (often larger) entity &lt;an independent subsidiary&gt;.</i> 3. <i>Not dependent or contingent on something else &lt;an independent person&gt;.</i></p> <p>In case, these five parties were not found at the addresses given, the learned AO ought to have issued summons to the present directors of these 5 share applicants to verify the genuineness of the transactions. However, the same was not done by the learned AO. The directors name and their addresses is easily available on the MCA portal. However, apart from issuing notice u/s 133(6) of the Act, no other action was taken by him.</p> <p>On the other hand, summon was issued to the assessee company in its PAN u/s 131 of the Act when it was specifically instructed that the enquires should be conducted independently and not through the assessee.</p> <p>Moreover, it is worth noting that the learned second AO has not alleged that replies were not filed by the other share applicants. Requisite documents including Bank statements were also submitted by the rest of the 13 parties in response to the notice issued u/s 133(6) of the Act to evidence their identity, creditworthiness and genuineness of the transactions. However, the said documents were not examined by the learned AO. No cash trail of share capital was made by the learned AO as directed by the learned PCIT. As such, the direction of the learned PCIT to examine the genuineness of the transaction was clearly not followed.</p>
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2	<p><i>Further the A.O. should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them on oath to verify their credentials as director and reach a logical conclusion regarding the controlling interest.</i></p>	<p>Summon dated 26-02-2014 was issued to the assessee company in its PAN and address u/s 131 of the Act as 'PAN:AADCG0582H To, The Director, M/s Goodview Marketing Pvt Limited, 28, Armenian Street, 1<sup>st</sup> Floor, Kolkata - 700001'</p> <p>Refer page 4 of the assessment order</p>	<p>Here, please note that the PCIT directed the learned AO to summon and examine the Directors.</p> <p>Only one summon was issued to the 'Director, M/s Goodview Marketing Pvt Limited' on 26-02-2014 in the PAN of the assessee company.</p> <p>The said summon was not issued in the name of the Directors of the assessee company. The name and address of the Directors of the company in the relevant year was in the assessment file. However, he failed to summon the individual Directors. Vide letter filed on 05-03-2014, the assessee specifically submitted the names and addresses of the present Directors. Copy of the reply is enclosed at <b>page 19-20</b> of the paper book.</p> <p>However, no summons were issued by the learned AO to the individual directors of the assessee company at their given addresses. There were two directors in the relevant year and four directors during the course of assessment. No summons were issued in the name of any Director of the company during assessment by the second learned AO.</p> <p>Here, it is relevant to quote section 62 of the CrPC,1973 which read as follows:</p> <ol style="list-style-type: none"> <li>1. <i>Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.</i></li> <li>2. <i>The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.</i></li> <li>3. <i>Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefore on the back of the other duplicate.</i></li> </ol> <p>In the present case, the learned AO was not required to issue summon to the company. Notice was issued at the company's address in the PAN of the company addressing the Director but not in the name of the individual director at their residential address and their PAN. The PCIT has specifically directed the learned AO to issue the summons to the Directors of the company.</p> <p>There were four Directors in the company, however only one summon was issued in the name and PAN of the company.</p>
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15. The contentions made by the Ld. Counsel for the assessee in the remarks column further gets fortified with the fact that Ld. AO issued the notice to 18 share applicants and 13 of them have duly replied. The five share applicants which were all having common addresses do not reply but then the Ld. Pr. CIT has directed the AO to carry out the thorough investigation and, therefore, Ld. AO ought to have checked the PAN and the current status of the income tax return and could have easily known the whereabouts of the share applicants. Ld. AO ought to have considered the fact that it was almost 7 to 8 years since the time when assessee received the share application money and one cannot ignore the possibility of change of address. We also note that a summon to the director of M/s. Goodview Marketing Pvt. Ltd. on 26.02.2014 was not addressed to the director but only in the name of company. Ld. AO failed to take note that the directors were changed and the assessee vide letter dated 05.03.2014 specifically submitted the names and addresses of the present directors. But even after getting the current address of the present directors Ld. AO did not issue any summon to the individual directors. This act of Ld. AO proves that he has not conducted any enquiry/investigation in the manner Ld. Pr. CIT has directed.

16. One more fact came to our notice while going through the assessment order dated 19.03.2014 wherein the addition u/s. 68 of the Act has been made and the said observation has been noticed from page 6 of the assessment order. First we will reproduce page 6 of the assessment order dated 19.03.2014 as under:

*“During assessment proceeding nobody on behalf of the assessee appears before the undersigned till the date of passing this order. This non-appearance strategy of the assessee is wilful and can be regarded as a plea to consume further time and prevent further enquiry to reach up to the root of the sources. Therefore, prima facie the assessee failed to discharge its onus by not providing (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of*

*the creditor/subscriber and all other relevant material evidence so as to conduct further enquiry, as a part of the verification, in this regard.*

*As stated earlier that all out verification of identity, genuineness of transaction and creditworthiness of the shareholder was needed in this case so as to reach into the fact as to why investment was made by the shareholders with such excessive high share premium, 99 times its face value to a company whose activity and financial strength do not commensurate with such a high premium. But, the enquiry could not be made as the assessee failed to discharge its onus in establishing the identity of the shareholders, their creditworthiness and genuineness of the transactions. As such prima facie existence of so called share holders could not be proved. Besides the summons issued to the director of the assessee company was returned unserved. Hence, to sum up the assessee company failed to discharge its onus to explain the return, produce Books of account for verification and to file required details as called for in the notice u/s. 142(1) of the Act. It is not also explained the source of inflow of the funds in the form of share capitals as well as the huge share premium.*

*Hon'ble Delhi High Court, in the case of CIT Vs. Nr Portfolio (P) Ltd. opined that "When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken."*

*It may also be justified in quoting the decision taken by Delhi High Court in Nova Promoters and Finlease (P) Ltd. ITA No. 342 of 2011 wherein the Learned Court confirms addition of Share Capital u/s. 68 of the I. T. Act.*

*In view of the above, the entire share capital received by the assessee to the tune of Rs.15,61,00,000/- during the year under consideration is treated as unexplained cash credit and added back to income of the assessee applying sec. 68 of I. T. Act, 1961.*

*I am also satisfied with the fact that this is a fit case for initiation of penalty proceeding u/s. 271(1)(b) and 271(1)(c). These penalty proceedings are being initiated separately."*

17. From a perusal of the above observation of Ld. AO where it is mentioned that excessive share premium being 99 times of its face value has been charged. This observation is factually incorrect because the assessee has issued equity shares for face value of Rs. 10/- and has charged premium of 19 times i.e. Rs. 190/- per share and this shows that finding of Ld. AO is based on wrong facts. In the second para of the page 6 of the assessment order referred above Ld. AO observes that the entire share capital received by the assessee to the tune of Rs.15,61,00,000/- during the year under consideration is

treated as unexplained cash credit and added back to the income of the assessee applying sec. 68 of the Act. This observation of Ld. AO is also factually incorrect because the addition in dispute is of Rs.7.97 Cr. but the Ld. AO has mentioned at Rs.15.61 Cr. which shows that Ld. AO has not made any application of mind and rather applied some cut and paste formula without putting his genuine efforts to examine the share capital and share premium received by the assessee during the year. It thus, brings us to a conclusion that Ld. AO has made the impugned addition without properly examining the facts of the case and rather proceeded on the basis of incorrect facts and alleged addition seems to be made on surmises and conjectures. We also note that the assessee has successfully explained the nature and source by way of proving the identity and creditworthiness of 18 share applicants and genuineness of the transaction with the help of documentary evidence and discharged its primary onus cast u/s. 68 of the act and in the very first round of reassessment proceedings all these details were examined by Ld. AO who was satisfied with the explanation given by the assessee and did not make any addition u/s. 68 of the Act. In the second round of reassessment proceeding, Ld. AO without bringing any new material/evidence on record or any discrepancy in the documents filed by the assessee has merely given general observations that too not specifically relevant to the assessee at some places and it seems that the second round of reassessment proceedings were a mere formality to the directions of Ld. Pr. CIT and nothing against the assessee was found. Here reference is made to section 142(2) and 142(3) of the Act which reads as under:

Section 142(2) of the Act reads as under:

*"(2) For the purpose of obtaining full information in respect of the income or loss of any person, the Assessing Officer may make such inquiry as he considers necessary.*

Section 142(3) of the Act reads as under:

*"(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under sub-section (2) or any audit under sub-section (2A) and proposed to be utilised for the purpose of the assessment. "*

18. Section 142(2) of the Act stipulates that Assessing officer is required to make all such inquiries as he considers necessary for the purpose of obtaining full information in respect of the income or loss of the Assessee. In immediate succession is section 142(3) of the Act which lays down that in respect of the material gathered on the basis of the said inquiry made u/s 142(3) of the Act and which is proposed to be utilized for the purposes of the assessment, the Assessing Officer has to give the Assessee an opportunity of being heard on the same. However, in the present case, as evident from the facts of the case, the results of the inquiries conducted and material gathered during the course of such enquiries were never shared with the assessee. Thus, the mandate of section 142(2) and 142(3) of the Act was clearly not followed by the learned AO in utilizing such information against the assessee without providing an opportunity to controvert the findings of the learned AO. Here, reliance is placed on the judgment of the Hon'ble ITAT, Kolkata in the case of M/s SPML Infra Ltd vs DCIT (ITA No.1228/K01/2018) pronounced on 17/01/2020 wherein on identical facts it was held that,

*"14. To conclude: We note that none of the statements were recorded by the assessing officer of the assessee company, and no opportunity for cross examination has been provided to the assessee company. The mandate of law to conduct enquiry by the Assessing Officer on due information coming to him to verify authenticity of information was not done as per section 142 of the Act. Therefore, mere receipt of unsubstantiated statement recorded by some other officer in some other proceedings more particularly having no bearing on the transaction with the assessee does not create any material evidence against the assessee. This is because section 142(2) mandates any such material adverse to the facts of assessee collected by AO u/s. 142(1) has to be necessarily put to the assessee u/s 142(3) before utilizing the same for assessment so as to constitute as reliable material evidence through the process of assessment u/s.143(3) of the Act."*

*Further reliance is placed on the recent judgment of the Hon'ble ITAT Delhi in the case of ACIT vs M/s Sur Buildcon Pvt Ltd (I.T.A No.6174/De1/2013)*

*pronounced on 15-07-2021 wherein relying on the above judgment of the Hon'ble Kolkata ITAT in the case of SPML Infra (supra) it was held that,*

*"7.11 Applying the law to the case at hand, it is evident that the Inspector Reports, that had been relied upon by the A.O., have been reproduced in length for the first time in the Assessment Orders only. The A.O., by failing to confront the assesseees with the evidence he had gathered u/s. 142(2) Act, has, therefore, erroneously skipped the mandatory intermediary step prescribed u/s. 142(3) of the Act. Thus, when the A.O. has directly gone on to pass the Assessment Orders u/s. 147/ 143(3) of the Act to make the impugned additions u/s. 68, the same is in direct violation of the procedure of enquiry prescribed in the Statute that inherently encompasses the Principle(s) of Natural Justice. We derive support to our line of reasoning from the decision of the coordinate Bench of the Hon'ble Kolkata Tribunal in M/s. SPML Infra Ltd. vs. DCIT, ITA No. 1228/Kol/2018 wherein it has been held as under:*

*.....*

*It was further held that,*

*7.14 Since the results of the enquiries conducted by the A.O. u/s. 142(2) of the Act have not been confronted to the assesseees, we are inclined to agree with the Ld. A.R. that there has been a violation of the Principle(s) of Natural Justice implied within Section 142 (2) of the Act and such statutory non-compliance vitiates the entire assessment proceedings, therefore, rendering it to be null and void. Thus, the Cross Objection taken on the violation of the Principle(s) of Natural Justice is also allowed in favour of the assesseees. "*

19. Thus, the order passed by the learned AO in the present case without affording an opportunity of being heard w.r.t his findings and observations during the course of assessment is not as per law and in violation of principles of natural justice

20. Moving further, reliance is also placed on the judgment of the Hon'ble jurisdictional ITAT, Kolkata in the case of ACIT vs Gold Rush Sales and Service Ltd pronounced on 21-08-2023 [2023] 156 taxmann.com 514 (Kolkata - Trib.) wherein it was held that non-compliance of summon cannot be a ground to make addition u/s. 68 of the Act when all the supporting documents are being submitted to evidence the identity, creditworthiness and genuineness of the transactions.

*"It is found that undisputedly the assessee has filed the evidences/details as called for by the Assessing Officer in respect of the share subscribers of Rs.2.34 crores which has not been commented by the Assessing Officer in the assessment proceedings nor any defect has been pointed out meaning thereby*

*that no further verification of these evidences was carried out by the Assessing Officer. Though there was a non-compliance to the summon issued under section 131 by the directors of the assessee-company, but the just mere non-compliance to the summon issued under section 131 cannot be a ground for adding the share capital/share premium raised by the assessee during the year as unexplained cash credit u/s. 68. The Commissioner (Appeals) has considered all the facts of the case and after passing a very detailed order has allowed the appeal of the assessee. It is opined that the mere non-compliance to the summons issued under section 131 is not sufficient to make the addition under section 68. [Para 6]*

*The case of the assessee is also squarely covered by the decisions of Calcutta High Court in the case of Crystal Networks (P.) Ltd. v. CIT [2013] 35 taxmann.com 432/353 ITR 171 wherein it has held that where all the evidences were filed by the assessee proving the identity and creditworthiness of the loan transactions, the fact that summon issued were returned unserved or no body complied with them is of little significance to prove the genuineness of the transactions and identity and creditworthiness of the creditors. [Para 6.1]*

*In the instant case before us also, the assessee has furnished all the evidences proving identity and creditworthiness of the investors and genuineness of the transactions but the Assessing Officer has not commented on these evidences filed by the assessee. Under these facts and circumstances and considering underlying facts in the light of ratio laid down in the decisions as discussed above, the order of the Commissioner (Appeals) is to be upheld." [Para 6.3]*

21. The alleged share applicants having sufficient source of funds with them in the form of net worth i.e. share capital and reserve and surplus cannot be brushed aside as it has been held time and again that it is not necessary that the investment in equity and other companies should be out of the income earned by the investors.

18. The ld. D/R, on the other hand, has merely given a general statement that these companies are paper/shell companies but no concrete evidence is filed on record which could prove the substance in such submissions failing which the issue in hand can be decided only on the basis of documentary evidence available on record which clearly states that the assessee has explained the nature and source of the alleged sum thereby proving the identity and creditworthiness of the share subscribers and genuineness of the transactions. So far as the reliance of the Ld. DR on the decision of the Hon'ble Supreme

Court in the case of “*PCIT v/s NRA Iron & Steel (P) Ltd. [2019] 412 ITR 161*” is concerned, we note that the Hon’ble Supreme Court in the said case has taken note of the observations made by the Supreme Court in the “*the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC) laying down the proposition that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and creditworthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.*”

19. Thereafter the Hon’ble Supreme court summed up the principles, which emerged after deliberating upon various case laws, as under:

“11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

- i. *The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*
- ii. *The Assessing Officer is duty bound to investigate the creditworthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*
- iii. *If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.”*

20. The Hon’ble Supreme Court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the

subscribers, then the AO is duty bound conduct to conduct an independent enquiry to verify the same. However, as noted above, the Assessing Officer in this case has not made any independent enquiry to verify the genuineness of the transactions. The assessee having furnished all the details and documents before the Assessing Officer and the Assessing Officer has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged initial burden upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction, the burden shifted upon the Assessing Officer to examine the evidences furnished and even made independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee. In view of this, even applying the ratio laid down by the Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron and Steel Pvt. Ltd. (supra)*, impugned additions are not warranted in this case.

21. Our view is further supported by the following judicial pronouncements:-

a) The Hon'ble Apex Court in the case of *CIT vs. Corporation Pvt. Ltd. (supra)*, under identical circumstances, has held as follows:-

*"In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were the income-tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion*

*was based on some evidence on which a conclusion could be arrived at, no question of law as such could arise.”*

{emphasis ours}

b) The ITAT Kolkata Bench in ITO vs Cygnus Developers (I) P Ltd in ITA No. 282/Kol/2012 dated 2.3.2016, held as follows:

*“9. We have considered the rival submissions. We are of the view that order of CIT(A) does not call for any interference. It may be seen from the grounds of appeal raised by the Revenue that the Revenue disputed only the proof of identity of the shareholder. In this regard it is seen that for A Y.2004-05 Shree Shyam Trexim Pvt. Ltd., was assessed by ITO, Ward- 9(4), Kolkata and the order of assessment u/s/ 143(3) dated 25.01.2006 is placed in the paper book. Similarly Navalco Commodities Pvt. Ltd., was assessed to tax u/s 143(3) for A Y.2005-06 by I TO, Ward- 9(4), Kolkata by order dated 20.03.2007. Similarly Jewellock Trexim Pvt. Ltd was assessed to tax for A Y.2005-06 by the very same ITO- Ward- 9(3), Kolkata assessing the Assessee. In the light of the above factual position which is not disputed by the Revenue, it cannot be said that the identity of the share applicants remained not proved by the assessee. The decision of the Hon'ble Allahabad High Court as well as ITA T Kolkata Bench on which reliance was placed by the learned counsel for the assessee also supports the view that for non production of directors of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been established. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal of the Revenue. ”*

22. Our views are further fortified by the judgment of the Jurisdictional Calcutta High Court in the case of Principal CIT vs. Sreeleathers reported in [2022] 448 ITR 332 (Cal) has held as follows:

*“Section 68 of the Income-tax Act, of 1961, deals with cash credits. It states that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The crucial words in the provision are “the assessee offers no explanation”. This would mean that the assessee offers no proper, reasonable and acceptable explanation as regards the amount credited in the books maintained by the assessee. No doubt the Act places the burden of proof on the taxpayer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their confirmations, the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit to be justified in referring to section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee*

*submits the explanation concerning the cash credit, the Assessing Officer should consider it objectively before he decides to accept or reject it. Where the assessee furnishes full details regarding the creditors, it is up to the Department to pursue the matter further to locate those creditors and examine their creditworthiness. While drawing the inference, it cannot be assumed in the absence of any material that there have been some illegalities in the assessee's transaction.*

*Held, dismissing the appeal, that the allegations against the assessee were in respect of thirteen transactions. The Assessing Officer issued a show-cause notice only in respect of one of the lenders. The assessee responded to the show-cause notice and submitted the reply. The documents annexed to the reply were classified under three categories namely: to establish the identity of the lender, to prove the genuineness of the transactions and to establish the creditworthiness of the lender. The Assessing Officer had brushed aside these documents and in a very casual manner had stated that merely filing the permanent account number details, and balance sheet did not absolve the assessee from his responsibility of proving the nature of the transaction. There was no discussion by the Assessing Officer on the correctness of the stand taken by the assessee. Thus, going by the records placed by the assessee, it could be safely held that the assessee had discharged his initial burden and the burden shifted onto the Assessing Officer to enquire further into the matter which he failed to do. In more than one place the Assessing Officer used the expression "money laundering". Such usage was uncalled for as the allegation of money laundering is a very serious allegation and the effect of a case of money laundering under the relevant Act is markedly different. The order passed by the Assessing Officer was utterly perverse and had been rightly set aside by the Commissioner (Appeals). The Tribunal had rightly deleted the additions under section 68."*

23. In view of the above and respectfully following the judicial precedence, we are of the considered view that since the assessee has successfully explained the nature and source of the alleged investments in share capital and share premium by proving the identity, genuineness and creditworthiness of all the 18 share applicants, which are regularly assessed to Income Tax, financial statements and duly audited, passed through the scrutiny proceeding of I. T Department and R.O.C and have sufficient net worth to explain the source of investment in the alleged share capital and share premium, in our considered view no addition u/s. 68 of the Act was called for at Rs.7.97 Cr. and the same is hereby deleted. Therefore, the order of the Ld. CIT(A) is set aside and the ground nos. 1 to 5 raised by the assessee are allowed.

24. Ground No. 7 is general in nature do not require any adjudication

25. In the result, the appeal of the assessee is partly allowed.

Order is pronounced in the open court on 16th October, 2024.

Sd/-

(Rajpal Yadav)  
Vice President

Sd/-

(Dr. Manish Borad)  
Accountant Member

Dated : 16.10.2024

*J.D. Sr. PS.*

*Copy of the order forwarded to:*

1. **Appellant – Goodview Marketing Pvt. Ltd.**
2. **Respondent – ITO, Ward-6(2), Kolkata.**
3. CIT(A), NFAC, Delhi
4. CIT-
5. Departmental Representative
6. Guard File.

*True copy*

By order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata