

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.247/Nag./2018
(Assessment Year : 2010-11)

Dy. Commissioner of Income Tax
Circle-2, Nagpur Appellant

v/s

M/s. N. Kumar Construction Co. Pvt. Ltd.
7th Floor, Poonam Plaza, Palm Road Respondent
Civil Lines, Nagpur 440 001 AABCN9937H

Appellant by : Shri Manoj G. Moryani
Revenue by : Shri Vikas Agrawal

Date of Hearing - 06/11/2024

Date of Order - 06/12/2024

ORDER

PER K.M. ROY, A.M.

This appeal by the Revenue is directed against the impugned order dated 25/07/2018, passed by the learned Commissioner of Income Tax (Appeals)-2, Nagpur, [*learned CIT(A)*], for the assessment year 2010-11.

2. The Revenue has raised following grounds:-

- "1. *On the facts and circumstances of the case the Ld. CIT(A)-2, Nagpur has erred in deleting the addition of Rs.2,15,00,000/- made in assessment under the provisions of section 68 of the Income Tax Act, 1961.*
2. *On the facts and circumstances of the case the Ld. CIT(A)-2, Nagpur erred in not appreciating the larger vicious cycle wherein larger network created to provide accommodation entries.*
3. *Any other ground which may be raised during the course of hearing."*

3. Fact in Brief :- In the present case, the assessee was engaged in the business of construction, filed its return of income on 11/10/2010 for the year under consideration. The case was re-opened on the basis of information received from DCIT, Central Circle-1(1), Ahmedabad, that the assessee had obtained accommodation entries worth ₹ 1,50,00,000, from M/s. Pravhav Industries Ltd. and ₹ 65,00,000, from Avance Technologic Ltd. Notice under section 148 of the Income Tax Act, 1961 (*"the Act"*) was issued on 16/03/2016, in response to which the assessee submitted copies of Audited Balance Sheet, PAN details, Memorandum and Articles and Association and agreement of sale along with other details which were called by the Assessing Officer from time to time. During the previous year relevant to the assessment year 2010-11, the assessee had received advance against booking of property through proper banking channels as per agreement of sale and no share premium were received and allotted by the assessee during the assessment year 2010-11. In view of a search and survey action carried out at the residence and office premises of one Shri Shirish Chandrakant Shah, at Mumbai, who was allegedly engaged in providing accommodation entries of share premium to various clients and against this cash provided these accommodation entries, statement was recorded during the course of search and post-search proceedings. Such statement was used as material evidence in the case of the assessee. During the course of assessment proceedings, the learned Counsel for the assessee requested that summons under section 131 of the Act may be issued to Shri Shirish Shah, and opportunity to cross-examine may be granted. However, the Assessing Officer did not accepted the contention of the assessee and without giving

opportunity to cross examine Shri Shirish Shah, made addition of ₹ 2,15,00,000. Though, as per notice under section 148 of the Act, the amount of share capital that has escaped assessment was mentioned at ₹ 1,50,00,000, while completing the assessment, the addition was made at ₹ 2,15,00,000. In the assessment order, the Assessing Officer incorrectly mentioned that the assessee company did not file its return of income for the year under consideration and also there were certain observations made in the assessment order which, according to the assessee, are factually incorrect. Being aggrieved, the assessee preferred appeal before the first appellate authority.

4. On appeal before the learned CIT(A), the assessee made following submissions, which were also reproduced by the learned CIT(A) in its order vide Page-3 to 19.

"5.0 The counsel of the appellant made the following submission

The appellant has filed manual return of income on 11/10/2010 vide acknowledgment No. 0210002815 declaring net taxable income NIL alongwith Audit Report and audited Profit & Loss Account and Balance Sheet and schedules. The appellant has submitted the copy of acknowledgment of return, computation of income alongwith Audit Report and audited Profit & Loss Account and Balance Sheet and schedules, which is on Page-1 To 16 of the Paper Book and same were submitted during the course of assessment proceedings before the assessing officer.

Notice U/s. 148 has been issued to the appellant on 16/03/2016 and in response to notice U/s. 148 the appellant submitted the reply. The appellant encloses herewith copy of notice U/s. 148 and reply, which is on Page-17 & 17A of the Paper Book. Since it was mandatory to e-file the return of income in response to notice U/s. 148 the appellant has again e-filed the return of income on 28/06/2016 declaring total income at Rs. NIL.

Notice U/s. 142(1) has also been issued to the appellant on 15/07/2016 alongwith reasons for re-opening of case. In response to notice the appellant has submitted the reply and raised objection for issuing of notice U/s. 148. The appellant encloses herewith copy of notice U/s. 148 and reasons alongwith objection reply, which is on Page-18 To 21A of the Paper Book. In the reasons

for reopening the assessing officer has stated that the basis of information received from DCIT, Central Circle-1(1), Ahmedbad that the appellant has obtained accommodation entries worth of Rs. 1,50,00,000/- from M/s. Prabhav Industries Ltd.

A search and survey action was carried out at the residence and office premises of Shri Shirish Chandrakant Shah at Mumbai, who is engaged in providing accommodation entries of shares premium from various clients and against this cash provides these accommodation entries. The statement was recorded behind the back during the course of search and post search proceedings. During the course of assessment proceedings the counsel for the appellant requested that summon U/s. 131 may kindly be issued to Mr. Shirish Shah and opportunity to cross examine may kindly be granted but the learned assessing officer has not accepted the contention of the appellant and without giving opportunity to cross examine Mr. Shirish C. Shah made addition of Rs. 2,15,00,000/- though as per notice U/s. 148 the amount of share capital was mentioned at Rs. 1,50,00,000/-but while passing the assessment order the addition were made at Rs. 2,15,00,000/-.

The appellant is engaged in business of construction. The appellant has received sum of Rs. 1,50,00,000/- from M/s. Prabhav Industries Ltd. and sum of Rs. 65,00,000/- from M/s. Avance Technologies Limited during the previous year relevant to Asstt. Year 2010-2011. The appellant has entered into agreement to sale dated 31/03/2010 with M/s. Prabhav Industries Ltd. through its director C.S. Gaikwad and decided to sale Showroom No. 22B, admeasuring about 11867 Sq. Ft. situated on ground floor in Shopping Mall cum Multiplex Complex constructed by the appellant for total consideration of Rs. 9,50,00,000/- and received sum of Rs. 1,50,00,000/- towards booking advance and shown in the books of account of the appellant. The appellant submitted herewith copy of agreement to sale, which is on Page-91 To 97 of the Paper Book.

The appellant has also entered into agreement to sale dated 31/03/2010 with M/s. Avance Technologies Limited through its director Mr. Deepak Satyaprakash Goyal and decided to sale Showroom No. 22A, admeasuring about 6835 Sq. Ft. situated on ground floor in Shopping Mall cum Multiplex Complex constructed by the appellant for total consideration of Rs. 5,50,00,000/- and received sum of Rs. 65,00,000/- towards booking advance and shown in the books of account of the appellant. The appellant submitted herewith copy of agreement to sale, which is on Page-155 To 161 of the Paper Book.

There are dispute arises between appellant and M/s. Prabhav Industries Ltd. and M/s. Avance Technologies Limited as per terms and condition of agreement to sale and failed to make payment of balance within stipulated time limit and also unable to make the payment in future alongwith interest due thereon. The appellant was also not in position to return booking advance after deduction of interest due to the both company, since the appellant had already invested the aforesaid sum in its project. In order to avoid any further litigation in the matter it was amicably decided between appellant and directors of M/s. Prabhav Industries Ltd. and M/s. Avance Technologies Limited that appellant will allot equity shares of the appellant company to M/s. Prabhav Industries Ltd. and M/s. Avance Technologies Limited. In respect of said transaction both the parties entered in to modification agreement on

16/12/2012. The appellant submitted herewith copy modification agreement of M/s. Prabhav Industries Ltd., which is on Page-98 to 100 and M/s. Avance Technologies Limited, which is on Page-162 To 164 of the Paper Book. Thereafter the appellant has allotted the equity shares by applying formalities for issuing of equity shares.

5.1 The appellant had submitted all the details with respect of aforesaid transaction during the course of assessment proceedings before the assessing officer, and has made the following submission

A) With respect to Prabhav Industries Limited the appellant submits the following:

- i. The Prabhav Industries Limited is assessed to tax vide PAN-AAACE4247Q. The appellant submitted herewith copy of PAN card of Prabhav Industries Limited, which is on Page-46 of the Paper Book. The appellant also submitted the postal address of company is 902, Galav Chamber Opp. Sardar Patel Statue, Sayaji Gunj, Vadodara, Gujarat-390005 as well as jurisdictional assessing officer of Prabhav Industries Limited is Income Tax Officer, Ward-4(2) BRD/GUJ/W/304/02 during the course of assessment proceedings.
- ii. The appellant has also submitted the copy of Memorandum of association and Article of association of Prabhav Industries Limited alongwith copy of certificate of incorporation during the course of assessment proceedings, which is on Page-47 to 65 of the Paper Book.
- iii. The appellant has also submitted the copy of ITR-V of Prabhav Industries Limited for the A.Y. 11-12 and Copy of auditor report & Balance Sheet of Prabhav Industries Limited for the A.Y.2010 -11 during the course of assessment proceeding before the assessing officer, which is on Page-66 to 86 of Paper Book.
- iv. So far as transfer of fund the appellant has submitted bank statement of Prabhav Industries Limited during the course of assessment proceedings, which is clearly showing amount transfer through proper banking channel, the appellant encloses herewith the copy of Bank Statement of Prabhav Industries Limited alongwith Copy of account of Prabhav Industries Limited, which is on Page-87 To 90 of the Paper Book.
- v. The appellant respectfully submits that all the shares allotted to Prabhav Industries Limited were amount received earlier in A.Y. 2010-11 towards advance against booking of property and later on booking were cancelled and allotment of shares were made against the said amount during the previous year relevant to Asstt. Year 2012-13. The appellant has submitted the copy of agreement to sale executed in the year 2010, which is on Page-91 To 97 of the Paper Book and modification agreement, which is on Page-98 To 100 of the Paper Book, the same were also submitted during the course of assessment proceedings before the assessing officer.
- vi. The appellant has also submitted the copy of share application form of Prabhav Industries Limited alongwith board resolution & copy of confirmation during the course of assessment proceedings, which is on Page-101 To 103 of the Paper Book.

B) *With respect to Avance Technologies Limited the appellant submits the following :*

- i. *The Avance Technologies Limited is assessed to tax vide PAN – AAECA5763B. The appellant submitted the copy of PAN card of Avance Technologies Limited, which is on Page-104 of the Paper Book. The appellant has also submitted the postal address of company is #505, Midas Chambers, Off.Link road, Andheri-West, Mumbai – 400053. The jurisdictional assessing officer of company Avance Technologies Limited is Income Tax Officer, Circle-8(1) during the course of assessment proceedings.*
- ii. *The appellant has also submitted the copy of Memorandum of association and Article of association of Avance Technologies Limited alongwith copy of certificate of incorporation during the course of assessment proceeding, which is on Page-105 To 150 of the Paper Book.*
- iii. *So far as transfer of fund the appellant has submitted bank statement of Avance Technologies Limited during the course of assessment proceedings, which is clearly showing amount transferred through proper banking channel, the appellant encloses herewith the copy of Bank Statement of Avance Technologies Limited alongwith Copy of account of Avance Technologies Limited, which is on Page-151 To 154 of Paper Book.*
- iv. *The appellant respectfully submits that all the shares allotted to Avance Technologies Limited were amount received earlier in A.Y. 2010-11 towards advance against booking of property and later on booking were cancelled and allotment of shares were made against the said amount during the previous year relevant to Asstt. Year 2012-13. The appellant submitted the copy of agreement to sale executed in the year 2010, which is on Page-151 To 161 of the Paper Book and modification agreement, which is on Page-162 To 164 of the Paper Book, the same were also submitted during the course of assessment proceedings before the assessing officer.*
- v. *The appellant has also submitted the copy of share application form of Avance Technologies Limited alongwith board resolution & copy of confirmation during the course of assessment proceedings, which on Page-165 & 166 of the paper Book.*

The learned assessing officer without going into merits of the case held that the amount received were accommodation entries.

The appellant further submits that so far as providing of accommodation entries from Prabhav Industries Ltd. & Avance Technologies Limited were concerned the appellant submitted that

- a. *The appellant denied the allegation made in notice that the M/s. Prabhav Industries Ltd. has provided accommodation entry to the appellant company. Since the appellant has received advance against booking of property (Showroom) for the sum of Rs. 65,00,000/- from Avance technologies Limited & Rs.1,50,00,000/- from Prabhav Industries Ltd & the same were duly shown in the books of accounts of the appellant as well as in Audited Balance Sheet of the appellant as Advance received from Booking. Therefore reason stated in notice that Prabhav Industries and Avance Technologies Ltd. has provided the accommodation entry to the appellant is*

totally denied. As per notice it was stated that it was admitted by Shri Shirish Chandrakant Shah in various statement recorded during the search and post search proceedings.

b. The appellant also denied the allegation made in notice that during the course of search and seizure action there were various material impounded by the department which mentioned that appellant company has obtained accommodation entries worth Rs.1,50,00,000/- from Prabhav industries Ltd. But while issuing the notice to appellant, details has not been provided to the appellant for proper adjudication of the matter. As per details stated in the notice there are no incrementing documents found in respect of the appellant company. Therefore allegations made in the notice are totally denied.

c. Shri Shirish C. Shah in his statement he stated and accepted that companies named M/s. Prabhav Industries Ltd and M/s. Avance Technologies Limited from whom appellant received share premium were being managed and controlled by Shri Shirish Shah and were used for providing accommodation entries of share capital/premium, share application, unsecured loan etc. but The department has not provided the copies of statement recorded of Mr. Shirish C. Shah during the course of search for proper adjudication of the matter nor Shri Shirish C. Shah have stated to whom he has provided the accommodation entries.

d. The appellant also specifically denied all the allegation made by Shri Shirish Shah. The appellant once again request that all the statement were recorded behind the back of the appellant. The appellant not aware of any statement even appellant do not know to Shri Shirish Chandrakant Shah. The appellant once again request that summons U/s. 131 may kindly be issued to Shri Shirish Chandrakant Shah and opportunity to cross examine Shri Shirish Chandrakant Shah may kindly be provided in the interest of justice. All the statements were recorded behind the back of the appellant and the same were not binding on the appellant. Therefore allegation made in the notice are totally denied.

e. Shri Jayesh Raichand Thakkar, the Director of M/s. Prabhav Industries from whom appellant have received share premium amounting to Rs.1,50,00,000/- on his statement on oath dated 10/02/2014 before DDIT (Inv), Unit-3, Ahmedabad stated and accepted that the activities of M/s. Prabhav Industries Ltd. were controlled and managed by Shri Shirish Shah Since F.Y. 2009-2010 but The department has not provided the copies of statement recorded of Shri. Jayesh Raichand Thakkar for proper adjudication of the matter. The appellant also request that summons U/s. 131 many kindly be issued to Shri. Jayesh Raichand Thakkar and opportunity to cross examine Shri Shirish Chandrakant Shah may kindly be provided in the interest of justice. Neither Shri Jayesh Raichand Thakkar accepted that he has provided accommodation entries and nor have stated to whom he has provided the accommodation entries. Therefore allegation made in the notice are totally denied.

Therefore, the allegations made are totally denied since transaction were made through proper banking channel and confirmations were also submitted regarding the said transactions.

The appellant has already submitted that the appellant is not known Shri Shirish C. Shah and the appellant has not provided any opportunity to cross examine to Shri Shirish C. Shah, therefore, all allegation made in aforesaid notice in various dates are totally denied.

The appellant also respectfully submitted that the transaction made with respect of advance received and later shares allotted is genuine transaction and made through proper banking channel. The department has not provided copies of the statement of the concerned parties and without affording an opportunity to the appellant to cross examine them. In view of the above all the allegations made in the notice are unjustified, unwarranted and excessive. The amount of share premium amounting to Rs. 2,15,00,000/- is genuine transaction and not to be added to total income of the appellant.

When the appellant has himself proposed for issuing summon U/s. 131 to called for cross examine, even though the appellant has submitted the all the details of company during the course of assessment proceedings. The learned assessing officer has failed to grant opportunity being cross examine the directors and has also failed to verify the documents submitted by appellant are genuine or not and made addition on assumption and presumption basis. When all transactions were made through proper banking channel as well as duly reflected in the books of account as well as shown in audited balance sheet of the appellant. The assessing officer has also not been found any defect in the books of account as well as documents submitted by the appellant during the course of assessment proceedings.

The appellant also draws attention to the following points on the basis of which appeal filed by the appellant may kindly be allowed

1. The appellant has received advance against booking of property (Showroom) for the sum of Rs. 1,50,00,000/- from Prabhav Industries Ltd and sum of Rs. 65,00,000/- from Avance technologies Limited and the same were duly shown in the books of accounts of the appellant as well as in Audited Balance Sheet of the appellant as Advance received from Booking, which evidence from agreement to sale.

2. The appellant has received advance against booking of Rs. 1,50,00,000/- & Rs.65,00,000/- by cheque though proper banking channel. The details of such amount were reflected in the bank statement of the appellant, which evidence from bank statement.

3. The appellant has filed confirmation, PAN card & income Tax returns, address, Memorandum of Association, Certificate of Incorporation, Auditor Report, Balance Sheet and Bank statement, copy of agreement to sale showing the genuineness of the transaction and creditworthiness and identity of the company.

4. The assessing officer has relied on the statement of Shirish Shah and on the basis of impounded material found during the course of search and survey action carried out at the residence and office premises of the Shirish Shah. The assessing officer issue notices U/s. 136(6) to Prabhav Industries Ltd. & Avance Technologies Limited to confirm the transaction but stated incorrect statement in the assessment order Para-3 of assessing officer that no reply were received from the companies. The statement were wrong the appellant

encloses the copy of reply given by companies which is on page-1 to 44 of the Paper Book.

5. The appellant denies the allegation that amount received were accommodation entries. The assessing officer did not cross examine Shri Shirish Shah and not provided any opportunity to cross examine Shri Shirish Shah. The appellant were not allowed to cross examine Jayesh Thakar D/o. Prabhav Industries. Though the appellant has made several request for the same. Hence the amount cannot be assessed as undisclosed income of the appellant in the absence of positive material brought by Revenue to prove that the amount in fact belonged to appellant as the burden lays on the Revenue.

6. The appellant further submitted the details of the companies from whom advance against booking were received and no share on premium were allotted during the previous year relevant to Asstt. Year 2010-2011, therefore there is no question of providing any accommodation entries arises at all.

7. The appellant has established identity of depositor then therefore, addition U/s. 68 could not be made on the ground that appellant failed to explain the source of credit.

8. Once the authorities have got all the details including the names and addresses of the company, their PAN, Name of bank from which the alleged investor received invested the money, then it cannot be termed as bogus. The issue is covered by the judgment in case of CIT -Vs.- Creative World Telefilms Ltd. (2011) 333 ITR 100 (Bom). In such circumstances there is no justification in addition making the under section 68 of the Income Tax Act, 1961.

9. There is no evidence that the entire transaction was sham and bogus transaction. The appellant has submitted that appellant company has established identity and creditworthiness of the entities as well as proved the bonafides and genuineness of transaction beyond doubt.

On the above mentioned preposition appellant placed reliance on following judgments

1) Judgment of Income Tax Appellate Tribunal, "C" Bench, Mumbai dated 07/02/2014 vide ITA no.1867/Mum/2012 in case of M/s. Orchid Industries Pvt. Ltd. -Vs.- DCIT, CC-22, Mumbai

2) Judgment of High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction dated 20/03/2017 vide ITA No. 1613 of 2014 in case of Commissioner of Income Tax-1 -Vs.- M/s. Gagandeep Infrastructure Pvt. Ltd.

3. (2011) 60 DTR 0018 (HC Gujrat)
Hindustan Inks & Resins Ltd. -Vs.- Deputy Commissioner of Income Tax

4. (2011) 333 ITR 0269 (MP HC)
Commissioner of Income Tax -Vs.- STL Extrusion (P) Ltd.

5. (2010) 327 ITR 0560 (Delhi HC)
Commissioner of Income Tax -Vs.- Orbital Communication (P) Ltd.

6. (2010) 325 ITR 0025 (P&H HC)
Commissioner of Income Tax –Vs.- GP International Ltd.

7. (2008) 216 CTR 0195 (SC)
Commissioner of Income Tax –Vs.- Lovely Exports (P) Ltd.

8. Judgment of Income Tax Appellate Tribunal, Nagpur Bench, Nagpur dated 25/11/2016 vide ITA No. 403, 413-414, 422-423 & 431/ Nag/2016 in case of Dy. Commissioners of Income Tax, Circle-4, Nagpur –Vs.- M/s. Inex Infotech Pvt. Ltd. Nagpur & Others.

9. (2014) 98 DTR 0187 (Mum. ITAT)
Green Infra Ltd. –Vs.- Income Tax Officer

The appellant has further placed reliance of following judgments during the appellant proceedings

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1. (1980) 125 ITR 0713 (SC)
Kishanchad Chellaram –Vs.- Commissioner of Income Tax
T, an employee of Madras officer of appellant making a telegraphic transfer of an amount of Rs. 1,07,350 to N, an employee of appellant in Bombay office, the amount cannot be assessed as undisclosed income of in the absence of positive material brought by Revenue to prove that the amount in fact belonged to appellant as the burden lay on the Revenue.

2. (2008) 303 ITR 0095 (Del. HC) Commissioner of Income Tax –Vs.- Pradeep Kumar Gupta Reassessment-Validity-Reopening on the basis of third Party's statement-Appellant showing agriculture income-Deposition by A that he was involved in bogus transaction with the appellant and provided 'accommodation entries' in the form of agriculture receipts-Same would constitute reason to believe that income chargeable to tax had escaped assessment-However, it was mandatory for the Revenue to produce A for cross-examination by the appellants on their specific demand in this regard-AO must first discharge the burden of showing that income has escaped assessment-Opportunity to cross-examine A denied to appellant-Reopening of assessment not therefore valid.

Failure of the Revenue to produce A for cross-examination, by the appellant, assumes fatal consequences. It is true that the appellants' failure to produce K had the consequence of not providing that the said person was tilling the land on their behalf. This failure cannot inexorably lead to the conclusion that no agriculture income had been generated by the appellants. Such on inference can only be drawn from the statement of A to the effect that the transaction between him, and the appellant were bogus. Therefore, it was mandatory for the Revenue to produce A for cross-examination by the appellant on their specific demand in this regard. There may well be instances where the reopening may pass muster in light of some facts, but those facts by themselves may turn out to be insufficient to preserve the assessment itself. Once ss. 147 and 148 are resorted to, the AO must first discharge the burden of showing that income has escaped assessment. It is only thereafter that the appellant has to provide all the answers. There is no reason why the

initial burden of proof should not rest on the AO even whether the assessment has gone through under s. 143(1). The Tribunal has, therefore, arrived at the correct conclusion.

3. (2001) 247 ITR 0274 (SC)

Prakash Chand Nahta –Vs.- Union of India & Ors.

High Court having wrongly proceeded to dispose of the reference upon the basis that the questions challenging the validity of assessment arose upon an order passed by Tribunal in a rectification application, the impugned order is set aside and reference is restored to the High Court to be decided afresh.

4. (1991) 192 ITR 0287 (Del. HC)

Commissioner of Income Tax –Vs.- Steller Investment Ltd.

Notwithstanding that Assessing Officer failed to enquire into genuineness of shareholders, assessment of company could not be revised to assess the amount of share capital in the hands of company.

5. *Judgment of High Court of Delhi at New Delhi, dated 14/03/2017 vide ITA No. 169/2017 in case of Pr. Commissioner of Income Tax-5 –Vs.- Laxman Industrial Resources Ltd.*

6. *Judgment of Income Tax Appellate Tribunal, "J" Bench, Mumbai dated 08/02/2018 vide ITA No. 1091/ Mum/2016 in case of M/s. Jasamrit Constructions Private Ltd. –Vs.- Income Tax Officer-6(3)(2), Mumbai*

7. *Judgment of High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction, dated 05/07/2017 vide ITA No. 1433 of 2014 in case of Commissioner of Income Tax-8 –Vs.- M/s. Archid Industries Pvt. Ltd.*

8. *Judgment of Income Tax Appellate Tribunal, Mumbai Bench "A", Mumbai dated 21/04/2017 vide ITA No. 6492/ Mum/2016 in case of Arceli Realty Limited –Vs.- Income Tax Officer-15(1)(1), Mumbai*

9. *Judgment of High Court of Punjab-Haryana, dated 02/08/2016 vide ITA No. 386 of 2010 in case of The Commissioner of Income Tax, Patiala –Vs.- M/s. K.C. Pipes Pvt. Ltd.*

10. (2011) 330 ITR 0298 (Del. HC)

Commissioner of Income Tax –Vs.- Dwarkadhish Investment (P) Ltd.

Tribunal having confirmed the order of the CIT(A) deleting the impugned addition under s. 68 holding that the appellant has been able to prove the identity of the share applicants and the share application money has been received by way of account payee cheques, no question of law arises.

11. (2000) 245 ITR 0160 (MP H.C.)

Commissioner of Income Tax –Vs.- Metachem Industries

Once the firm has satisfactorily explained that the credit entries in the name of its partners represent the amount invested by them the burden of proof stood discharged and the amount cannot be treated as income of the firm under s. 68.

12. *Judgment of High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction, dated 12/10/2009 vide ITA No. 2182 of 2009 in case of Commissioner of Income Tax –Vs.- M/s. Creative World Telefilms Ltd.*

13. (2008) 307 ITR 0334 (Del. HC)

Commissioner of Income Tax –Vs.- Value Capital Services (P) Ltd.

CIT(A) having accepted the existence of the share applicants and the Revenue having not shown that the applicants did not have the means to make the investment and that such investment actually emanated from the coffers of the appellant company, addition was rightly deleted by the Tribunal; no substantial question law arises.

14. (2014) 368 ITR 0001 (Bom. H.C.)

Vodafone India Services Pvt. Ltd. –Vs.- Addl. CIT

Provision of chapter X are not applicable to international transaction of issuance of equity share by resident company to its non-resident holding company at certain value, since neither capital receipts received by resident company on issuance of equity shares to its non-resident holding company nor short-fall between the fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

On the above facts and circumstances appellant humbly request that transaction made by the appellant are genuine transaction and details submitted by the appellant true and correct. In view of the above appellant humbly request that addition made by the assessing officer may kindly be deleted and appeal filed by the appellant may kindly be allowed.

5.2 During the course of appellate proceedings, the counsel for the appellant has also furnished written submission expressing grievance that cross examination of Shri Shirish Chandrakant Shah was not provided despite clear requests, and that the AO has made the addition on the basis of statement of Shri Shirish Chandrakant Shah which was recorded during the course of search and seizure action and also behind the back of the appellant. During the course of assessment proceedings, the counsel for the appellant specifically requested that summon u/s. 131 may be issued to Mr. Shirish Shah & Others and opportunity to cross examine Mr. Shirish Chandrakant Shah may be provided. The AO did not accepted the request of the appellant and without granting such opportunity has made the addition of Rs. 2,15,00,000/-. The appellant drew attention to the fact that the issue is covered in favour of the appellant by the following judgments;

1) Judgment of Hon'ble Supreme Court of India dated 28/03/2018 vide Special Leave petition (Civil) Diary No(s) 9432/2018 in case of Commissioner of Income Tax –Vs.- Sunita Dhadha

2) Judgment of Hon'ble High Court of Judicature for Rajasthan, Bench of Jaipur dated 31/07/2017 vide D.B. Income Tax Appeal No. 197-199/2012 in case of Commissioner of Income Tax-Central –Vs.- Smt. Sunita Dhadha and others

3) Judgment of Hon'ble Income Tax Appellate Tribunal, Jaipur bench "A" Jaipur dated 30/12/2011 vide ITA No. 751 & 852/JP/2011 in case of Smt. Sunita Dhadha –Vs.- Deputy Commissioner of Income Tax, Central Circle-2, Jaipur

During the course of appellate proceeding, the counsel for the appellant also made written submission with respect of applicability of Section 68 and

contradicted the judgments cited by AO and the submissions are reproduced as under

The learned assessing officer has involved Section 68 of the Income Tax Act, 1961 while passing the order in case of the appellant and made addition of Rs. 6,58,12,500/- U/s. 68 of the Income Tax Act, 1961. The provision of Section 68 is speak that

"Where any sum is found credited in the books of an appellant maintained 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 income-tax as the income of the appellant of that previous year:

Inserted by the Finance Act, 2012 w.e.f. 01/04/2013 [Provided that where the appellant is a company (not being a company in which the public are substantially interested), and the sum of credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such appellant-company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory;

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10]

The appellant draw attention that section 68 is not applicable in the case of the appellant

1. The appellant has received an amount from the parties through proper banking channel;

2. The aforesaid amounts were received by the appellant against booking of property showroom for the sum of Rs. 65,00,000/- from Avance Technologies Ltd. and Rs. 1,50,00,000/- from Prabhav Inustries Ltd. the same were duly shown in the books of account of the appellant as well as in Audited Balance Sheet of the appellant. The agreement to sell was also executed between the appellant and the said companies vide agreements dated 31/03/2010. As both failed to make the payment of balance amount within the stipulated time limit, therefore, modification agreement was made on 16/02/2012 and the appellant has allotted equity shares to all the companies during the previous year relevant to Asstt. Year 2012-2013. The appellant has already submitted copies of agreement to sell which is on Page-91 To 97 & 155 To 161 of the Paper Book and Modification agreement alongwith the submission which is on Page-98 To 100 & 162 To 164 of the Paper Book. In view of the above there is no question of share application money as well as involving of Section 68 is applicable in the case of the appellant. On the above mentioned preposition appellant placed reliance on following judgments

- 1) *Order of the Hon'ble Income Tax Appellate Tribunal, Delhi Bench 'SMC' New Delhi dated 25/06/2018 vide appeal ITA No. 3133/Del/2018 in case of Moti Adhesives P. Ltd. -Vs.- Income Tax Officer, Ward 17(2), New Delhi*
- 2) *Order of the Hon'ble Income Tax Appellate Tribunal, Delhi Bench "B" Delhi dated 01/01/2018 vide appeal ITA No. 453/Del/2016 in case of the Assistant Commissioner of Income Tax, Circle-17, New Delhi -Vs.- M/s. TRN Energy Pvt. Ltd.*
- 3) *Order of the Hon'ble Income Tax Appellate Tribunal, Nagpur Bench, Nagpur dated 09/05/2018 vide appeal ITA No. 407, 425, 430, 412, 427, 416, 421, 402, 429, 418, 406, 424, 420/N/2016 & ITA No. 34 & 32/N/2017 in case of Assistant Commissioner of Income Tax, Circle-4, Nagpur -Vs.- M/s. Swiftsol (I) Pvt. Ltd. and Others*
3. *Amount received were duly reflected in the books of account of the appellant as well as books of accounts of parties;*
4. *The appellant also draw attention that the department has not provide the copies of statement, whose statement were recorded during the course of search for proper adjudication of the matter nor whose stated to whom they have provided the accommodation entries;*
5. *The assessing officer has not issued summon U/s. 131 to the persons, whose statements were recorded as required by the appellant during the course of assessment proceedings and also not provided any opportunity to cross examine to the appellant;*
6. *All the statements were recorded behind the back of the appellant and the same were not binding on the appellant;*

The learned assessing officer while passing the assessment order has placed reliance on following judgments. The judgments cited by the assessing officer in the assessment order are totally difference as compared to case of the appellant. The appellant contradict judgment, which are as under

- 1) *(2012) 342 ITR 0169
Commissioner of Income Tax -Vs.- Nova Promoters & Finlease (P) Ltd.*

In the aforesaid case share applicant companies which are said to have subscribed to the share capital of the appellant company were found to be non-existent at all the address given to the department and the appellant failed to produce any of the directors or employees of these share applicants, and therefore, there identity is not proved and the onus cast upon it by s. 68 has not been discharged by the appellant and, therefore, addition under s. 68 in respect of share application money was justified; mere submission of share application form, PAN, names and address and RoC registration, etc. was not sufficient in view of the fact that these companies were found to be non-existent.

But in the case of the appellant has proved the genuineness of the transaction with the companies. The appellant has not introduced monies through existing companies through proper banking channel. The appellant has explained and produced the each and every details during the course of

assessment proceeding before the assessing officer. During the course of assessment proceedings the learned assessing officer has issued notice U/s. 133(6) to both companies regarding transaction and all the parties have confirmed the transaction by submitting the written reply. The learned appellant officer has also mentioned the said aspect in Para-2, Page-2 of the assessment order. The appellant company itself also requested to the assessing officer for issue summons U/s. 131 and also requested to provide the copies of statement recorded behind the back of the appellant. The appellant requested for opportunity to cross examine but the assessing officer has not granted any opportunity to cross examine. In view of the above said judgment not applicable in case of the appellant. On the above mentioned proposition appellant placed reliance on following judgments

2) (2011) 63 DTR 0201 (Indore ITAT)
Agrawal Coal Corporation (P) Ltd. -Vs.- AddL. CIT

In the said case the appellant has submitted only identity of both these companies and details of the ROC as well as their returns but failed to submit explanation regarding transaction. The assessing officer has issued summons/notices to the companies, which were returned back. In the said case appellant did not comply with the directions of the bench regarding production of any of the directors or employees of the share applicant. The appellant companies has also not been explained the nature and source of the receipt.

But in the case of the appellant, the appellant has submitted each and every detail of the companies, from whom the appellant has received amounts towards advance against booking of property and not towards share application money. The appellant has already submitted the copies of agreement of sell, which is on Page-91 To 97 & 151 To 161 of the Paper Book. When the terms and conditions were not fulfilled thereafter the appellant has converted the booking advance by allotting equity shares executing modification agreement and the said aspects were clearly mentioned in the said agreement as well as modification agreement. The appellant has already submitted copies of modification agreement, which is on Page-98 To 100 & 162 To 164 of the Paper Book. The appellant has submitted the PAN, addresses, Memorandum of Articles alongwith incorporation certificate, copy of return alongwith audit reports of the both companies. The appellant has also submitted the bank statement of the both companies, in which transaction were duly reflected and the transaction of the appellant were against the advance received by the appellant towards sale of property. In the case of the appellant both the companies have also confirmed the transaction by submitting the reply. In view of the aforesaid judgment cited by the assessing officer is not applicable in the case of the appellant.

3) (2008) 306 ITR 0414 (P & H HC)
Som Nath Maini -Vs.- Commissioner of Income Tax

The aforesaid case is with respect of the short term capital gain from sale of shares in view of astronomical difference between the share price of a company with a short span of 6-7 months and made addition to the income of the appellant.

But in the case of appellant, the appellant has received the amounts towards booking advance against the sale of property and not received towards share

application money. The appellant has already submitted the agreement of sell during the course of assessment proceedings. When the terms and conditions were not fulfilled thereafter the appellant has converted the booking advance in share application money by executing modification agreement after 1 to 1½ year, since the appellant was already invested the said amount in its project and was unable to return back said advance to the said companies and the said aspects were clearly mentioned in the said agreement. In view of the above facts of the above judgment are totally different, therefore the said judgment is not applicable in case of the appellant.

In the circumstance appellant humbly request that facts of the judgments cited by the assessing officer were totally different and the same may kindly be considered while passing order in the interest of justice."

5. The learned CIT(A), considering the submissions of the assessee, partly allowed the appeal filed by the assessee. However, the issue relating to the addition of ₹ 2.15 crore made by the Assessing Officer under section 68 of the Act was directed to be deleted by the learned CIT(A). The observations so made by the learned CIT(A), vide Page-19 to 34, on the issue of deletion of addition under section 68 of the Act are reproduced herein below:-

"Decision:

6.0 I have considered the submissions made by the counsel for the appellant and perused the documents filed in the paper book. I have also considered the facts and circumstances of the case and case laws relied upon by the appellant. The facts on record show that the appellant is engaged in the business of construction. The appellant has received total advances against sale of property of Rs. 1,50,00,000/- from M/s. Prabhav Industries Ltd. Rs. 65,00,000/- from M/s. Avance Technologies Limited during the year under consideration. Perusal of the paper book indicates that the appellant has entered into agreements to Sell dated 31/03/2010 with M/s. Prabhav Industries Ltd. through its director Shri C.S. Gaikwad and decided to construct and sell Showroom No. 22B admeasuring about 11867 ft. situated on ground floor in Shopping Mall cum Multiplex Complex under construction by the appellant company, for a total consideration of Rs. 9,50,00,000/- and received a sum of Rs. 1,50,00,000/- towards booking advance and the amount was shown in the books of account of appellant. Similarly, the appellant entered into Agreement to Sell dated 31/03/2010 with M/s. Avance Technology Limited through its director M/s. Deepak Satyaprakash Goyal and decided to sell Showroom No. 22 admeasuring about 6835 sq.ft. situated on ground floor in Shopping Mall cum Multiplex Complex constructed by appellant, for a total consideration of Rs. 5,50,00,000/- and received a sum of Rs. 65,00,000/- towards booking advance. The appellant has duly recorded amount its books of account. Copy of the Agreement to Sell entered with M/s. Avance

Technologies Limited is placed in the paper book at pages-155 to 161. Both these agreements are legal evidence and cannot be brushed aside

6.1 *It is a matter of recorded that there arose disputes between the appellant and M/s. Prabhav Industries Ltd. and M/s. Avance Technologies Limited since as per terms and condition of agreement to sale, these entities had failed to make payment of balance agreed amounts within the stipulated time limit, as also the interest due thereon. The appellant having already invested the aforesaid sums in its project, was also not in the position to return the booking advance, after deduction of interest due to both the companies. Therefore, in order to avoid any further litigation in the matter, it was amicably decided between the appellant and the directors of M/s. Prabhav Industries and M/s. Avance Technologies Limited that the appellant will allot equity shares of the appellant company to M/s. Prabhav Industries and M/s. Avance Technologies Limited. In respect of the said transactions, both the parties entered into Modification Agreements on 16.02.2012. The appellant submitted the copy of Modification Agreement with M/s. Prabhav Industries Ltd. and M/s. Avance Technology Limited, documents thereof are place on record. Consequently, the appellant allotted the equity shares by completing the formalities for issuing of such equity shares. These documents have not been controverted by the Assessing Officer.*

6.2 *In respect to all the aforesaid companies, the appellant has filed copies of PAN, their addresses, copies of Memorandum of Association and article of Association, Copies of audit report and balance sheets, Bank statement of the companies, copies of share application form along with Board Resolutions before me and the same were filed during the course of assessment proceedings. The appellant also filed the confirmation of the aforesaid two companies confirming the payments made to appellant and the same are placed on record. All the transaction are through proper banking channel and reflected in the books of account of appellant company as well as aforesaid two companies. The books of account of appellant company are audited and auditor has not made any adverse remark in maintaining of the books of account. On the basis of above, and evidences filed, I do not find any justification in A.O.'s observation that the aforesaid two companies had provided accommodation entries to the appellant. The AO has not brought on record any contrary evidences that negates the legal evidences provided by appellant. The AO appears to have simply dismissed the evidences provided without assigning any valid reasons, other than the statement recorded by the department in some other case, the contents of which were also not provided to the appellant. In this, the action of the AO is found to be untenable.*

6.3 *In the search and seizure action at the residence and office premises of Shri Shirish Chandrakant Shah at Mumbai, it is seen that no incriminating material or documents were found in respect of appellant company. The statement of Shri Shirish Chandrakant Shah was recorded behind the back of the appellant and no copy of the statement of Shri Shirish Chandrakant Shah was provided to the appellant before using it as evidence. No opportunity was granted to the appellant to cross examine Shri Shirish Chandrakant Shah. No copies of material found in search were provided to the appellant for controverting the same. It is also seen that the statement was recorded of Shri Jayesh Thakkar, the Director of M/s. Prabhav Industries behind the back of the appellant neither the copy nor any opportunity to cross examine him was provided to the appellant by the A.O. It is the case of the appellant that it*

did not know Shri Shirish C. Shah who is a third party. No credence can be given to the statements which were not provided to the appellant for cross examination nor can any adverse view can be taken from this statements.

6.4 The appellant has discharged its onus by filing confirmation, PAN, IT Return, addresses, Memorandum of Association, Certificate of incorporation, Auditor report, Balance sheet to prove the identity and creditworthiness of the parties. The appellant also filed the copies of agreement to prove the genuineness of transactions. It was not a case where the share applicants are merely provided confirmation letters. They had provided their PAN details assessment particulars, mode of payment, cheque numbers in question, copies of minutes of resolution authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the appellant. The A.O. failed to conduct any scrutiny of documents and rested contents by placing reliance on a report of the Investigation wing, which was also not provided to the appellant for rebuttal. Therefore, in my opinion, the appellant has established the identity, creditworthiness of the parties and genuineness of the transaction and, therefore, the A.O. was not justified in treating the said as unexplained money of the appellant under section 68 of I.T. Act. 1961.

6.5 It is now a settled legal proposition of law that, assuming if there is any suspicion on genuineness of shareholders, then the addition can be made in the hands of the shareholders only and not the appellant company. The appellant has relied on the following judicial precedents of various Hon'ble Court including Hon'ble Apex Court and Hon'ble Bombay High court as under

(i) CIT Vs. Lovely Exports (P) Ltd. (2008) 216 CTR 0195 (SC)

If the share application money is received by the appellant company from alleged bogus shareholders, whose name are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of appellant company.

(ii) CIT V. Gagandeep Infrastructure (P) Ltd. (247 Taxman 245 (Bombay High Court) wherein it has been held as:

"Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the appellant's income as unexplained cash credit."

(iii) CIT V. Goa Sponge and Power Ltd. (Tax Appeal 16 of 2012) (Bombay High Court) wherein it has been held as under

"Once the authorities have got all the details, including the names and addresses of the shareholders, their PAN/GIR number, so also the name of the Bank from which the alleged Investor received money as share application, then it cannot be termed as "bogus". The controversy is covered by the judgments rendered by the Hon'ble Supreme Court in the case of Lovely

Exports Pvt. Ltd. Vs. CIT (2008) 216 CTR (SC) 195, as also by this Court in CIT Vs. Creative World Telefilms Ltd., (2011) 333 ITR 100 (Bom.). In such circumstances, we are of the view that the Tribunal's finding that there is no justification in the addition made under Section 68 of the Income Tax Act, 1961 neither suffers from any perversity nor gives rise to any substantial question of law."

The above case laws have been referred only for the proposition that if the shareholders are found to be not having adequate means, the addition can be made in the hands of the shareholders only and not the appellant company. Though, it is noted that in the present case no finding has been given by the A.O. that the shareholders/share applicants were not identifiable or bogus.

6.6 The appellant has also relied on various decision of Hon'ble Courts that the support its contention that once the appellant had provided all the supporting evidences, and which were not found defective or incorrect, no addition could be made by treating the advance amounts received as unexplained cash credit u/s. 68. The issue in dispute is covered in favour of appellant by the decision of jurisdictional High Court in the case of CIT Vs. Creative World Telefilm Ltd. reported at 333 ITR 100 (Bom) wherein it has been held that the amount of share premium cannot be treated as income u/s. 68 of I.T. Act 1961. Further, the decision of Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. 216 CTR (SC) 195, also supports the contention of the appellant. The appellant has relied on the following judgments that supports the case of the appellant.

*1. Hindustan Inks & Resins Ltd. -Vs.- Deputy Commissioner of Income Tax (2011) 60 DTR 0018 (HC Gujrat)
Appellant having established identity of shareholders, addition under s. 68 could not be made on the ground that appellant failed to explain the source of credit; Department was free to proceed against shareholders in accordance with law.*

*2. Commissioner of Income Tax -Vs.- STL Extrusion (P) Ltd. (2011) 333 ITR 0269 (MP HC)
Appellant having duly furnished the name, aged, address, date of filing the application of shares, number of shares of each subscriber, there was no justification for the AO for making the addition under s. 68.*

*3. Commissioner of Income Tax -Vs.- Orbital Communication (P) Ltd. (2010) 327 ITR 0560 (Delhi HC)
Tribunal upheld the order of CIT(A) deleting addition made by the AO on account of share application money following the decision of the Hon'ble Supreme Court in the case of CIT vs Lovely Exports (P) Ltd. 2008) 219 CTR (SC) 195 as the appellant produced substantial evidence to establish the identity and creditworthiness of share applicant-Tribunal justified in holding that the share application money cannot be regarded as undisclosed income of the appellant under s. 68.*

*4. Commissioner of Income Tax -Vs.- GP International Ltd. (2010) 325 ITR 0025 (P&H HC)
AO having not doubted the identity of the persons from whom the appellant company has shown receipt of share application money, impugned transactions cannot be treated as non-genuine merely because some of the*

applicants did not respond to the notice issued by the AO under s. 133(6) and, therefore, addition was not sustainable.

5. *Commissioner of Income Tax –Vs.- Lovely Exports (P) Ltd. (2008) 216 CTR 0195 (SC)*

If the share application money is received by the appellant company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of Appellant company.

6. *Green Infra Ltd. –Vs.- Income Tax Officer (2014) 98 DTR 0187 (Mum. ITAT)*

Expenditure and receipts directly relating to share capital of a company are of capital in nature and therefore cannot be taxed u/s. 56(1)-Share premium realized from issue of shares is of capital in nature and forms part of share capital of company and therefore cannot be taxed as a Revenue receipt-As per Section 68, initial onus was upon appellant to establish identity, genuineness of transaction and capacity of lender or depositor-Confirmation of transaction had been received by AO by issuing notice U/s. 133(6), therefore, identity had been established-Genuineness of transaction could be safely concluded since entire transaction had been done through banking channel duly recorded in books of assessee-Appellant company had invested fund in its three subsidiary companies, wherein appellant was holding 99.68 percent of share capital which meant that funds had not been diverted to an outsider—No single evidence was found leading to entire transaction as sham-Revenue erred in treating share premium as income of appellant U/s. 56(1)

Conclusion- Share premium realized from the issue of share is of capital in nature and forms part of the share capital of the company and therefore cannot be taxed as a Revenue receipt.

7. *Commissioner of Income Tax –Vs.- Pradeep Kumar Gupta (2008) 303 ITR 0095 (Del. HC)*

Reassessment-Validity-Reopening on the basis of third Party's statement-Appellant showing agriculture income-Deposition by A that he was involved in bogus transaction with the appellant and provided 'accommodation entries' in the form of agriculture receipts-Same would constitute reason to believe that income chargeable to tax had escaped assessment-However, it was mandatory for the Revenue to produce A for cross-examination by the appellants on their specific demand in this regard-AO must first discharge the burden of showing that income has escaped assessment-Opportunity to cross-examine A denied to appellant-Reopening of assessment not therefore valid.

Failure of the Revenue to produce A for cross-examination, by the appellant, assumes fatal consequences. It is true that the appellants' failure to produce K had the consequence of not providing that the said person was tilling the land on their behalf. This failure cannot inexorably lead to the conclusion that no agriculture income had been generated by the appellants. Such an inference can only be drawn from the statement of A to the effect that the transaction between him, and the appellant were bogus. Therefore, it was mandatory for the Revenue to produce A for cross-examination by the appellant on their specific demand in this regard. There may well be instances where the reopening may pass muster in light of some facts, but those facts

by themselves may turn out to be insufficient to preserve the assessment itself. Once ss. 147 and 148 are resorted to, the AO must first discharge the burden of showing that income has escaped assessment. It is only thereafter that the appellant has to provide all the answers. There is no reason why the initial burden of proof should not rest on the AO even whether the assessment has gone through under s. 143(1). The Tribunal has, therefore, arrived at the correct conclusion.

8. *Commissioner of Income Tax -Vs.- Steller Investment Ltd. (1991) 192 ITR 0287 (Del. HC)*

Notwithstanding that Assessing Officer failed to enquire into genuineness of shareholders, assessment of company could not be revised to assess the amount of share capital in the hands of company.

9. *Commissioner of Income Tax -Vs.- Dwarkadhish Investment (P) Ltd. (2011) 330 ITR 0298 (Del. HC)*

Tribunal having confirmed the order of the CIT(A) deleting the impugned addition under s. 68 holding that the appellant has been able to prove the identity of the share applicants and the share application money has been received by way of account payee cheques, no question of law arises.

10. *Commissioner of Income Tax -Vs.- Value Capital Services (P) Ltd. (2008) 307 ITR 0334 (Del. HC)*

CIT(A) having accepted the existence of the share applicants and the Revenue having not shown that the applicants did not have the means to make the investment and that such investment actually emanated from the coffers of the appellant company, addition was rightly deleted by the Tribunal; no substantial question law arises.

6.7 *Reliance is also placed on the judgment of High Court of Bombay, dated 05/05/2017 vide ITA No. 1433 of 2014 in case of Commissioner of Income Tax-8 -Vs.- M/s. Archid Industries Pvt. Ltd. wherein at Para-6 of the said judgment, the Hon'ble Court held that*

"The appellant has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors' alongwith the confirmation, their bank statement showing payment of share application money. It was also observed by the Tribunal that the Appellant has also produced the entire record regarding issuance of share i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the share of the applicant. In view of these voluminous documentary evidence, only because those persons had not appeared before the assessing officer would not negate the case of the appellant. The judgment in case of Gagandeep Infrastructure (P) Ltd. (Supra) would be applicable in the facts and circumstances of the present case"

6.8 *The appellant's counsel had requested to be supplied with copies of the statement and other material based on which the department had taken an adverse view against the appellant. I find that this were neither provided, nor was opportunity granted to cross examination. Where the Assessing Officer on basis on statement of one unrelated person, proceeds to made an addition to income of the appellant as unexplained cash credit, it was incumbent on the AO to afford the appellant an opportunity of cross-examination and in the*

absence of such an opportunity, the impugned addition was not justified. Reliance in this regard is placed on the decision of Delhi High Court in case of CIT V. Ashwani Gupta [2010] 322 ITR 396, CIT Vs. SMC Share Brokers Ltd. [2007] 288 ITR 345 (Delhi) and Dy. CIT V. GVS Investments (P) Ltd. [2005] 146 Taxman 36 (Delhi)(Mag.) where the addition made has been deleted as the AO has passed the assessment order in violation of the principles of natural justice in as much as no cross examination was allowed to the appellant on basis of whose statement the said addition was made.

6.9 I have considered the submission made by the learned counsel with respect of providing of opportunity to cross examination to the appellant, since the addition was made on the basis of statement recorded during the course of search and seizure action in a difference case and also behind the back of the appellant. I find that the AO has not issued summon u/s. 131 to the person whose statement was used against the appellant, as requested, and opportunity to cross examine was not provided to the appellant before making the impugned addition. I also find that the AO rather than made independent enquires as the assessing authority has in turn asked the appellant to produce the Directors of the two companies before the AO! Therefore, the AO expected the appellant to produce in person the Directors of the companies that had advanced monies. In fact, the AO failed to make any effort in that direction. He did not take to the logical end the half-hearted attempt at getting the Directors to appear before him. He did not even seek the assistance of the AOs of the concerned companies whose ITRs and PAN card copies had been produced. I find that the AO failed to come up with the material to disprove what had been produced by the appellant. Once the appellant had placed before the AO all the relevant and best documents in its possession to establish its burden u/s. 68 of the Act qua cash credit (here advance payment for purchase of showroom which was later converted to share capital received), the appellant had discharged the onus that lay on it and the burden to prove the appellant incorrect was on the AO. Simply because there is no personal appearance from directors of said cash creditors (shareholder/purchaser of property), no adverse inference u/s. 68 of the Act. In my view, once all important and crucial documents are filed by appellant to prove its case qua share capital received u/s. 68 of the Act, then simply harping on non-production of director person by the appellant before AO cannot be a justified ground to draw adverse inference without adequate discharge of secondary burden lying on AO u/s. 68 of the Act. Burden u/s 68 of the Act, as it is settled law, keeps shifting.

6.10 In the present case under consideration the appellant has denied the knowledge of any statement recorded Shri Shirish Shah of Mumbai. The appellant has also stated that Shri Shirish Shah is not known to the company. The AO has not established his identity and capacity in respect of his relationship either with the M/s. Prabhav Industries Ltd. or M/s. Avance Technologies Ltd. or with the appellant company. From the information made available to the appellant by the AO, it can be construed that, the impugned statement given by Shri Shirish Shah was in his individual capacity and not on behalf or related to the appellant. Therefore the appellant's contention, that the said Shri Shirish Shah has no capacity or connection with the appellant company to make any statement on behalf of the appellant company is found to be correct and justified. The same holds true for the statement given by Shri Jayesh Thakkar, of Prabhav Industries wherein no mention of the appellant company was made, but merely that Shri Shah was organizing

accommodation entries for Prabhav Industries Ltd. Apart from this, the AO has also not provided the copy of statement of Shri Shirish Shah to the appellant, and has not given any opportunity to the appellant to cross-examine Shri Shirish Shah, or of Shri Jayesh Thakkar even though the appellant repeatedly requested the AO for cross examination of Shri Shirish Chandrakant Shah and Shri Jayesh Thakkar. If some depositor or any other person with whose evidence cash credit in question can be proved, does not cooperate in the assessment proceedings with the appellant concerned, then the appellant can also take assistance of Section 131 of the Act wherein ample powers have been given to the A.O. for compelling the attendance of witnesses.

6.11 The advances for purchase of showroom which was later converted to allotment of shares in FY 11-12, were paid by the companies by account payee cheques and copy of the bank statements have been filed on record. The entries of advances paid to the appellant are appearing in the statement of accounts of the two companies. The PAN and TAN of the companies have been intimated to the AO. The appellant also submitted the Share allotment forms issued in FY 11-12 (AY 2012-13), Balance sheet in which the said allotment is duly recorded, in respect of share allotted to the two companies. The AO has not carried out any enquiries that disproves the above transactions.

6.12 I have carefully verified the evidences produced the appellant company and the facts of the case and found that the addition of Rs. 2,15,00,000/- is made merely on the basis of statement of third party, Shri Shirish Shah. The AO failed to establish his connection either with the appellant company or with the investing companies. The AO disregarded all the evidences and documents produced before him or could be called for him for verification of the appellant's claim. At the cost of repeating, the AO also has not provided a cross verification of Shri Shirish Shah to the appellant even after various request by them. In view of all of the above fact, the addition could not be made in the hands of the appellant without allowing opportunity to cross-examine the said person and in the absence of any corroborative evidence to establish the truthfulness of the statement of the third party. To reiterate, the appellant has proved the genuineness of the transaction with the afore-stated two companies. The amounts were received from these seven companies as advances for booking/purchase of showrooms in the project under construction in the year 2010 and thereafter. These transactions are backed by Agreement to Sell and the amounts were received through banking channels. The appellant has explained and produced each and every details during the course of assessment proceedings before the AO. During the course of assessment proceedings, the AO himself has issued notice u/s. 133(6) to both the companies regarding the said transaction and both companies confirmed the transaction vide their letters dated 08/08/2016 & 28/11/2016. The AO has admitted the same in Para-2 (Page-2) of the assessment order. Therefore, it is an uncontroverted fact the appellant received amounts towards advance against booking of property and not towards share application money, initially. When the terms and conditions were not fulfilled, the appellant converted the booking advance by allotting equity shares executing modification agreement and the said aspects were clearly mentioned in the said agreement as well as modification agreement. Besides in any case, the shares were allotted in the year 2012, and not in the year under consideration. The appellant has already submitted copies of Modification Agreements as evidence of the same which has not been

controverted by the AO. The appellant has submitted the PAN, addresses, Memorandum of Articles alongwith Certificate of incorporation, copy of return alongwith audit reports of the both companies. The appellant has also submitted the bank statement of the both, in which transaction were duly reflected and the transaction of the appellant were against the advance received by the appellant towards sale of property. In the case of the appellant, both the companies have also submitted the reply in response to notice u/s 133(6) issued by the AO and confirmed the transaction, which is evident from the assessment order. All these facts have not been denied or disproved by the AO. The AO has simply brushed aside all the evidences, and relied on the statement given by one of the Directors of Prabhav Industries, before the investigation wing, which in any case makes no mention whatsoever of the appellant company or any dealings of the purported nature with the appellant company. It is my view that the statement of which the AO has based the finding of unexplained cash credit in the hands of the appellant was a general statement, of the modus operandi followed by one Shri Shirish Shah, and had no bearing on the business transactions with appellant company. Unless the AO obtained direct evidences to controvert the documents provided by the appellant, there is no case for unexplained credits and the AO could not have made the addition u/s. 68.

6.13 In the issue under dispute, the money was received through the banking channel in the financial years 2009-10, and the same were towards advance for purchase of showroom. All the documents in respect of issue and allotment of share to the two companies in the subsequent year were submitted to Registrar of companies (ROC), including the Audited Balance Sheet of the company after the said entire allotment of shares, its Form No. 2 for allotment of shares, Board Resolution and the challan for the filing fees of these documents filed by the appellant. There was no query in the year of issue of shares for any default in this transaction. It is worth to mention here that the ROC has never objected to this issue of shares or treated the share transaction as invalid till this date.

6.14 It is observed that the AO has stated that the investment made by the seven companies are bogus, even after all the documents in support were available on record, or it could have been called by the AO from various Govt. Departments (including ROC/Income Tax authority of the investor company etc.) Even after these submissions were made of all the relevant documents to justify the appellant's stand, the AO simply disagreed with the contentions of the appellant without mentioning any concrete reason for his disagreement. I find that the AO has not demanded any other documents that could have been produced by the appellant that were required for his satisfaction. The AO has also not mentioned in his order about any contrary findings or the existence of any adverse documents that were available with him that proved the transaction as bogus. The AO has also provided no findings that the advances received by the appellant company were its own cash rerouted through accommodation entries, or even that the advances were accommodation entries of any other person. Therefore, merely on the basis of Third Party statements, the actual facts and evidences available cannot be denied or rejected. Moreover all the seven entities are Companies (and not unidentified persons) which are duly registered with Registrar of companies and have filed all their details as statutorily required. Even if, for argument's sake, the AO had any adverse information or suspicions regarding the investor companies, he could have obtained all the information about the companies if he wished

so. However, I find that no corroborative documents, other than a statement of an unconnected person was used against the appellant and the AO has held that the identity was not proved. Therefore the stand of the AO in this regard is not justified.

6.15 On perusal of the documents and submission pertaining to the said share allotment transactions, it is found that the appellant has discharged its onus of establishing the identity of the purchaser/investor and genuineness of the transaction. Taking into consideration of all the above, I find merit in the argument of the counsel for the appellant that the primary burden cast on the appellant was duly discharged. The issue of primary onus is to be weighed on the scale of evidence available on the record and the discharge of burden by the appellant and facts and circumstances of the case and on that basis a reasonable view is to be taken as to whether the appellant has discharged the primary onus of establishing the identity of share applicant, its creditworthiness and genuineness of the transaction. In this regard, the Hon'ble Delhi High Court in Commissioner of Income Tax Vs Divine Leasing & Finance Ltd. 2008 (299) ITR 268 (Del) had held as under:-

"13. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the appellant it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of section 68 and 69 of the It Act. The burden of proof can seldom be discharged to the hilt by the appellant; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out through investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company.

16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the Income Tax Act. The appellant has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely; whether it has been transaction, namely whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness of financial strength of the creditor/subscriber; (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, share Transfer Register etc. it would constitute acceptable proof or acceptable explanation by the appellant (5) The department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices: (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the appellant nor should the Assessing Officer take repudiation at face value and construe it, without more, against

the appellant, (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation:

6.16 The preceding enumeration of the circumstances of the case show that the appellant had furnished all relevant data before the AO, which, however, were not inquired into by the AO. Instead he obdurately adhered to his initial understanding that the entire transaction was neither creditworthy nor genuine. The appellant has relied upon the documents to prove that the monies had been received through banking channel from all the investor related companies; it had produced copy of bank statement, copy of Form 2 filed before ROC etc. for the year 2012-13 and the confirmation given by the remitters towards remittance of share capital etc. It could not be expected to prove the negative that the monies received by it were suspicious or not genuine infusion of capital etc. The appellant had discharged its burden of proof in terms of the settled dicta in *Divine Leasing (Supra)*. It is only logical to expect that if the AO was not convinced about the genuineness of the said documents, he would have inquired into their veracity from the bank(s) to ascertain the truth of the appellant's claims. Having not done so, he was not justified in disregarding the appellant's contentions that the infusion of advance/capital into its accounts was legitimate. Where the appellant adduces evidence in support of the advances received, it is open to the AO to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, or some statement of an unconnected party, some meaningful enquiry ought to be conducted by him to establish a link between the appellant and the alleged accommodation entry providers. Consequently, the AO was not justified in making additions of the amounts under Section 68 of the Act.

6.17 In the assessment order, the AO has cited the following judgments, the basic facts of these case is found to differ from the appellant's case, as found below :

1) *CIT -Vs.- Nova Promoters & Finlease (P) Ltd. (2012) 342 ITR 0169*
In the aforesaid case share applicant companies which are said to have subscribed to the share capital of the appellant company were found to be non-existent at all the address given to the department and the appellant failed to produce any of directors or employees of these share applicants, and therefore, their identity is not proved and the onus cast upon it by s. 68 has not been discharged by the appellant and, therefore, addition under s. 68 in respect of share application money was justified; mere submission of share application form, PAN, names and address and ROC registration, etc. was not sufficient in view of the fact that these companies were found to be non-existent.

In the present case, the Directors of both companies had confirmed the payment of advances and statement of the directors of one company was recorded and used against the appellant, therefore, these were existing entities.

2) *Agrawal Coal Corporation (P) Ltd. -Vs.- Additional Commissioner of Income Tax (2011) 63 DTR 0201 (Indore ITAT)*
In the said case the appellant has submitted only identity of both these companies and details of the ROC as well as their returns but failed to submit

explanation regarding transaction. The assessing officer has issued summons/notices to the companies, which were returned back. In the said case appellant did not comply with the directions of the bench regarding production of any of the directors or employees of the share applicant. The appellant companies has also not been explained the nature and source of the receipt.

In the present case, the appellant has cried hoarse explaining the genesis of the advance receipts and the same is backed by documents. These advances were later converted as allotment of share after about a year and half, due to specific reasons of failure to make full payment towards purchase of showrooms.

3) *Som Nath Maini vs. CIT (2008) 306 ITR 0414 (P & H HC)*
The aforesaid case is with respect of the short term capital gain from sale of shares in view of astronomical difference between the share price of a company within a short span of 6-7 months and addition was made to the income of the appellant as the genuineness of transactions were not proved.

In the present case, the appellant has provided all possible documents to prove the genuineness of transactions and had fulfilled its burden. Not a single document has been proven false, and the onus was on the AO to disprove the transactions which he has failed miserably.

Therefore, the decision relied upon by the AO are on different facts, and not comparable. In fact, these decisions go to show how the AO in the present case had not discharged his own duties as a revenue authority, and how ineffective the addition was, without completing such enquires and recording of such proper findings by the AO.

6.18 *I am also aware of the fact that the Finance Act, 2012 inserted two provisos to Section 68, with effect from 1-4-2013 (assessment year 2013-14). First proviso is to enlarge the onus of a closely held company and provides that if a closely held company receives any share application money or share capital or share premium or the like, it should also establish the source of source (that is, the resident from whom such money is received). Second proviso provides that the first proviso will not apply if the receipt of sum (representing share application money or share capital or share premium etc.) in from a VCC or VCF [referred in Section 10(23FB)]. However, in the year under consideration, no such provisions or stipulation existed. The amended provisions therefore, would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In any view of the matter, the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts, namely, the genuineness of the transaction, identity and the capacity of the investor have all been examined and on facts it is found satisfied.*

6.19 *Considering the totality of the fact and circumstances of the case, and the evidences filed before the AO and also during the appellate proceedings, and respectfully following the judicial decisions discussed in the body of the order, I am of the considered view that the A.O. was not justified in making the addition of Rs. 2,15,00,000/- under section 68 of I.T. Act 1961 and the same cannot be sustained. The AO is hereby directed to delete the addition of Rs. 2,15,00,000/-. These grounds are allowed."*

6. The Revenue being aggrieved by the decision of the learned CIT(A) in directing the Assessing Officer to delete the addition, filed appeal before the Tribunal raising the deletion of addition made by the Assessing Officer under section 68 of the Act.

7. The learned Departmental Representative, Shri Vikash Agrawal, appearing for the Revenue strongly relied on order of the Assessing Officer as well as placed reliance on the following case laws:-

- (i) *Agrawal Coal Corporation (P) Ltd v/s ACIT, [2011] 63 DTR 201 (Indore ITAT)*
- (ii) *CIT v/s Nova Promoters & Finlease (P) Ltd. [2012] 342 ITR 169 (Del. HC)*
- (iii) *Som Nath Maini v/s CIT, [2008] 306 ITR 414 (P&H HC).*

8. Per-contraria, at the very outset, the learned Counsel for the assessee submitted that the case laws relied upon by the learned Departmental Representative are not applicable to the facts of the present case of the assessee which are also distinguishable on facts. Further, the learned Counsel for the assessee reiterated the submissions made before the learned CIT(A) and prayed that the order passed by the learned CIT(A) is just and was passed in accordance with law. He thus submitted that the order passed by the learned CIT(A) be upheld.

9. We have heard the rival contention of both the parties, perused material placed on record and duly considered the facts of the case in the light of settled legal position and the case laws relied upon by both the learned Representative of the parties. We find that it is admitted fact that the assessee company engaged in the business of construction. The assessee

company, during the year under consideration, has received advance against sale of property at ₹ 1,50,00,000, from M/s. Prabhav Industries Ltd. and sum of ₹ 65,00,000, from M/s. Avance Technology Ltd. The copies of agreement of sell dated 31/03/2010, were placed on record which on Page-91 to 97 of the Paper Book. The assessee company has received sum of ₹ 1,50,00,000 towards booking advance and said amount was shown in the books of account of the assessee company. Similarly, the agreement of sell dated 31/03/2010 executed with M/s. Avance Technology Ltd. and received sum of ₹ 65,00,000, towards booking advance. The copy of agreement of sale is placed at Page-155 to 161 of the Paper Book. Both the agreements are legal evidence in the eyes of law and cannot be brushed aside.

10. We further find that since both the companies are failed to make balance agreed payment within the stipulated time limit and the assessee company has already invested aforesaid sum in its project and also was not position to return booking advance. It was amicably decided to avoid further litigation the assessee company will allot equity shares to M/s. Prabhav Industries Ltd. and M/s. Avance Technology Ltd. With respect of said transaction, both the parties entered into Modification Agreement dated 16/02/2012. The assessee company has also filed copies Modification Agreement executed with M/s. Prabhav Industries Ltd. and M/s. Avance Technology Ltd., which is placed on record Page-162 To 164 of the Paper Book. Consequent upon execution of such agreements, the assessee company has allotted equity shares by completing of formalities for issuing of such

equity shares. It is admitted fact that these documents have not been controverted by the Assessing Officer.

11. It is admitted fact that the assessee company has also furnished PAN details, copies of Memorandum of Association and Article of Association, copies of Audit Report and Balance Sheets, Bank Statement of the companies, copies of share application form along with Board Resolutions before us and the same were filed during the course of assessment proceedings also. The assessee company also filed the confirmation of the aforesaid two companies confirming the payments made to assessee company and the same are placed on record. All the transactions are through proper banking channel and reflected in the books of account of the assessee company as well as aforesaid two companies.

12. It is also admitted fact that the assessee company has filed original return of income declaring ₹ nil income. It is also admitted fact the reasons for issue of notice under section 148 of the Act was for ₹ 1,50,00,000, copy of notice under section 148 was placed at Page-21A of the Paper Book. While passing the assessment order, the assessing officer has made addition of ₹ 2,15,00,000, which is contrary to the contents of the notice under section 148 of the Act served by the Assessing Officer.

13. It is also admitted fact that all the parties have confirmed their transactions stating the fact that the amounts were paid as advance against property and their confirmation which are placed at Paper Book Page-1 to 44 Paper Book Part-II. Both the companies are assessed to tax and both the

parties have submitted Memorandum and Articles of companies along with acknowledgment of return of income, Audit Report with Schedule, copies of Bank Statement and all other details, which are placed on record.

14. We further find that the case of the assessee is covered in favour of the assessee and against the Revenue by the following case laws:-

1. *CIT v/s Lovely Exports (P) Ltd. [2008] 216 CTR 0195 (SC)*

If the share application money is received by the appellant company from alleged bogus shareholders, whose name are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of appellant company.

2. *Prakash Chand Nahta v/s Union of India & Ors. [2001] 247 ITR 0274 (SC)*

High Court having wrongly proceeded to dispose of the reference upon the basis that the questions challenging the validity of assessment arose upon an order passed by Tribunal in a rectification application, the impugned order is set aside and reference is restored to the High Court to be decided afresh.

3. *CIT v/s v/s M/s.Creative World Telefilms Ltd., Ordinary Original Civil Jurisdiction, dated 12/10/2009 vide ITA no.2182 of 2009;*

4. *CIT v/s Value Capital Services (P) Ltd. [2008] 307 ITR 334 (Del.).*

CIT(A) having accepted the existence of the share applicants and the Revenue having not shown that the applicants did not have the means to make the investment and that such investment actually emanated from the coffers of the appellant company, addition was rightly deleted by the Tribunal; no substantial question law arises.

5. *Vodafone (I) Services P. Ltd. v/s ACIT, [2014] 368 ITR 001 (Bom.)*

Provision of chapter X are not applicable to international transaction of issuance of equity share by resident company to its non-resident holding company at certain value, since neither capital receipts received by resident company on issuance of equity shares to its non-resident holding company nor short-fall between the fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

6. *Judgment of Hon'ble Supreme Court of India dated 28/03/2018 vide Special Leave petition (Civil) Diary No(s) 9432/2018 in case of Commissioner of Income Tax -Vs.- Sunita Dhadha*

7. *Judgment of Hon'ble High Court of Judicature for Rajasthan, Bench of Jaipur dated 31/07/2017 vide D.B. Income Tax Appeal No. 197-199/2012*

in case of Commissioner of Income Tax-Central -Vs.- Smt. Sunita Dhadda and others

8. *Judgment of Hon'ble Income Tax Appellate Tribunal, Jaipur bench "A" Jaipur dated 30/12/2011 vide ITA No. 751 & 852/JP/2011 in case of Smt. Sunita Dhadda -Vs.- Deputy Commissioner of Income Tax, Central Circle-2, Jaipur*

9. *Hindustan Inks & Resins Ltd. -Vs.- Deputy Commissioner of Income Tax (2011) 60 DTR 0018 (HC Gujrat)*
Appellant having established identity of shareholders, addition under s. 68 could not be made on the ground that appellant failed to explain the source of credit; Department was free to proceed against shareholders in accordance with law.

10. *Commissioner of Income Tax -Vs.- STL Extrusion (P) Ltd. (2011) 333 ITR 0269 (MP HC)*
Appellant having duty furnished the name, aged, address, date of filing the application of shares, number of shares of each subscriber, there was no justification for the AO for making the addition under s. 68.

11. *Commissioner of Income Tax -Vs.- Orbital Communication (P) Ltd. (2010) 327 ITR 0560 (Delhi HC)*
Tribunal upheld the order of CIT(A) deleting addition made by the AO on account of share application money following the decision of the Hon'ble Supreme Court in the case of CIT vs Lovely Exports (P) Ltd. 2008) 219 CTR (SC) 195 as the appellant produced substantial evidence to establish the identity and creditworthiness of share applicant-Tribunal justified in holding that the share application money cannot be regarded as undisclosed income of the appellant under s. 68.

12. *Commissioner of Income Tax -Vs.- GP International Ltd. (2010) 325 ITR 0025 (P&H HC)*
AO having not doubted the identity of the persons from whom the appellant company has shown receipt of share application money, impugned transactions cannot be treated as non-genuine merely because some of the applicants did not respond to the notice issued by the AO under s. 133(6) and, therefore, addition was not sustainable.

13. *Commissioner of Income Tax -Vs.- Lovely Exports (P) Ltd. (2008) 216 CTR 0195 (SC)*
If the share application money is received by the appellant company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of Appellant company.

14. *Green Infra Ltd. -Vs.- Income Tax Officer (2014) 98 DTR 0187 (Mum. ITAT)*
Expenditure and receipts directly relating to share capital of a company are of capital in nature and therefore cannot be taxed u/s. 56(1)-Share premium realized from issue of shares is of capital in nature and forms part of share capital of company and therefore cannot be taxed as a Revenue receipt-As per Section 68, initial onus was upon appellant to

establish identity, genuineness of transaction and capacity of lender or depositor-Confirmation of transaction had been received by AO by issuing notice U/s. 133(6), therefore, identity had been established-Genuineness of transaction could be safely concluded since entire transaction had been done through banking channel duly recorded in books of assessee-Appellant company had invested fund in its three subsidiary companies, wherein appellant was holding 99.68 percent of share capital which meant that funds had not been diverted to an outsider—No single evidence was found leading to entire transaction as sham-Revenue erred in treating share premium as income of appellant U/s. 56(1)

Conclusion- Share premium realized from the issue of share is of capital in nature and forms part of the share capital of the company and therefore cannot be taxed as a Revenue receipt.

15. *Commissioner of Income Tax –Vs.- Pradeep Kumar Gupta (2008) 303 ITR 0095 (Del. HC)*

Reassessment-Validity-Reopening on the basis of third Party's statement-Appellant showing agriculture income-Deposition by A that he was involved in bogus transaction with the appellant and provided 'accommodation entries' in the form of agriculture receipts-Same would constitute reason to believe that income chargeable to tax had escaped assessment-However, it was mandatory for the Revenue to produce A for cross-examination by the appellants on their specific demand in this regard-AO must first discharge the burden of showing that income has escaped assessment-Opportunity to cross-examine A denied to appellant-Reopening of assessment not therefore valid.

Failure of the Revenue to produce A for cross-examination, by the appellant, assumes fatal consequences. It is true that the appellants' failure to produce K had the consequence of not providing that the said person was tilling the land on their behalf. This failure cannot inexorably lead to the conclusion that no agriculture income had been generated by the appellants. Such an inference can only be drawn from the statement of A to the effect that the transaction between him, and the appellant were bogus. Therefore, it was mandatory for the Revenue to produce A for cross-examination by the appellant on their specific demand in this regard. There may well be instances where the reopening may pass muster in light of some facts, but those facts by themselves may turn out to be insufficient to preserve the assessment itself. Once ss. 147 and 148 are resorted to, the AO must first discharge the burden of showing that income has escaped assessment. It is only thereafter that the appellant has to provide all the answers. There is no reason why the initial burden of proof should not rest on the AO even whether the assessment has gone through under s. 143(1). The Tribunal has, therefore, arrived at the correct conclusion.

16. *Commissioner of Income Tax –Vs.- Steller Investment Ltd. (1991) 192 ITR 0287 (Del. HC)*

Notwithstanding that Assessing Officer failed to enquire into genuineness of shareholders, assessment of company could not be revised to assess the amount of share capital in the hands of company.

17. *Commissioner of Income Tax –Vs.- Dwarkadhish Investment (P) Ltd. (2011) 330 ITR 0298 (Del. HC)*

Tribunal having confirmed the order of the CIT(A) deleting the impugned addition under s. 68 holding that the appellant has been able to prove the identity of the share applicants and the share application money has been received by way of account payee cheques, no question of law arises.

18. *Commissioner of Income Tax -Vs.- Value Capital Services (P) Ltd. (2008) 307 ITR 0334 (Del. HC)*
CIT(A) having accepted the existence of the share applicants and the Revenue having not shown that the applicants did not have the means to make the investment and that such investment actually emanated from the coffers of the appellant company, addition was rightly deleted by the Tribunal; no substantial question law arises.

15. It is also admitted fact that no opportunity for cross-examination has been granted to the assessee. During the search and seizure action carried on at the residence and office premises of Shri Shirish Chandrakant Shah, situated at Mumbai, it is seen that no incriminating material or documents were found in respect of assessee company. The statement of Shri Shirish Chandrakant Shah, was recorded behind the back of the assessee company and no copy of the statement of Shri Shirish Chandrakant Shah, was provided to the assessee company before using it as evidence. No opportunity was granted to the assessee company to cross examination Shri Shirish Chandrakant Shah. No copies of material found in search were provided to the assessee company for controverting the same. It is also seen that the statement was recorded of Shri Jayesh Thakkar, Director of M/s. Prabhav Industries, behind the back of the assessee company, Neither the copy nor any opportunity to cross-examine him was provided to the assessee company by the Assessing Officer. It is the case of the assessee company that it did not know Shri Shirish C. Shah, who is a third party. No credence can be given to the statements which were not provided to the assessee company for cross-examination nor can any adverse view be taken from these statements.

16. It is a matter of record that there arose disputes between the assessee company and M/s. Prabhav Industries Ltd. and M/s. Avance Technologies Ltd. Since as per terms and condition of agreement to sale, these entities failed to make payment of balance agreed amounts within the stipulated time limit, and also the interest due thereon. The assessee company has already invested the aforesaid sums in its project, and was also not in a position to return the booking advance after deduction of interest due on both the companies. Therefore, in order to avoid any further litigation in the matter, it was amicably decided between the assessee company and the directors of M/s. Prabhav Industries and M/s. Avance Technologies Ltd. that the assessee company will allot equity shares belonging to the assessee company to M/s. Prabhav Industries and M/s. Avance Technologies Ltd. In respect of the said transactions, both the parties entered into Modification Agreements on 16/02/2012. The assessee company furnished copy of Modification Agreement executed with M/s. Prabhav Industries Ltd. and M/s. Avance Technology Ltd., the documents thereof are placed on record. Consequently, the assessee company allotted the equity shares by completing the formalities for issuing of such equity shares and such documents have not been controverted by the Assessing Officer.

17. In respect of both the companies, the assessee company filed PAN details, copies of Memorandum of Association and Article of Association, Copies of Audit Report and Balance Sheets, Bank statement of the companies, copies of share application form along with Board Resolutions before the Assessing Officer and before the learned CIT(A) also, which are placed on

record. The assessee company also filed the confirmation of the aforesaid two companies confirming the payments made to assessee company and the same are placed on record. All the transactions are through proper banking channel and reflected in the books of account of assessee company as well as aforesaid two companies. The books of account of assessee company are audited and auditor has not made any adverse remark in maintaining of the books of account. Under these circumstances and the evidences furnished on facts of the case, we do not find any justification in observations made by the Assessing Officer that the aforesaid two companies provided accommodation entries to the assessee company. It is also admitted facts that the Assessing Officer has not brought on record any contrary evidences that negates the legal evidences adduced by the assessee company. The Assessing Officer appears to have simply dismissed the evidences provided without assigning any valid reasons, other than the statement recorded by the Department in some other case, the contents of which were also not provided to the assessee company. In view of the above fact, the action of the Assessing Officer is found to be untenable.

18. It is also admitted facts that during the course of assessment proceedings. the assessee company's counsel had requested the Department to supply copies of the statement and other material based on which the Department had taken an adverse view against the assessee company. We find that the Department has neither provided nor had granted opportunity to cross examination. Whereas, the Assessing Officer on basis of statement of one unrelated person, proceeded to made addition to income of the assessee

as unexplained cash credit under section 68 of the Act. It was incumbent on the Assessing Officer to afford the assessee an opportunity of cross-examination and in the absence of such opportunity, the impugned addition is not justified. Reliance in this regard is placed on the decision of Delhi High Court in rendered in CIT v/s Ashwani Gupta [2010] 322 ITR 396, CIT v/s SMC Share Brokers Ltd. [2007] 288 ITR 345 (Del.) and D CIT v/s GVS Investments (P) Ltd. [2005] 146 Taxman 36 (Del.) where the addition made has been deleted, as the Assessing Officer passed the assessment order in violation of the principles of natural justice inasmuch as no opportunity for cross-examination was allowed to the assessee on basis of whose statement the said addition was made.

19. It is observed that the Assessing Officer has stated that the investment made by these companies is bogus despite furnishing of all the documents in support which were available on record. Even after making such submissions and after furnishing all the relevant documents to justify the assessee company's stand, the Assessing Officer simply disagreed with the contentions of the assessee company without mentioning any concrete reason for his disagreement. We find that the Assessing Officer has not demanded any other documents that could have been produced by the assessee company which were required for his satisfaction. The Assessing Officer has also not mentioned in his order about any contrary findings or the existence of any adverse documents that were available with him which proved the transaction as bogus. The Assessing Officer also has not mentioned that the advances received by the assessee company were its own cash re-routed through

accommodation entries or even that the advances were accommodation entries of any other person. Therefore, merely on the basis of Third Party statements, the actual facts and evidences available cannot be denied or rejected. Moreover, both the entities are Companies (and not unidentified persons) which are duly registered with Registrar of Companies and have filed all their details as statutorily requirement. Even if, for argument's sake, the Assessing Officer had any adverse information or suspicions regarding the investor companies, he could have obtained all the information about the companies, if he so desired. However, we find that no corroborative documents, other than a statement of an unconnected person was used against the assessee company and the Assessing Officer has held that the identity was not proved. Therefore the stand of the Assessing Officer in this regard is not justified.

20. On perusal of the documents and submission pertaining to the said share allotment transactions, it is found that the assessee company has discharged its onus of establishing the identity of the purchaser/investor and genuineness of the transaction. Taking into consideration of the above, we find merit in the argument of the learned Counsel for the assessee company that the primary burden cast on the assessee company was duly discharged. The issue of primary onus is to be weighed on the scale of evidence available on the record and the discharge of burden by the assessee company and facts and circumstances of the case and on that basis, a reasonable view is to be taken as to whether the assessee company has discharged the primary onus of establishing the identity of share applicant, its creditworthiness and

genuineness of the transaction. In this regard, reliance is placed on the judgment of the the Hon'ble Delhi High Court in CIT v/s Divine Leasing & Finance Ltd., [2008] 299 ITR 268 (Del.) had held as under:-

"13. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the appellant it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of section 68 and 69 of the It Act. The burden of proof can seldom be discharged to the hilt by the appellant; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out through investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company.

16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the Income Tax Act. The appellant has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely; whether it has been transaction, namely whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness of financial strength of the creditor/subscriber; (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, share Transfer Register etc. it would constitute acceptable proof or acceptable explanation by the appellant (5) The department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices: (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the appellant nor should the Assessing Officer take repudiation at face value and construe it, without more, against the appellant, (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation:

21. The preceding enumeration of the circumstances of the case shows that the assessee company had furnished all relevant data before the Assessing Officer, which, however, were not inquired into by the Assessing Officer.

Instead, the Assessing Officer obdurately adhered to his initial understanding that the entire transaction was neither creditworthy nor genuine. The assessee company relied upon the documents to prove that the monies had been received through banking channel from all the investor related companies, it had produced copy of Bank statement, copy of Form 2 filed before ROC, etc., for the year 2012-13 and the confirmation given by the remitters towards remittance of share capital, etc. It could not be expected to prove the negative that the monies received by it were suspicious or not genuine infusion of capital, etc. The assessee company had discharged its burden of proof in terms of the settled dicta in *Divine Leasing & Finance Ltd.* (supra). It is only logical to expect that if the AO was not convinced about the genuineness of the said documents. He would have inquired into their veracity from the bank(s) to ascertain the truth of the assessee company's claims. Having not done so, the Assessing Officer was not justified in disregarding the assessee company's contentions that the infusion of advance/capital into its accounts was legitimate. Where the assessee company adduces evidence in support of the advances received against property, it is open to the Assessing Officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, or some statement of an unconnected party, some meaningful enquiry ought to have been conducted by him to establish a link between the assessee company and the alleged accommodation entry providers. Consequently, the Assessing Officer was not justified in making additions of the amounts under section 68 of the Act.

22. In the assessment order, the Assessing Officer has cited the following judgments, the basic facts of these cases are found to differ from the assessee company's case, which as found below:-

1) *CIT v/s Nova Promoters & Finlease (P) Ltd. [2012] 342 ITR 0169*

In the aforesaid case share applicant companies which are said to have subscribed to the share capital of the appellant company were found to be non-existent at all the address given to the department and the appellant failed to produce any of directors or employees of these share applicants, and therefore, their identity is not proved and the onus cast upon it by s. 68 has not been discharged by the appellant and, therefore, addition under s. 68 in respect of share application money was justified; mere submission of share application form, PAN, names and address and ROC registration, etc. was not sufficient in view of the fact that these companies were found to be non-existent.

In the present case, the Directors of both companies had confirmed the payment of advances and statement of the directors of one company was recorded and used against the assessee company, therefore, these were existing entities.

2) *Agrawal Coal Corporation (P) Ltd. v/s ACIT, [2011] 63 DTR 201 (Indore ITAT)*

In the said case the appellant has submitted only identity of both these companies and details of the ROC as well as their returns but failed to submit explanation regarding transaction. The assessing officer has issued summons/notices to the companies, which were returned back. In the said case appellant did not comply with the directions of the bench regarding production of any of the directors or employees of the share applicant. The appellant companies has also not been explained the nature and source of the receipt.

In the present case, the assessee company has cried hoarse explaining the genesis of the advance receipts and the same is backed by documents. These advances were later converted as allotment of share after about a year and half, due to specific reasons of failure to make full payment towards purchase of showrooms.

3) *Som Nath Maini v/s CIT, [2008] 306 ITR 414 (P&H HC)*

The aforesaid case is with respect of the short term capital gain from sale of shares in view of astronomical difference between the share price of a company within a short span of 6-7 months and addition was made to the income of the appellant as the genuineness of transactions were not proved.

In the present case, the assessee company has provided all possible documents to prove the genuineness of transactions and booking advance. The assessee has also fulfilled its burden, but not a single document has been proven false and the onus was on the Assessing Officer to disprove the transactions which he has failed miserably.

23. Keeping in view the above ratios laid down by the judicial forums, the case-laws relied upon by the Assessing Officer are on different facts, which are not comparable with the facts of the present case. In fact, these decisions go to show how the Assessing Officer in the present case had not discharged his own duties as a Revenue Authority, and how ineffective the addition was, without completing such enquires and recording of such proper findings by the Assessing Officer.

24. The issue of the assessee is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in CIT v/s Lovely Exports (P) Ltd., [2008] 216 CTR 195 (SC), wherein it has been held as under:-

"If the share application money is received by the appellant company from alleged bogus shareholders, whose name are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of appellant company."

25. It is also admitted fact the Finance Act 2012, inserted two provisos to section 68 of the Act with effect from 01/04/2013 (assessment year 2013-

14). The first proviso is to enlarge the onus of a closely held company and provides that if a closely held company receives any share application money or share capital or share premium or the like, it should also establish the source of source (i.e., the resident from whom such money is received). The second proviso provides that the first proviso will not apply if the receipt of sum (representing share application money or share capital or share premium, etc.) represent of any income of a venture capital company (VCC) or venture capital fund (VCF) [referred in Section 10(23FB)]. However, in the year under consideration, no such provisions or stipulation existed. The amended provisions therefore, would be effective only from the assessment year 2013-14 onwards and not for the subject assessment year. In any view of the matter, the three essential tests while confirming the pre-proviso to section 68 of the Act laid down by the Courts, namely, the genuineness of the transaction, identity and the capacity of the investor have all been examined and on facts it is found satisfied. The case laws cited above also support the case of the assessee and insofar as provisions of section 68 of the Act are concerned, the said is not applicable in the case facts of the present case.

26. In the background of aforesaid discussion and case laws relied upon by the learned Counsel for the assessee and the Revenue, we do not find any infirmity in the order of passed by the learned CIT(A) warranting us to interfere with the same. Accordingly, the order passed the learned CIT(A) is hereby upheld by dismissing the grounds raised by the Revenue.

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

Order pronounced in the open Court on

V. DURGA RAO
JUDICIAL MEMBER

K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED:

Copy of the order forwarded to:

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

Pradeep J. Chowdhury
Sr. Private Secretary

By Order

Sr. Private Secretary
ITAT, Nagpur