IN THE INCOME-TAX APPELLATE TRIBUNAL"C" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
&
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 2045/MUM/2019
(A.Y. 2012-13)

DCIT, CC-7(4), Mumbai Room No. 659, Aaykar Bhavan, M.K. Road, Mumbai-400020	v/s. बनाम	Poddar Renaissance Reality Pvt. Ltd. (Now known as Imperial Renaissance Renaissance Reality Pvt. Ltd.) 501/601, Aqua Marine, Carter Road, Mumbai-400050030
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAGCP2657R		
Appellant/अपीलार्थी	..	**Respondent**/प्रतिवादी

Assessee by :	Mr. Rishabh Mehta
Revenue by :	Mr. R. A. Dhyani

Date of Hearing	15.10.2024
Date of Pronouncement	20.12.2024

आदेश / O R D E R

PER OM PRAKASH KANT [A.M.] :-

This appeal by the Revenue is directed against the order dated 31.01.2019 of the Learned Commissioner of Income-tax (Appeals), Mumbai-49 [hereinafter referred to as "CIT(A)"] for Assessment Year [A.Y.] 2012-13, raising following grounds :

"1. "On the fact and circumstances of the case, the Learned CIT(A) has erred in deleting the addition of Rs. 5,15,00,000/- made by the AO on account of unexplained investment u/s. 69 of the I.T. Act, 1961 without appreciating the

fact that the assessee failed to explain the unaccounted cash investment made by him during assessment and remand proceedings."
2. "On the fact and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 11,71,32,000/- made by the AO on account of unexplained cash credit u/s. 68 of the I.T. Act, 1961 without appreciating the fact that the assessee failed to prove the genuineness of transactions during assessment and remand proceedings."
3. "On the fact and circumstances of the case, the Learned CIT(A) has erred in deleting the addition of Rs. 11,71,32,000/- made by the AO on account of unexplained cash credit u/s. 68 of the I.T. Act, 1961 without appreciating the fact that the Hon'ble Supreme Court in the case Sumati Dayal Vs CIT (1995) 214 ITR 801(SC) has held genuineness could validity be tested on the ground or principle of preponderance of human possibilities which form a valid ground or parameter for determining the genuineness."

2. Briefly stated facts of the case are that the assessee filed return of income on 27.09.2012 declaring total income at Rs. nil. Subsequently, a statutory notices under the Income Tax Act, 1961 [hereinafter referred as "Act"] were issued and complied with, and thereafter assessment u/s 143(3) of the Act was completed on 13.03.2015, wherein addition of Rs. 5,15,00,000/- for unexplained investment and commission paid for purchase of the flats along with addition of Rs. 11,71,32,000/- for bogus share premium were made.

3. On further appeal, the Ld. CIT(A) deleted the above additions.

4. Aggrieved with order of Ld. CIT(A), the Revenue is in appeal before the Tribunal by way of raising grounds as reproduced above.

5. The assessee filed a paper book containing pages 1 to 300. As far as ground No. 1 of the appeal concerning the addition of Rs. 5,15,00,000/- on account of unexplained investment u/s 69 of the Act which has been deleted by the Ld. CIT(A) is concerned, the Ld. Departmental Representative [DR] relied on the findings of the of the AO, whereas the Ld. Counsel for the

assessee relied on the findings of the Ld. CIT(A). The brief facts qua the issue in dispute are that in the search proceedings at the premises of sh Manish Garg (i.e. executive director of M/s Loha Ispat Ltd) documents relating to unaccounted payment for commission in cash for purchase of the two flats, namely, flat No. 501 and 601 at Tamarisk CHS Ltd., Carter Road, Bandra (W), Mumbai were seized. The said document revealed a debit note for commission of Rs. 15,00,000/- calculated at the rate of 1% on actual purchase price of those two flats, which are purchased in the name of the assessee. Accordingly, the search team inferred the total purchase cost of two flats at Rs. 15,00,00,000/-. In the course of search statement of Shri Rajesh Poddar, i.e. the managing director of M/s. Loha Ispaat Ltd., was recorded u/s 132(4) of the Act on 22.02.2012, , wherein he admitted that those two flats were purchased by sh Aayush Rajesh Poddar in the name of assessee company for a consideration of Rs. 15 crores , out of which Rs. 10 crores was paid in cheque and balance Rs. 5 crores was paid in cash by M/s Loha Ispat Ltd in FY 2010-11. He explained that said cash of Rs. 5.00 crores was paid put of the cash generated out of non-genuine purchases by M/s Loha Ispat Ltd from M/s Vikram Coils pvt. Ltd. He stated that said generation of cash was already offered as undisclosed income in the hands of M/s Loha Isopat ltd. Considering the seized document and statement of mr Rajesh poddar, the AO in the case of the M/s. Loha Ispaat Ltd. made addition of Rs. 5.15 crore as

unexplained investment and undisclosed income on substantive basis. The same addition has been made on protective basis in the hand s of the assessee as those flats were purchased in the name of the assessee entity. The Ld. CIT(A) deleted the addition made on the protective basis in the hands of the assessee on the ground that the evidences found during the course of serach indicated that undisclosed income was of M/s Loha Ispat Ltd and not any iota of evidence that cash was paid by the assessee company , the AO can't proceed to make addition in the hands of the assessee company on protective babis that too when addition on substantive basis was already been made in the hands of the M/s. Loha Ispaat and which has been upheld by the Ld. First appellate author in that case also. The relevant findings of the Ld. CIT(A) is reproduced as under:

> *"5.3 I have carefully considered the submission of the Id. Counsel and the assessment order. On going through the assessment order, it is observed that from the premises of Shri Manish Garg (executive director and one of the shareholders in M/s. Lohalspaat Ltd.) at 402, City Jewel, Plot no. 81, Koparkhairane, Navi Mumbai, the document relating to unaccounted payments for commission in cash for purchase of 2 flats no, 501 and 601 at Tamarisk CHS Ltd., Carter Road, Bandra (W), Mumbai were seized as page no. 91 of Annexure A-1 to Panchnama. The said finding revealed that it is a debit note and contains the amount of commission of Rs. 15,00,000/- calculated @ 1% on the actual purchase price of these two flats. Accordingly, from the said commission amount and rate, it was worked out that the total value of the flats so purchased was at Rs. 15,00,00,000/-. In the course of search, the said finding was put before Shri Rajesh Poddar, the managing director of M/s. Loha Ispaat Ltd. and his statement was recorded u/s. 132(4) on 22.02.2012. His statement is reproduced by the AO in the impugned order and it is noted that he has admitted that these two flats were purchased by Aayush Rajesh Poddar in the name of the assessee company at a consideration of Rs. 15 crores out of which Rs. 10 crores were paid in cheque by the assessee company and balance Rs. 5 crores were paid in cash by M/s. Loha Ispaat Ltd. in F.Y. 2011-12 being generated out of non-genuine purchases from M/s. Vikram Coils Pvt. Ltd. He accordingly offered the said undisclosed income of Rs. 5 crores of M/s. Loha Ispaat Ltd./ Considering the said findings of the search and statement recorded, the AO of M/s. Loha Ispaat Ltd.*

made the addition of Rs. 5 crores and the commission of Rs. 15 lacs thereon as undisclosed income in the hands of M/s. Loha Ispaat Ltd. This fact is not in dispute The Id. Counsel before me urged that the since the substantive addition has already been made in the right hands, there was no need on part of the AO to make the addition in the hands of the assessee company even on protective basis. I have carefully examined the facts and the issue involved here. There is no doubt that the payment in cash was made by M/s. Loha Ispaat Ltd.. Further, the income of Rs. 5.15 crores is already assessed in hands of M/s. Loha Ispaat Ltd. The issue before me is whether the protective addition is sustainable or not. It is a trite law that the findings of the search and the statements recorded during the search are to be read as a whole and that the incriminating material found in the course of search have a substantial evidentiary value in eyes of law. Gainful reference in this regard can be drawn from the following cases.

ACIT vs. Hotel Harbour View [2009][184 taxman 42] (Cochin)
All the events leading to the instant case happened before the date of search on 6-8- 2003. The materials and details relating to the aborted sale transactions were collected in the course of search. It was on the basis of those materials and particulars that the Assessing Officer had proceeded to make the assessment under section 153A. Therefore, it was a case without any dispute arising as a consequence of the search conducted by the department. Therefore, it was very necessary on the part of the revenue to make out a case on the basis of the searched materials so that it could argue that the assessee was liable for capital gains tax. By the time of search, it was clear that the agreement to sell was not reached to its logical conclusion; the agreement was rescinded and part of the money received from the vendee was returned; the subject property was let out to another third party; and the whole transaction was aborted. In view of that, the Assessing Officer should not have read the events in a piecemeal manner and stopped on 31-3-1999 instead of reading it in a logical and a continuous manner from the beginning to the end. If he would have read the episode as a whole, he would know that there was no actual transfer of any capital asset from the assessee to MAPL. In order to make a case of capital gains tax, the Assessing Officer was cutting the chain of events into two parts; one part upto 31-3-1999 and the other part after 31-3-1999. That approach adopted by the Assessing Officer was against law. When the Assessing Officer was relying on the materials collected in the course of search for making an assessment, he should have read the materials in a wholesome and continuous manner, which ultimately would lead to a lawful conclusion. Therefore, the order of the Assessing Officer was without the support of law.

The Dhanvarsha Builders v. DCIT [2006] [102 ITD 375] (Pune)

...6.1. We have considered the facts of the case and rival submissions. The main issue in this case is about quantification of undisclosed income of the assessee on the basis of seized material, placed in the paper book, on pages 59 & 60. The connected issue about the confessionary statement made by Shri Akalank M. Mishrikotkar, on 15.02.1996 and its subsequent retraction. On perusal of the seized material, it is seen that the assessee was found in

possession of meticulous record regarding monies received in respect of various godowns and shops to be constructed by it. The details inter-alla contained the narration about the premises No., name of the customer, total sale cost, money received by way of cash, money received by way of cheque and the balance amount to be received. All the figures are written by omitting three zeros. The learned Counsel of the assessee fairly admitted that names mentioned in the list are those of its customers. He also fairly admitted that the amounts received by way of cheque will tally with the books of account if three zeros are supplied to the amount mentioned in the seized papers. His arguments against placing reliance on this paper inter-alia were that i) the paper does not bear the name of the assessee, ii) no evidence has been found regarding actual receipt of cash, and iii) the paper does not contain the dates on which respective cash amounts were allegedly received. Therefore, his case was that the impugned document is a dumb document and, therefore, it cannot be relied upon for the purpose of assessment. We are unable to persuade ourselves to agree with the learned Counsel in either of these matters. The reason is that the authenticity of the names and decoding of amounts received by way of cheques lead to establishment the fact that the documents belongs to the assessee and various amounts entered therein are correct if three doros are supplied. The absence of the names of the assessee thus gets fully corroborated on the basis of aforesaid interpretation of the document. The document speaks of receipt in cash and also receipt by way of cheques. The receipts by way of cheques tally with the books of account. Therefore, it is a natural consequence that the receipt by way of cash have also been made. As we shall see subsequently, the date of receipt of cash is not material for deciding the assessment year in which the profits embedded in such receipts are to be taxed. Suffice it to say at the moment, the assessee is following project completion method and, therefore, all amounts, l.e., amounts received in cash as well as amounts received by way of cheques are taxable in the year in which project is completed or substantially completed. Therefore, the leamed Counsel's arguments on all three grounds fall. Accordingly, it is held that the document is not a dumb document but it is a speaking document and it pertains to the business transactions of the assessee. This conclusion is further fortified by answer to question No. 12 of Shri Akalank to the effect that the cash will be shows for 1996-97 assessment year as additional income over and above the book profits of Dhanvarsha Builders and Developers Pvt. Ltd. After this statement, the document becomes, in fact, an eloquent document regarding the receipt 'on money' of the assessee.

6.2. It was also the argument of the learned Counsel that the impugned papers not only to show the receipts but also the expenditure. Therefore, it was argued that the document should be read as a whole and deduction for the expenditure incurred should be given to the assessee while computing undisclosed income. We have considered this argument also. We are of the view that the seized document should be read as a whole if it has to be relied upon. It cannot be read only to the extent it is advantageous to the revenue and not read when it becomes disadvantageous to the revenue. In other words, if we do not read the figure of expenditure of Rs. 4200 against the name of Rajender by doubting the expenditure, then all the receipts

mentioned therein also comes under cloud of doubt. It is an accepted principle of interpretation of documents that they should be read as a whole as persons of common prudence will read them. They cannot be read in bits and parts to suit the convenient of one or other party. Therefore, the expenditure of 4200 will also have to be read on proper appreciation of the document. Such reading gets further fortified by the fact that one Mr. Rajender Agarwal was one of the contractor of the assessee and his bill was placed on page 112 of the paper book. Though the figure of Rs. 4200 is qualified by the remark approximately in the sald papers, the expenditure on that basis will have to be estimated. Such conclusion also gets strength from the fact that the figure is a round figure. Accordingly, it is held that the expenditure of round some of Rs. 40.00 lakh becomes admissible to the assessee as cash expenditure in relation to cash receipts of the assessee. Thus, the excess of receipts over the expenditure can be worked out at Rs. 8,95 lakh. The matter does not end here. It has been pointed out earlier that there are certain other figures of cash amount to be received by the assessee. The two sums of 400, being old and 179 from Dhawal, aggregating to 579, are to be received in cash. Therefore, this amount will have to be added to the undisclosed income. Thus, the undisclosed income, by reading the document as a whole is calculaed at Rs. 14.74 lakh (Rs. 8.95 lakh + Rs. 5.79 lakh). The argument of the leamed DR in this matter may also be considered here. His case was that the expenditure has to be proved by the assessee. We are unable to agree with this submission if the impugned seized material is to be considered for the purpose of computation of the undisclosed income. The learned DR had pointed out that the AO had verified some of the cash receipts from the customers. It appears that no opportunity of cross examination has been given by the AO to the assessee in this behalf. Therefore, the evidence gathered by him in respect of receipt of 'on money' is only a tentative evidence on which no firm conclusion can be drawn. If the learned DR's arguments regarding expenditure were to be accepted, then, the figures of cash receipts mentioned in the seized paper will also have to be ignored. Such course of action will be against the tenor of the evidence seized in the course of search operation, more particularly when the evidence gives clear picture of the undisclosed income of the assessee."

6. Upon hearing the submissions of the parties and examining the material placed on record, we find that during a search operation conducted at the premises of the director of M/s Loha Ispat Ltd., certain documents were seized indicating the payment of commission or brokerage at the rate of 1%. This commission was calculated to amount to ₹15 lakh, as explicitly stated in the documents. Based on this, the search team inferred the purchase price to be ₹15 crore. The director of M/s Loha Ispat Ltd. admitted during questioning that this 1% commission was paid

in connection with the purchase of two flats for the assessee company, M/s Poddar Renaissance Realty Pvt. Ltd. It was revealed that the registered sale deed reflected a consideration of only ₹10 crore, while the remaining ₹5 crore and the ₹15 lakh commission were paid in cash. The director further stated that the cash payments were sourced from funds generated through cheques issued for bogus purchases recorded in the books of M/s Loha Ispat Ltd. It is pertinent to note, however, that the seized documents do not conclusively establish the source of the cash payment for the two flats. The claim that the funds originated from bogus purchases was based solely on the statements of the director of M/s Loha Ispat Ltd. and lacked corroborative documentary evidence.

6.1 Given these facts, the AO observed that the unexplained investment of ₹5.15 crore must be attributed to the assessee. The purchase consideration of ₹10 crore, which was reflected in the registered sale deed, has been duly accounted for in the books of the assessee. However, no addition has been made in the hands of M/s Loha Ispat Ltd. for the unexplained investment of ₹5.15 crore, even though the source of this payment was purportedly explained by M/s Loha Ispat Ltd. as arising from undisclosed income generated through bogus purchases. Notably, the seized documents did not contain any evidence to substantiate the flow of such funds. Under these circumstances, irrespective of whether the Assessing Officer made additions for undisclosed income in the case of M/s Loha Ispat Ltd., the onus remains squarely on the assessee to satisfactorily explain the source of the unexplained investment under the provisions of Section 69 of the Income Tax Act, 1961. For reference, Section 69 states:

> ***"Unexplained investments.***
>
> ***69.*** *Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."*

6.2 In the present case, the assessee has failed to include the cash payment of ₹5 crore in the registered sale deed for the properties and has also failed to substantiate the source of this payment with credible documentary evidence. In light of the facts and circumstances of the case, we are of the opinion that the addition of ₹5.15 crore must be made on a substantive basis in the hands of the assessee. The finding of the Learned Commissioner of Income Tax (Appeals) on this issue is hereby set aside, and the addition of ₹5.15 crore is upheld as the unexplained investment of the assessee under Section 69 of the Act. Accordingly, **Ground No. 1 of the revenue's appeal stands allowed**, and the addition is sustained in the hands of the assessee on substantive grounds. Ordered accordingly**.**

7. **Ground Nos. 2 & 3** relate to addition of Rs. 11,71,32,000/- made by the AO in respect of the share premium received from the subscribers and held by the AO as unexplained but deleted by the Ld. CIT(A).

8. The facts, qua, issues and disputes have been summarized by the Ld. CIT(A) in his findings. The assessee received share capital along with share premium from four share subscribers including two promoters. The AO did not make any addition in respect of share capital received from those subscribers but made addition u/s 68 of the Act in respect of the share

premium only. Relevant findings of the Ld. CIT(A) in respect of all the four share subscribers is reproduced here as under:

> *" 6.4 I have carefully considered the assessment order, remand report and the submissions of the learned counsel. During the year under consideration, the assessee has raised share capital along with premium which is as under:-*
>
> *From above details, it is seen that the company has received share capital and premium from four shareholders at a different premium. The face value of shares issued by the assessee is at Rs. 10 per share whereas the premium per share differs for different parties.*
>
> *6.5 As regard the shares issued to* ***M/s. Loha Ispaat Ltd.****, it is seen that premium of Rs. 6 per share is fetched from it in December, 2011. It is noted that the total subscription of M/s. Loha Ispaat Ltd. in the company is only to the tune of Rs. 5,15,00,000/- as the investments in two flats no. 501 and 601 of Bandra (W) as discussed above were made by M/s. Loha Ispaat Ltd. Accordingly, since the agreement of the said flats were in the name of the assessee company and the property ought to have been shown in its books, consideration was given to M/s. Loha Ispaat Ltd. in the form of issue of shares. Thus, there is no cash outflow to M/s. Loha Ispaat Ltd. in the said transaction but is merely a case of recording the investment in the books of the assessee company in consideration of the issue of shares to M/s. Loha Ispaat Ltd. Further, the total own funds of M/s. Loha Ispaat Ltd. is Rs. 39.51 crores and the profit before tax is reported at Rs. 65.29 crores for the year under consideration. Thus, the nature and source of transaction in relation to M/s. Loha Ispaat Ltd. gets duly substantiated.*
>
> *6.6 As regard the shares issued to* ***Mr. Aayush Poddar****, it is seen that premium of Rs. 10 per share is fetched from it in March, 2012.It is noted that the total subscription of Mr. Aayush Poddar, managing director of the assessee company is Rs. 5,99,000/-. In this regard, the Id. Counsel submitted that the identity and genuineness of the transaction is not in doubt even by the AO. It is noted that the networth of Mr. Aayush Poddar is Rs. 63,34,059/- which is quite adequate to cover the meagre investment of Rs. 5,99,000/- in the assessee company. The AO is of the view that assessee failed to produce him in the remand proceedings. However, since the records clearly establish the identity of the investor, genuineness of the transaction and creditworthiness of the lender, addition cannot be sustained merely because the party was not produced before him. Reference in this regard can be made to the decision of Hon'ble Apex Court in thecases of CIT vs Orisssa Corporation (P) Ltd. 1986 159 ITR 78 (SC) and CIT v/s. Orchid Industries (P.) Ltd. (2017) 88 taxmann.com 502 (Bom)*
> *6.7 As regard the shares issued to* ***Mis. Jagdhara Dealcom Pvt. Ltd.*** *and* ***M/s. Jhilmil Deal Trade Pvt. Ltd****., it is seen that premium of Rs. 115 per share is fetched from them in March, 2012. It is noted that the total subscription made by these two companies is Rs. 10,60,00,000/-. Undoubtedly, the share premium received from these two companies is high as compared to other shareholders. In*

response to this, the appellant submitted that the shares issued to other shareholders referred above were at a low premium as they belonged to the same group. In order to substantiate the transaction entered with M/s. Jagdhara DealcomPvt. Ltd. and M/s. Jhilmil Deal Trade Pvt. Ltd., the assessee has filed the copies of confirmation, audited financial statements, PAN and address of the investors. It is seen that in the course of remand proceedings before the AO, these parties also filed their bank statements, copies of board resolution along with the audited financial statements. All these documents have been examined by the AO thoroughly. In his remand report, the AO states that the bank statements of these two entities show a pattern and non-conduct of any real business transactions, except rotation / laundering of funds and inter-alia strengthen and reinforce the fact that these transactions are nothing but are of the nature of accommodation entries. Also, the assessee failed to produce their directors before him.

6.8 In rebuttal to the remand report the appellant submitted that all the vital documents have not been disputed or controverted by the AO except the entries in the bank statements. It further submitted that even the allegation of the AO about the rotation of funds is misplaced and unjustified and merely driven on the suspicion and surmises of the AO. The appellant further submitted the copies of the assessment order of both the investor companies before me and also the copy of notice issued to M/s. Jhilmil Deal Trade Pvt. Ltd. for A.Y. 2011-12 and the reply by the said party filed before AO. The appellant also submitted that this is a case of share subscription and its onus is limited to establish the identity and the genuineness of the transaction and not the creditworthiness of the investors although proved beyond doubt as evident from the assessment orders of the investor companies. The appellant further submitted that the premium fetched from the investors is also not high and even otherwise, the addition on this count is not justified in view of the decision of the jurisdictional High ?Court in the case of Vodafone India Serivces (P.) Ltd. v. UOI [2014] 50 taxmann.com 300 (Bom), CIT v. Gagandeep Infrastructure Pvt. Ltd. [2017] 80 taxmann.com 272 (Bom) and CIT v. Green Infra Ltd. [2017] 78 taxmann.com 340.

6.9 I have carefully considered the submissions of the appellant and the impugned assessment order and the contentions of the AO in his remand report and the material on record on this issue. The appellant has submitted adequate documents in the form of confirmation, board resolution, copy of audit report and financial statements, bank statements along with PAN and address. Further, the appellant has also filed the assessment order of the aforesaid investors for A.Y. 2011-12 which is the year in which these companies were incorporated and had raised their share capital. The AO of these two companies have already examined the genuineness of said share capital raised and has found it to be in order. It is these funds which have been invested by these two companies in the assessee company during the year which is not in doubt and therefore, mere criteria of low income ignoring the networth of these two companies cannot be given due weightage in deciding the creditworthiness of these investors. The net worth of M/s. Jagdhara DealcomPvt. Ltd is Rs. 38.26 crores and that of M/s. Jhilmil Deal Trade Pvt. Ltd. is Rs. 29.23 crores. This view finds support from the decisions of Hon'ble Delhi High Court in the case of CIT v. Vrindavan Farms (P.) Ltd. and jurisdictional Tribunal in the case of H.K.Pujara Builders v. ACIT. Essentially, in view of the assessment orders of investors, even the source of source of investments made in the assessee company gets established.

6.10 Section 68 is not a charging section but a deeming fiction dealing with the burden of proof. The section casts initial onus u/s. 68 of the Act on the assessee to prove identity, genuineness and creditworthiness of the transaction to the satisfaction of the AO. If the assessee fails to do so or the explanation offered by him is not satisfactory to the AO, the AO is empowered to add the same to the total income of the assessee. The said power is to be exercised judiciously by the AO. Thus, once the initial onus is discharged by the assessee, the onus shifts on the AO to bring out fallacies in evidence brought by the assessee or by bringing new evidence that indicate the transactions undertaken by the assessee are non-genuine. Thus, the section deals with an equilibrium of onus of proof and must be viewed to evaluate as to whether the evidences brought by the assessee or AO weigh more and accordingly in whose favour the equilibrium bends. In the present case, on one hand, the assessee has placed ample evidences but the AO has failed to bring anything contrary on record to disprove these evidences. It is not even the case where the AO has unearthed any adverse material on enquiry. In fact, it is a case where no enquiry has been carried out at all by the AO but he has formed his opinion based on surmises and conjectures. Merely because the parties were not produced before the AO, he cannot make the addition u/s. 68 of the Act. This position is well settled in view of the decision of the Hon'ble Apex Court in the case of CIT v. Orissa Corporation (P) Ltd. (1986) 159 ITR 78 (SC) and CIT v. Orchid Industries (P.) Ltd. [2017] 88 taxmann.com 502 (Bom.). It is not even the case where the AO has relied upon the statements of any entry providers who were indulged in said transactions. Thus, it is a case of absence of any enquiry on part of the AO and therefore AO has failed to discharge his onus u/s. 68 of the Act.

6.11 The decision of the Hon'ble Jurisdictional ITAT in the case of ITO v. Sringeri Technologies Pvt Ltd [ITA No. 3924/Mum/2014] is also relevant wherein it was observed as under:

> *11. Having considered arguments of both the sides and materials available on record, we do not find any merit in the reasons given by the AO to come to the conclusion that the assessee has failed to prove the genuineness of transaction and creditworthiness of the parties on the ground that the assessee has filed enormous details in respect of 9 companies including their PAN details, CIN master data, affidavits sworn before Executive Magistrate, reply to the notices issued u/s 133(6). The assessee also filed copies of assessment order passed u/s 143(3) by the department in respect of 4 companies. The assessee also filed a certificate from a Chartered Accountant certifying the active status of the company in the website of Ministry of Corporate Affairs. On going through various detailed filed by the assessee, we find that there is no reason for the AO to doubt the genuineness of transactions of creditworthiness of the parties. We further notice that all 9 companies are active in the website of ROC and also they have filed their balance-sheet upto 31-03-2016 and in some cases upto 31-03-2017. We further notice that the AO has furnished a report accepting the fact that all these companies are active in the website of MCA and none of the companies' name is struck off from the list published by the MCA as shell company. We further notice that the assessee has filed balance-sheet of all 9 subscribers wherein they have huge share capital and reserves and surplus to establish creditworthiness of the parties. On perusal of the balance sheet filed by the*

assessee, we find that the aggregate of share capital and reserves of 9 companies is at Rs.333.67 crores, whereas investment in assessee company is only Rs.12 crores. We further notice that all companies are having regular business ranging from 2 to 3 crores. The assessee also furnished copies of sales-tax returns filed with Commercial Tax Department to prove the business activity of the assessee. All these evidences go to prove an undoubted fact that these companies are not paper companies and recognized with business activity. We further observe that the assessee also filed affidavit from the directors of subscriber companies, wherein thy have explained the reasons for not receiving communication sent by the AO u/s 133(6) of the Act. They further stated in the affidavit that they have subscribed to the share capital of the company and also furnished supporting evidences to justify investment in share capital of the company. We further notice that the assessee has furnished bank statement of subscribers wherein we do not find any instance of cash deposits or transfer from other companies prior to the date of transfer to the assessee company. Therefore, we are of the view that the AO was incorrect in treating share capital alongwith share application money as unexplained cash credit u/s 68 of the Income-tax Act, 1961."

6.12 Further, I find that the decision of the Hon'ble jurisdictional High Court in the case of CIT v. Paradise Inland Shipping Pvt Ltd (TA No. 66 of 2016) (Bom HC) applies to this case wherein it was observed as under:

5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus:

"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows:
1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-
Date of Registration 09/05/1995
Memorandum of Association and Article of Association
Certificate of Incorporation
Certificate of Commencement of Business
Acknowledgment of the Return of Income AY 08-09
Affidavit of the Director confirming the investment
Application for allotment of shares
Photocopy of the share certificate

Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009.
Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010
The Bank Statement highlighting receipt of the amount by way of RTGS.
Banks certificate certifying the receipt of the amount through Banking channels."

6.On going through the documents which have been produced which are basically from the public offices, which maintain the records of the companies. The documents also include assessment Orders for last three preceding years of such Companies
7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot re-appreciate the evidence to come to any contrary evidence. Considering that the authorities have rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial question of law which arises in the present Appeal for consideration.

8. The Apex Court in the case of Orissa Corpn. (P.) Ltd. (supra), has observed a Para 13 thus:

> *"13. In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income- tax assessees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under S. 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who would advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the*

Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises.

9. This court in the Judgments relied upon by the learned counsel appearing for the Respondents, have come to the conclusion that once the assessee has produced documentary evidence to establish the existence of such Companies, the burden would shifted the revenue-appellants herein to establish their case. In the present case, the appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subjected to cross examination. In such circumstances the question of remanding the matter for re-examination of such persons, would not at all be justified. The assessing officer, if he so desire ought to have allowed the assessee to cross examine such persons in case the statement were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents.

10. We find no infirmity in the findings arrived at by the ITAT as well as CIT appeals on the Contentions raised by the Appellants-Revenue in the present case and, such question of interference by this court in the present proceedings under section 260A of the Income Tax Act would not at all be justified. Apart from that, as rightly pointed out by the Learned counsel appearing for the Responents, the CIT Appeals had also noted that proceedings under Section 147 of the Income-tax Act caanot lead to re-verification of the records. These findings of the CIT-Appeals have not been assailed before the Income Tax Appellate court.

11. In such circumstances, we find that there is no case made out by the appellants-revenue for any interference in the impugned orders passed by the Courts below:

12. Hence, the appeal stands rejected.

The SLP filed against the said order of the High Court is also discussed by the Hon'ble Apex Court in [2018[93 taxmann.com 84 (SC).

6.13 The only issue which remains now is the premium fetched from the investors @ Rs. 115 per share. It is found that the appellant has not even submitted any valuation report in regard to this valuation. The AO has made the addition for this reason u/s 68 of the Act. During the course of appellate proceeding, the Id. Counsel for the assessee submitted that the said premium was justified to third parties and charging of the premium is prerogative of the Board of Directors of the company and the subscribers. The appellant submits that vide Instruction no. 2/2015, CBDT has accepted the ratio decidendi of the judgment of Hon'ble Bombay High Court in the

case of Vodafone India Services (P.) Ltd. v. UOI [2014] 50 taxmann.com 300, wherein it was held that that the premium cn share issue was on account of capital account transaction. Accordingly, the share premium received by the assessee has to be construed as a capital receipt. However, this can still be taxed u/s. section 68 of the Act of the Act under peculiar facts. Similar issue of high share premium has come across before the Hon'ble jurisdictional High Court in the following cases:-

Major Metal Ltd. v. UOI [2012] 359 ITR 450 (Bom)
Assessee an unlisted company was given huge loan of Rs. 6 crores by two companies - Later on these companies were allotted 30,000 shares each of face value 10 at huge premium of Rs. 990 - Settlement Commission fund that neither these two companies had financial standing for giving such huge loan nor past performance of assessee would justify payment; hence addition was made under section 68 in assessee's hand - Assessee submitted that Commissioner's had identified two companies being income-tax assessees, recourse to section 68 was not in order - Whether since view taken by Settlement Commission was borne out on basis of material record, same could not be interfered with - Held, yes

CIT V. Green Infra Ltd. (2017) 78 taxmnn.com 340
The Hon'ble Bombay High Court has upheld the order of the Hon'ble Mumbai Tribunal in this case reported in (2013) 149 ITD 240 wherein the ITAT had taken view that No doubt a non est company or a zero balance company asking for a share premium of Rs 490 per share defies all commercial prudence, but at the same time one cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The revenue authorities cannot question the charging of such huge premium without any bar from any legislated law of the land.
On a complete and conjoint reading of the aforesaid decisions, it is seen that the case of Major Metals Ltd. does not apply in present facts as the decision was rendered on distinguished facts where in that case, none of the investors had a financial standing or creditworthiness to justify payment of high premium and even the nature and source of the transaction entered was not accepted to be genuine. Whereas in view of the discussion made above, the assessee has clearly established the three ingredients viz identity, genuineness and creditworthiness u/s. 68 of the Act. Even the source of source of investment made by subscribers is proved. On the contrary, the decision of Gagandeep Infrastructure P. Ltd. and Green Infra P. Ltd., Sringeri Technologies Pvt. Ltd and Paradise Inland Shipping Pvt. Ltd.

> *becomes applicable in the present context of the facts and circumstances of the case.*
> *6.14 Respectfully following the decisions of the binding courts / tribunal, I find that the addition u/s. 68 of the Act is uncalled for in the present facts and circumstances of the case in view of the discussion made above. Accordingly, the addition of Rs. 11,71,32,000/- made by the AO deserves to be deleted. This ground of appeal is accordingly ALLOWED."*

9. Before us, Ld. counsel for the assessee referred to documents filed by the assessee before lower authorities supporting identity, creditworthiness and genuineness of the transaction in respect of all four share subscribers, which are placed on paper book page from PB 237 to PB 300. The Ld. Counsel for the assessee submitted that the source of share premium of Rs. 5,15,00,000/- in the hands of M/s. Loha Ispaat Pvt. Ltd. has already been explained by way of the undisclosed income of Rs. 5,15,00,000/- offered by said company in the return of income filed and same has been adjusted against the investment in cash of Rs. 5.15 crores made towards purchase of the two flats No. 501 & 601 in the name of assessee company. Regarding the share premium received from Shri Aayush Poddar, Ld. Counsel submitted that the net worth of Rs. 63,34,059/- has not been disputed against the investment of Rs. 5,99,000/-. Regarding another two share subscribers M/s. Jagdara Dealcom Pvt. Ltd. and M/s. Jhilmil Deal Trade Pvt. Ltd., Ld. Counsel for the assessee submitted that those companies have duly responded to the notices issued by the AO and filed their confirmation, audited financial statements, PAN, bank statements, copies of board resolution etc. during remand proceedings. Ld. Counsel

submitted that the assessee could not meet the request of AO for producing the directors of those companies as same was beyond the control of the assessee company. Ld. Counsel, further, submitted that once the assessee has discharged his onus of establishing identity, creditworthiness and genuineness of the transactions, the assessee was not required to establish the source of the source, despite, the assessee has reported that the scrutiny assessments were carried out by the department in the hands of the two companies and examined the issue of share premium subscribed by them, and therefore, no addition is warranted in the hands of the assessee. Ld. Counsel for the assessee relied on the findings of the Ld. CIT(A). On the contrary, Ld. DR relied on the findings of the AO.

10. We have heard submissions of both the parties and perused the material on record. We find that the Ld. CIT(A) has given detailed findings in respect of the applicability of provisions of section 68 of the Act in respect of share capital and share premium received from four parties. We find that as far as credit received against share capital no addition has been made by the AO which means those parties have been found to be genuine, but when the share premium is received from the said parties, the AO is doubting the identity, creditworthiness and genuineness of the transaction. We find that Ld. CIT(A) noted that undisclosed income of Rs. 5,15,00,000/- has been accepted by the M/s. Loha Ispaat Pvt. Ltd. and same amount has been, by way of book entry,

adjusted against the share premium in the hands of the assessee against investment in cash made towards purchase of two flats. Similarly, in case of the share premium received from Shri Ayush Poddar, also the Ld. CIT(A) noted that against the credit worthiness of said party of more than 63,00,000/-, the investment in share premium of Rs. 5,15,99,000/- is found to be justified. Further, in respect of another two share subscribers viz. Ms/. Jagdhara Dealcom Pvt. Ltd and M/s. Jhilmil Deal Trade Pvt. Ltd., also the identity and creditworthiness have been established before the Ld. CIT(A). The assessee has already filed copies of the scrutiny assessments in the hands of those two companies which are available on the page No. PB 269 to PB 270 and PB 294 to PB 295 of paper book. On perusal of those scrutiny assessments, we find that no addition has been made in their hands which mean the department has accepted the source of investment of those two companies. In such circumstances, we do not find any infirmity in the order of the Ld. CIT(A) on the issue and dispute and, accordingly, we uphold the order of the Ld. CIT(A) on deleting the addition.

11. Ground Nos. 2 and 3 of the revenue are, accordingly, dismissed.

12. In the result, the appeal of the Revenue is partly allowed.

Order pronounced in the open court on 20.12.2024.

Sd/-	**Sd/-**
SANDEEP SINGH KARHAIL	**OM PRAKASH KANT**
(न्यायिक सदस्य/JUDICIAL MEMBER)	**(लेखाकार सदस्य/ACCOUNTANT MEMBER)**

Place: मुंबई/Mumbai
दिनांक/Date. 20.12.2024
अनिकेत सिंह राजपूत/स्टेनो

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.