| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 43/Kol/2021
Assessment Year: 2009-10

Income Tax Officer, Ward -5(1), Kolkata	Vs	**M/s. Express Tradelink Pvt. Ltd.** 64, Bentinck Street 3rd Floor Kolkata - 700001 **[PAN: AACCE0887C]**
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Somnath Ghosh, Advocate and Shri Asim Panda, A/R
Revenue by :	Shri Abhijit Kundu, CIT, D/R

सुनवाई की तारीख/**Date of Hearing : 28/11/2023**
घोषणा की तारीख /**Date of Pronouncement: 08/02/2024**

आदेश/O R D E R

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The above captioned appeal is directed at the instance of the revenue against the order of the Commissioner of Income Tax (Appeals), Kolkata – 7, (hereinafter the "ld. CIT(A)") dt. 23/09/2023, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2009-10.

2. The Registry has pointed out that there is a delay of 36 days in filing the present appeal by the revenue. Petition for condonation of delay is placed on record explaining the reasons. On perusing the same, we are convinced that the revenue was prevented by sufficient cause from filing this appeal in time. Accordingly, we condone the delay and proceed to admit the appeal for hearing.

3. The revenue has raised the following grounds of appeal:-

"1. That on the facts and in the circumstances of the case, Ld, CIT(A) was justified in the deleting the addition of Rs. 7 15,50,000/- made by the Assessing Officer on account of share capital and premium in the course assessment in absence of identity of the creditors, genuineness and creditworthiness of the entire transactions.

2. That on the facts and in the circumstances of the case, Ld. CIT(A) was justified in the deleting the addition of Rs. 26,50,000/- made by the Assessing Officer where no personal attendance was made by any director of the share allottee companies during the course of assessment proceedings and as such identity & creditworthiness of the creditors and genuineness of transactions could not be verified.

3. That on the facts, the principles which has been laid down by the Hon'ble Supreme Court in the case of Pr. CIT(Central)-l, Kolkata vs NRA Iron & Steel Pvt. Ltd(412 ITR 161) suggests that "the assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the A.O., failure of which, would justify addition of the said amount to the income of the assessee". In the facts and under the circumstances of the case, the assessee company has failed to do so other than submission of mere statements of various kinds. Thus, the decision of the Ld. CIT(A) is erroneous in holding that the raised share capital was not the assessee's own income.

4. That on the facts, the he principle which has been laid down by the Hon'ble Supreme Court in the case of Pr. CIT(Central)-1, Kolkata vs NRA iron & Steel Pvt. Ltd. (412 ITR 161) also suggests that the Assessing Officer is duty bound to investigate the creditworthiness of the creditor /subscriber, verify the identity of the subscribes, and ascertain whether the transaction is genuine, or these are bogus entries of name lenders,. In the facts of the case, in spite of best efforts made by the assessing officer, he could not verify the same as there was no response from the companies to whom share were allotted on private placement basis. Thus, the decision of the Ld. CIT(A) is erroneous in holding that the raised share capital was not the assessee's own income.

5. That on the facts, the principles which has been laid down by the Hon'ble Supreme Court in the case of Pr. CIT(Central)-l, Kolkata vs NRA Iron & Steel Pvt. Ltd. (412 ITR 161) also suggests that if the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lacked credit-worthiness. Then the genuineness of the transactions would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section of the act, In the facts of the case, the Ld. CIT(A) completely ignored this aspect, thus he has erred in giving relief to the assessee.

6. That on the facts of the present case, clearly the Assessee Company failed to discharge the onus required under section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the income of the Assessee and the Ld. CIT(A) has erred in allowing relief to the assessee.

7. That on the facts, the In absence of verification, Ld. CIT(A) should have remanded the matter to A.O. for fresh verification. Thus, he has violated the provisions of Rule 46A of the I, T. Rules

8. That on the facts, the appellant craves to add, alter, amend, delete or substitute any of the grounds and/or take additional grounds before or at any time of hearing of this appeal."

4. Facts in brief are that the assessee is a private limited company and is engaged in the business of share dealing and investments. Loss of Rs.

20,434/- declared in the income tax return for Assessment Year 2009-10 on 21/09/2009, which was duly processed u/s 143(1) of the Act. Subsequently, the assessment was reopened by the Assessing Officer by issuing notice u/s 148 of the Act, as the Assessing Officer observed that certain expenses were not disallowed/certain income had not been disclosed u/s 147/143(3) of the Act on 30/06/2011 determining the total income of the assessee at Rs.24,029/-. Thereafter, the ld. CIT, Kolkata –II, found that the Assessing Officer has not conducted proper inquiries regarding the identity and creditworthiness of the shareholders and the re-assessment order was passed mechanically and without application of mind. The ld. CIT, Kolkata-II, invoking jurisdiction u/s 263 of the Act and vide order dt. 21/03/2014, set aside the order u/s 148 of the Act as being erroneous and prejudicial to the interest of the revenue and gave directions to conduct proper enquiry and verification and thereafter pass a speaking order. Subsequently, the Assessing Officer in light of the order passed u/s 263 of the Act, issued notice u/s 142(1) of the Act but assessee did not comply. Further, notices u/s 131 were issued to the directors of the assessment company but none appeared. Finally the Assessing Officer framed a best judgment order u/s 144 of the Act on the basis of material available on record. The ld. Assessing Officer made detailed observation that the share applicant companies are *jamakharchi* companies engaged in the activity of providing accommodation entries. The ld. Assessing Officer on examining the financial statements of the share subscribers noticed that they have no reasonable sources to purchase shares of the assessee company and in order to examine the said transactions it is the assessee who knows the intricacies of its account to prove its claim of share

capital/application money. As there was no personal appearance, therefore, the ld. Assessing Officer concluded the assessment referring to various decisions and observing that the alleged transactions of receiving share capital and share premium are in the nature of accommodation entries and is mere rotation of funds and the share subscribing companies are paper/shell companies. He thus held that the assessee failed to explain the sum of Rs. Rs. 7,26,50,000/- received towards share capital and share premium and added the said sum u/s 68 of the Act. The Assessing Officer made further addition of Rs.42,450/- on account of undisclosed income and disallowance u/s 14A of the Act of Rs.20,434/-. The assessment was completed u/s 144/263/143(3)/147 of the Act vide order dt. 02/03/2015, assessing the total income of the assessee at

4.1. Aggrieved the assessee preferred appeal before the ld. CIT(A) challenging only the addition made u/s 68 of the Act by the Assessing Officer on account of unexplained share application money amounting to Rs. 7,26,50,000/- and filed complete details of the share subscribers, their net worth as on the date of applying for the shares, complete details to prove the identity, creditworthiness of the share applicants and genuineness of the transactions, replies filed by the share subscriber companies to the summons issued u/s 131 of the Act and also contended that all the documents filed before the Assessing Officer are sufficient enough to explain the nature and source of the allege sum and even the source of source has been proved by giving the details and the ld. Assessing Officer has not indicated any discrepancies in these details. Various judgments were relied on by the assessee including that of the Hon'ble Bombay High Court in the case of *CIT vs. M/s. Gagandeep*

Infrastructure Pvt. Ltd. [2017] 80 taxmann.com 272 (Bombay); the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Lovely Exports P. Ltd.,* and other case-laws.

4.2. The ld. CIT(A) based on the facts stated by the assessee with sufficient documentary evidence in support of the claim of the nature and source being explained for the alleged transactions and also taking support from the various judicial decisions again sent all these documents filed by the assessee to ld. Assessing Officer to issue a remand report even when these details were already filed before the Assessing Officer. In the remand proceedings, the ld. Assessing Officer accepted that the Assessing Officer obtained all these details from the investment companies when summons issued u/s 131 of the Act and again no discrepancies were observed in the documents filed with regard to the share subscriber companies. The ld. CIT(A) considering these details and also the facts that all the share subscribers had sufficient net worth to cover up the investments made in the equity capital of the assessee company and also giving a finding that judgment of the Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron & Steel (P) Ltd. reported in [2019] 103 taxmann.com 48(SC)* is not applicable on the facts of the case decided in favour of the assessee by deleting the impugned addition u/s 68 of the Act.

5. Aggrieved, the revenue is now in appeal before this Tribunal.

6. The ld. CIT D/R submitted that the ld. Assessing Officer has examined the facts of the case extensively and financial statements of the share applicants were also scrutinised and came to a plausible conclusion. He vehemently argued supporting the order of the ld. Assessing Officer and stated that merely filing paper documents cannot be treated as a

compliance to explain the nature and source of the alleged sum. Surrounding circumstances which includes the meagre income offered by the share subscribers, no regular business activity carried out by the assessee company as well as by the share subscribers and the typical nature of flow of funds in the bank statement indicates that share subscribing companies are engaged in rotation of funds for providing accommodation entries and they are *jamakharchi* or shell/paper companies and, therefore, the ld. Assessing Officer has rightly added the sum in the hands of the assessee. The Ld. D/R has further relied upon the decision of the Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron & Steel (P) Ltd. reported in [2019] 103 taxmann.com 48(SC).*

7. On the other hand, the ld. Counsel for the assessee apart from referring to the detailed written submissions and paper book containing 166 pages again asserted the fact that the assessee company which is engaged in the business of share dealing and investment, issued equity shares along with share premium to various share applicants and all these share subscribing companies are regularly assessed to tax, transactions being carried out through banking channels, most of these concerns have passed through scrutiny proceedings and have been assessed u/s 143(3) of the Act for Assessment Year 2012-13 itself and replied to summons issued u/s 131 of the Act providing details to the Assessing Officer. He thus claimed that assessee has explained the nature and source of the share application money received during the year and has discharged the primary onus casted upon it u/s 68 of the Act and even the source of source has also been explained. Therefore, the ld. CIT(A) has rightly deleted the addition u/s 68 of the Act.

8. We have heard rival contentions and perused the material placed before us and carefully gone through the decisions referred and relied by both the sides.

9. The sole effective ground raised by the revenue is against the finding of ld. CIT(A) deleting the addition u/s 68 of the Act made for alleged unexplained share application money in the form of share capital and share premium amounting to Rs.7,26,50,000/-. During the year, the assessee company received share capital including share premium of Rs.7,26,50,000/- from 9 share subscribers who are body corporate entities. A chart depicting the amount invested by each of the share subscribers and the reserves and surplus available with the companies as on 31/03/2009 is extracted below :-

Name of share subscriber	*mounts in Reserve & Surplus as on 31.03.2009*	*ount invested with the appellant*
Ayushman Tradecomm P. Ltd.	*3,19,19,874/-*	*45,00,000/-*
Bluewater Vincom P. Ltd.	*6,67,87,874/-*	*98,00,000/-*
Broadline Commercial P. Ltd.	*7,04,92,500/-*	*65,00,000/-*
Nischal Share & Stock P. Ltd.	*8,95,20,000/-*	*1,04,00,000/-*
Panchmukhi Suppliers Pvt. Ltd.	*8,80,80,000/-*	*94,00,000/-*
Paras Barter P. Ltd.	*9,73,14,000/-*	*80,00,000/-*
Silvershine Tradecom P. Ltd.	*8,40,45,000/-*	*74,00,000/-*
SJR Auto Financers P. Ltd.	*27,30,94,603/-*	*83,00,000/-*
Utsav Nirman P. Ltd.	*6,14,42,148/-*	*82,50,000/-*

10. We further observe that during the course of assessment as well as appellate proceedings before the ld. CIT(A), the assessee has complied and has filed all the details, evidences and relevant documents which are necessary to prove the identity and creditworthiness of the share applicants and genuineness of the transactions. Though these details have been filed in the paper book for each of the share subscriber but the same can be summarized as filing of the copy of PAN card, share application form, allotment advices, relevant bank statements, ITRs for Assessment

Year 2011-12, audited financial statement, source of funds i.e., the immediate source of fund which has been utilised by alleged share applicants to apply for the equity shares of the company. Assessee has also filed copy of the summons issued u/s 131 of the Act during the course of assessment proceedings and reply of each of the share subscribing companies sent directly to the Assessing Officer and again provided necessary details before the ld. CIT(A). The ld. Counsel for the assessee also referred to the assessment orders u/s 143(3) of the Act in the case of various share subscribing companies which have been passed through scrutiny proceedings for the very same Assessment Years and the alleged transactions have been examined by the concerned Assessing Officer. Perusal of these details which have been filed in the paper book containing 166 pages indicates that whatever documents which the assessee needs to file in order to explain the identity and creditworthiness of the share applicants and genuineness of the transactions have been filed and thereby the primary onus casted upon the assessee by virtue of Section 68 of the Act has been discharged and consequently the burden shifted over to the Assessing Officer to prove the contrary which the ld. Assessing Officer failed.

11. We further observe that the ld. CIT(A) has made a thorough examination of all these facts and also referred to various judicial pronouncements adjudicating similar type of issues and we find it necessary to go through the relevant finding of the ld. CIT(A):-

> *"5. I have considered the issue in the assessment order and the remand report framed by the AO in light of the arguments made by the appellant. The short issue for my consideration is that whether the share application monies along with premium in the aggregate of `7,26,50,000/- disclosed by the appellant invites the*

mischief of the provisions of s. 68 of the Act or not. The provisions of s. 68 of the Act deal with cash credit which reads as under:

> *"**68.** Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."*

According to this section, if identity, creditworthiness of the creditor and genuineness of the transaction are not proved and the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as income of the assessee of that previous year. In the instant case, it is observed that the addition was made with the predetermined mindset that share application monies received by the appellant is not genuine as identity and creditworthiness of the shareholders were bogus in nature as if they did not exist and the transactions were an eyewash only for converting its black money into white without paying any tax to the revenue. In the instant case, the appellant had raised share capital in the aggregate sum of `7,26,00,000/- by issuing equity shares of 2,90,200 were allotted to 9 share subscribers with the face value of `10 each at a premium of `240 per share. In the instant case, it is found that all the nine share applicants are body corporates who had subscribed to the aforesaid share capital raised by the appellant and all the payments were made by each of them through a/c payee cheques drawn on their respective bankers. Each of the nine share subscribers are regularly assessed to income tax and the investments made by each of them are duly and fully reflected in their audited books of accounts as well as their income tax return. The appellant had duly filed its return of total income u/s 139(1) of the Act in respect of the assessment year 2009-10. In the course of the appellate proceedings, the appellant in response had produced its audited books of accounts, filed copies of its audited annual accounts including various details and other documents as desired by the AO. The details and documents so produced were remanded to the AO which included, inter alia, full details of each of the nine share applicants, who had subscribed to the aggregate share capital as well as share premium money raised by the appellant during the assessment year under appeal which was categorically admitted by him in the remand report. The AO, on receipt of the aforesaid details from the appellant did not pursue the matter further. He solely doubted the genuineness of the said share capital and the creditworthiness of the share applicants in the teeth of the cast iron evidence to the contrary on mere presumption and added the sum of `7,26,50,000/- in respect of the share capital to the total income of the appellant in respect of the assessment year under appeal.

6. It is observed that the corporate share applicants are registered under the Companies Act, 1956 and are on the records of Registrar of Companies functioning under Ministry of Corporate Affairs, Government of India and are having independent Permanent Account Numbers. The appellant had provided the copies of the Permanent Account Numbers of the share subscribers along with the acknowledgment of submission of their return of income and audit report and

financial statements which in my humble opinion proves their identities to the hilt. It is also observed that each of the share applicants maintained bank accounts; and copies of their respective bank accounts from which they made payments to the appellant for subscribing to the shares issued to them, was filed by each of them before the AO. Further, from the balance sheet of the share applicants it is seen that they had subscribed to the shares issued by the appellant; and such transactions were duly reflected therein. It is axiomatic that the criteria mandatorily required to be satisfied by the appellant were categorically fulfilled. These facts, in my opinion, clearly prove the genuineness of the transactions. Thus, the evidence adduced on record by the appellant in respect of the share applicants, in my humble opinion, clearly prove their source of funds, and their capacity for making such payments and accordingly, the criteria of their creditworthiness is proved. The AO has not found any defect and/or deficiency in the evidence adduced on record by the appellant.

6.1. It is also observed that the appellant had provided the copies of the acknowledgments evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheets wherein such investments made by each of them in the subscription of shares issued by the appellant are duly reflected as also copies of their bank statements for the relevant period from which such subscription monies were paid by them respectively and copy of the allotment advise received by them from the appellant in respect of shares allotted to them in respect of every share applicant. The annual return for the assessment year 2009-10 incorporating the allotments was filed by the appellant with the Registrar of Companies, Ministry of Corporate Affairs, which categorically proves the fact of allotment of shares to the share applicants. It is further observed that the net worth of each of the share applicants, as disclosed in their Balance Sheets, far exceeded the amount of investments made by them in the shares of the appellant which is incorporated in the charts here under: -

Sl No.	*Name of the **Share Subscriber***	*Amounts in **Reserve & Surplus** as on 31.03.2009*	***Amount invested** with the appellant*
1.	*Ayushamn Tradecomm P. Ltd.*	*`3,19,19,874/-*	*`45,00,000/-*
2.	*Bluewater Vincom P. Ltd.*	*`6,67,87,500/-*	*`98,00,000/-*
3.	*Broadline Commercial P. Ltd.*	*`7,04,92,500/-*	*`65,00,000/-*
4.	*Nischal Share & Stock P. Ltd.*	*`8,95,20,000/-*	*`1,04,00,000/-*
5.	*Panchmukhi Suppliers P. Ltd.*	*`8,80,80,000/-*	*`94,00,000/-*
6.	*Paras Barter P. Ltd.*	*`9,73,14,000/-*	*`80,00,000/-*
7.	*Silvershine Tradecom P. Ltd.*	*`8,40,45,000/-*	*`74,00,000/-*
8.	*SJR Auto Financers P. Ltd.*	*`27,30,94,603/-*	*`83,00,000/-*
9.	*Utsav Nirman P. Ltd.*	*`6,14,42,148/-*	*`82,50,000/-*

It is accordingly observed that these facts adequately prove the creditworthiness of the share applicants to make investment in the share capital of the appellant. The aforesaid facts underlined by evidence clearly prove the identity of the share applicants, their capacity and source of funds, as well as the genuineness of the

transactions in relation to the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant, in the impugned previous year relevant to the assessment year under appeal, as clearly evident from their respective balance sheet adduced on record by the appellant which were filed with the income tax authorities in relation to their own income tax assessments and as such, the genuinity of the sources of such funds are beyond reproach.

6.2. The AO had before him a plethora of evidence adduced on record by the appellant and it is well recognized that if he wished to act in a manner contrary to such proof, he had to disprove them first. At the same time, it is also a well established principle of law that in any matter, the burden is not a static one. The initial burden upon the appellant was duly discharged by it by providing the identity of share applicants by furnishing the copies of their returns along with audited report and financial statements, copies of bank accounts and proving the genuineness of the transactions by showing that money in the banks was debited by account payee cheques, and thereafter, the onus to disprove them shifted to the AO who grievously failed to discharge the same. It is observed that the AO had not issued summons u/s 131 of the Act or notices u/s 133(6) of the Act or made enquiries through his Inspector even after a direction issued to him. It was the bounden duty of the AO to make enquiry about a particular receipt before drawing adverse conclusions to castigate the appellant. However, in the instant case, on receipt of such evidence, the AO did not pursue the issue further. In the case of CIT vs. Orissa Corporation Ltd. (1986) 159 ITR 78 (SC) it was held as under: -

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

The ratio laid down in the aforesaid case is squarely applicable to the case at hand. In the instant case, thus, the AO had not controverted these indisputable evidences adduced on record but acted on his whims and fancies in disregarding them. It is observed that the burden which lay on the appellant, in relation to s. 68 of the Act, has been duly discharged and nothing further remains to be proved on the issue.

Since the conditions precedent for discharging of burden under the provisions of s. 68 of the Act are met, the addition made under such pretext deserves to be deleted.

7. In this respect it is relevant to refer to the decision of the jurisdictional High Court in the case of CIT vs. Sagun Commercial P. Ltd. [ITA No. 54 of 2001 dated 17.02.2011] wherein it was held as under:

> *"After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion.*
>
> *We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income-tax (Appeals) and the Tribunal below and answer the questions formulated by the Division Bench in the affirmative and against the Revenue. The appeal is, thus, dismissed."*

7.1. Further, the Hon'ble jurisdictional High Court in the case of CIT vs. Gayatri Portfolio Fund (P) Ltd [ITA No. 664 of 2004 dated 26.08.2014], it was observed as under:

> *"We find that the learned Tribunal has confirmed the order passed by the CIT who had overturned the order of the Assessing Officer by making the following*
>
> *observation:*
>
> > *"…We find that the identity of the 5 parties investing in the share capital is not in doubt. They are body corporates and their complete addressees are on record. This is the very first assessment in the life of the assessee company. The amounts were deposited by these 5 corporates per account payee cheques. These parties were not shareholders of the assessee company at the time when the case was reopened under section 147 or when the summons were issued to them. We find that the assessee has filed before the A.O. copies of share application forms duly signed along with the complete addresses of the investors along with their I.T. file numbers, account payee cheque numbers and the assessee's bank statements disclosing the deposits of these amounts. In these facts we find that the assessee has discharged its initial onus to prove the identity of the investors as well as their creditworthiness. It is not the case of the Revenue that the investor parties did not exist or that the money was not invested by them through banking channels."*

Having found such, the Tribunal had relied on the judgement in Hindusthan Tea Trading Co. Ltd. v. CIT (Cal): 263 ITR 289 (Cal) to uphold the order of the CIT.

In view of the findings above noted, no substantial question of law arises and therefore, the appeal and the application are dismissed."

7.2. Again, the Hon'ble Jurisdictional High Court in the case of CIT vs. Sanchati Projects (P.) Ltd. [ITAT 140 of 2011 dated 08.06.2011] it was observed as under:

"It appears from record that the assessee company during the relevant assessment year under appeal raised its share capital by way of receiving share application money against 1,64,000 equity shares aggregating to Rs.82,00,000/- from 8 different parties. The Assessing Officer, however, treated the share application money of Rs.45,00,000/- received from five different persons as unexplained cash credit in the hands of the assessee.

According to the Assessing Officer, those parties had the same addresses as that of the assessee and they had no fixed assets and utilised their capitals in share application of the assessee company. The Assessing Officer, therefore, was of the view that the money ultimately went to the beneficiary through these companies and there was no advertisement even published by the assessee company inviting share application and no Registrar was engaged for such raising of share capital.

Being dissatisfied the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), however, set aside the said order of assessment and came to the conclusion that all the share applicant/companies were assessed to the tax and their PAN and acknowledgement of I.T. returns along with their audited balance sheets, bank statements showing transactions etc. were made available to the Assessing Officer. It was pointed out that there was no legal bar of more than one company being registered at the same address and, thus, according to the Commissioner of Income-tax (Appeals), the doubt raised by the Assessing Officer about all those companies at the same address did not hold good.

Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals).

After hearing Mr. Nizamuddin, learned advocate appearing on behalf of the appellant and after going through the aforesaid materials, we agree with the Tribunal below that the Assessing Officer failed to establish that the share applicants did not have the means to make investment and that such investment actually emanated from the coffers of the assessee company. The receipt of share capital money had been duly recorded in the books of the assessee company and the payment of share application money was also duly recorded in the audited account of each of the share applicants.

We, thus, find that both the authorities below on the basis of the aforesaid materials on record were quite justified in deleting the aforesaid addition of

Rs.45,00,000/- done by the Assessing Officer. We are of the view that the order impugned does not suffer from any defect whatsoever and no question of substantial error of law arises justifying our interference.

The appeal is, thus, summarily dismissed."

There is no evidence adduced on record to show that the identities of the share applicants are not proved and/or that the subscription made by them to the share capital of the appellant was not genuine and/or the source of investment was not fully explained to the satisfaction of the AO. Further, the Hon'ble Jurisdictional High Court in the case of ***CIT vs. Dataware Private Ltd.*** *[ITAT No. 263 of 2011 dated 21.09.2011] wherein while examining the issue of addition of share application money received by the assessee therein u/s. 68 of the Act, the Hon'ble Jurisdictional High Court held that after getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing Officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the assessing officer of the creditor but instead of adopting such course, the Assessing Officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. The Hon'ble High Court further held that so long as it is not established that the return submitted by the creditor (subscriber shareholder) has been rejected by its Assessing Officer, the Assessing Officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established. In the present case also, no evidence was adduced on record that the investments made with the appellant in the shape of share application monies disclosed in the returns of the share applicants were rejected by their respective Assessing Authorities and accordingly, the issue is set at rest by the decision of the jurisdictional High Court on the issue which is applicable in the present context.*

7.3. In this respect, the A/R relied on the decision of CIT vs. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Del) wherein it was held as under:

"A distillation of the precedents yields the following propositions of law in the context of section 68. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (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 assessee. Further, (1) the department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (2) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more evidence against the assessee; (3) 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."

7.4. Further this decision of the Hon'ble Delhi High Court was approved by the Hon'ble Supreme Court in CIT vs. Lovely Exports Ltd. (2008) 216 CTR 195 (SC) observing that if share application money is received by an assessee from subscribers, whose names are given to the AO, are allegedly bogus, then the Revenue is free to proceed to reopen their individual assessments in accordance with law. It was held that: -

> *"2. Can the amount of share money be regarded as undisclosed income under section 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law."*

8. It is also noted that the Hon'ble Income Tax Appellate Tribunal, Kolkata Benches in several cases has deleted the addition on account of share application in similar circumstances. The relevant portion of the decisions are extracted as under: -

(a) In the case of DCIT vs. Global Mercantiles (P.) Ltd. [2016] 67 taxmann.com 166/157 ITD 924, it was held as follows: -

> *"3.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. The facts stated hereinabove remain undisputed are not reiterated herein for the sake of brevity. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned Ld. CIT(1) on the decision of the Hon'ble Apex Court in the case of CIT v. Lovely Exports (P) Ud reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.*
>
> *3.4.1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT v. Roseberry Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the-questions raised before their lordships and decision rendered thereon is as under:-*
>
> > *"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction. "*

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT v. M/s Lovelv Exports Pvt Ltd, we are at one with the tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

3.4.2. In view of the aforesaid findings and respectfully following the decision of the apex court (supra) and Jurisdictional High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the ground no.2 raised by the Revenue is dismissed."

(b) In the case of ITO vs. R.B. Horticulture & Animal Projects Co. Ltd. [IT Appeal No. 632 (Kol) of 2011, dated 13-1-2016] it was held as follows: -

"6. We have heard the Learned DR and when the case was called on for hearing , none was present on behalf of the assessee. However, we find from the file that the assessee had filed a detailed paper book and written submissions. Hence the case is disposed off based on the arguments of the Learned DR and written submissions and paper book already available on record. The facts stated in the Learned CIT(A) were not controverted by the Learned DR before us. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned CITA on the decision of the Hon'ble Apex Court in the case of CIT v. Lovelv Exports (p) Ltd reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.

6.1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT v. Roseberrv Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the questions raised before their lordships and decision rendered thereon is as under:-

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT(A) ought to have held that the assessee had not established the genuineness of the transaction." Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT v. M/s Lovely Exports Pvt Ltd, we are at one with the tribunal below that the point involved in this appeal is covered

by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed. "

6.2. We find that the issue is also covered by the decision of Hon'ble Delhi High Court in the case of CIT v. Value Capital Services P Ltd reported in (2008) 307ITR 334 (Del), wherein it was held that:

"In respect of amounts shown as received by the assessee towards share application money from 33 persons, the Assessing Officer required the assessee to produce all these persons. While accepting the explanation and the statements given by three persons the Assessing Officer found that the response from the others was either not available or was inadequate and added an amount of Rs. 46 lakhs pertaining to 30 persons to the income of the assessee. The Commissioner (Appeals) upheld the decision of the Assessing Officer. On appeal, the Tribunal set aside the order of the Commissioner (Appeals) and deleted the additions. On further appeal:

Held, dismissing the appeal, that the additional burden was on the department to show that even if the share applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose. "

6.3. We find that the argument of the Learned DR to set aside this issue to the file of the Learned AO for verification of share subscribers would not serve any purpose as the ratio decided in the above cases is that in any case, no addition could be made in the hands of the recipient assessee. In view of the aforesaid findings and respectfully following the decision of the apex court (supra), Jurisdictional High Court (supra) and Delhi High Court (supra), we find no infirmity in the order of the Learned CIT(A) and accordingly, the grounds raised by the Revenue are dismissed. "

(c) In the case of ITO vs. Cygnus Developers (I) (P.) Ltd. [IT Appeal No. 282 (Kol) of 2012, dated 2-3-2016], it was held as follows:-

"6. On appeal by the assessee the CIT(A) deleted the addition made by the AO observing as follows : -

(6) I have considered the submission of the appellant and perused the assessment order. I have also gone through the details and documents filed by the appellant company in the course of assessment: proceedings vide letter dt. 3-10-2007. On careful consideration of the facts and in law I am of the opinion that the AO was not justified in making, the addition aggregating to Rs.54,00,000/- u/s.68 of the Act being the amount of share application money by holding that the appellant company has failed to prove the identity, and creditworthiness of The creditors as well as the genuineness of transactions. It is observed that all the three share applicant companies i.e. M/s. Shree Shyam Trexim Pvt. Ltd., M/s Navalco Commodities Pvt. Ltd. and M/s. Jewellock Trexim Pvt. Ltd. had filed their confirmations wherein each of them confirmed that they had applied for shares of the appellant - company. All the three companies provided- the cheque number, copy of bank

statements and their PAN. It is observed that these companies also filed, copies of their return of income and financial statements for as well as copy of their assessment order u/s. 143(3) of the I. T Act for AY 2005-06. In the case of M/s. Jewellock Trexim Pvt. Ltd. the assessment for AY 2005-06 was completed by the ITO Ward 9(3), Kolkata and the assessments in the case of M/s. Navalco Commodities Pvt. Ltd. and M/s. Shree Shyam Trexim Pvt. Ltd. for A. Y.2005-06 and AY.2004-05 respectively were completed by the I TO, Ward 9(4), Kolkata. Under the circumstances, I am of the opinion that the AO was not justified in holding that the share applicant companies were not in existence. The assessment orders were completed on the address as provided by the appellant company in the course of assessment proceedings. It is not known as to how the AO's inspector had reported that the aforesaid companies were not in existence at the given address. Since the appellant company had provided sufficient documentary evidences in support of its claim of receipt of share application money, I am of the opinion that the no addition u/s.68 could be made in the hands of appellant company. On going through the various judicial pronouncements relied upon by the appellant, it is observed that the view taken as above is also supported by them. In view of above the AO is directed to delete the addition of Rs.54,00,000/-. The ground Nos. 2 and 3 are allowed.

7. Aggrieved by the order of CIT{A) the Revenue is in appeal before the Tribunal.

8. We have heard the submissions of the learned DR, who relied on the order of AO. The learned counsel for the assessee relied on the order of CIT(A) and further drew our attention to the decision of Hon'ble Allahabad High Court in the case of CIT v. RajKumar Agarwal vide ITA No. 179/2008, dated 17. 11.2009 wherein the Hon'ble Allahabad High Court took a view that non production of the director of a Public Limited company which is regularly assessed to Income tax having PAN, on the ground that the identity of the investor is not proved cannot be sustained. Attention was also to the similar ruling of the ITAT Kolkata bench in the case of ITO v. Devinder Singh Shant in ITA No.20BIKo112009 vide order dated 17.04.2009.

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

of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been established. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal of the Revenue."

(d) In the case of ITO vs. Megasun Merchants (P.) Ltd. [IT Appeal No. 1038 (Kol) of 2015, dated 29-3-2019], it was held as follows:-

"44. To conclude, in this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee, cannot be brushed aside by the AO to draw adverse view, cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we hold that an addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to uphold the order of the Ld. Commissioner of Income Tax (Appeals).Section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we confirm the order of ld CIT(A) in deleting the addition of Rs.1,60,00,000/-.
45. In the result, the appeal of the Revenue is dismissed."

9. In the instant case, the doubts expressed in the reasoning of the AO in the instant case is on the premise that the apparent is not real which is based on the decisions of the Apex Court in the cases of CIT vs. Durga Prasad More (1971) 82 ITR 540 and Sumati Dayal vs. CIT (1995) 214 ITR 801 wherein it was expounded that Revenue authorities are also supposed to consider the surrounding circumstances and apply the test of human probability. In the case of Sumati Dayal (Supra), the assessee has claimed to have won substantial amount in horse races in two consecutive assessment years. When the matter reached the Settlement Commission, it was held by the majority view that the appellant did not really participate in any of the races, except purchasing the winning tickets after the events. The Chairman of the Settlement Commission expressed dissenting opinion and stated that the assessee has produced the evidence in support of the credits in the form of certificates from Racing Clubs. The Apex Court after considering the ratio of

CIT vs. Durga Prasad More (Supra) upheld the majority view of the Settlement Commission and held at page 808 of the Report as under:

> *"The observation by the Chairman of the Settlement Commission that "fraudulent sale of winning tickets is not an usual practice but is very much of an unusual practice" ignores the prevalent malpractice that was noticed by the Direct Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972, whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc., was withdrawn. Similarly, the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering the surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winnings from races is not genuine."*

Thus, it is evident that the facts of the instant case are quite different from the facts in the case of CIT vs. Sumati Dayal (supra). In that case, there were claims for winning of substantial amounts in horse races in two consecutive years and the Hon'ble Supreme Court rejected the assessee's claim about her winnings from races as genuine and gave finding keeping in view the facts relating to that issue only. While in the case of the appellant, it had received share application monies and share premium monies from various corporates who were duly assessed to tax and have disclosed the transactions in their own records. Therefore, the ratio of decision in the case of CIT vs. Sumati Dayal (supra) is not applicable to the case of the appellant. In this respect, it is observed that there was no ground to draw any adverse inference against the appellant, in relation to the provisions contained in s. 68 of the said Act since the appellant had adduced all possible evidence in support of the share capital raised by it and there was nothing more for the director of the appellant to state in that respect. Thus, the justification sought to be construed by the AO in support of his adverse action fails on merit. It is observed that the nature and source of such money received from the share applicants were duly explained by the appellant. Therefore, in my considered opinion, the appellant has discharged its primary onus of proving the identity and creditworthiness of the share applicants and genuineness of the transactions, more so when the share applicants had sufficient funds in their possession from which such investment in share subscriptions were made. Thus, the requirements of the provisions of s. 68 of the Act are duly met by the appellant and

therefore, the AO was entirely in error in resorting to the impugned addition thereunder misconceiving the sweep and scope of the case of CIT vs. Sumati Dayal (supra).

9.1. Further, I am aware of the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd (2019) 412 ITR 161 (SC) wherein the addition made on account of share capital towards cash credit was rendered in favour of the revenue. I have gone through the said judgement and I find in that case, the AO had made extensive enquiries and from that he had found that some of the investor companies were non-existent which is not the case before me. Certain investor companies did not produce their bank statements proving the source for making investments in the assessee company, which is also not the case before me. Source of funds were never established by the investor companies in the case before the Hon'ble Apex Court, whereas in the instant case, the entire details of source of source were duly furnished by all the respective share subscribers before the AO and the AO did not make any investigation into the subscription received by the appellant. Hence the decision is factually distinguishable and does not advance the case of the AO.

9.2. Further during the course of assessment proceedings, the AO has conceived that the share premium received along with share capital to be unexplained without considering into the facts of the instant case. In my considered opinion, the issue of shares at premium is always a commercial decision which does not require any justification. In any case, the premium is a capital receipt which has to be dealt with in accordance with sec.78 of the Companies Act, 1956. In other words, it is a prerogative of the Board of Directors of the appellant to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a premium. It is an accepted position that in case of unlisted companies, share premium is fixed upon mutual agreement. In this context the Hon'ble Income Tax Appellate Tribunal, Mumbai "G" Bench in the case of ACIT vs. Gagandeep Infrastructure P. Ltd. (ITA No. 5784/Mum/11, dated 23.04.2014) has held as under: -

> *6. After considering the facts and the submissions, the Ld. CIT(A) observed that the AO has not given any reason as to why the investment with a premium is not genuine when the assessee has produced all the details of investors in the form of share application form, bank account details, copies of the return of income alongwith balance sheet. The Ld. CIT(A) further observed that charging of premium is outlook of the investors. If an investor finds that the payment of premium is justified then only he would look to invest otherwise he may not invest in the shares of newly promoted company. The Ld. CIT(A) was of the belief that the department cannot question the charging of premium by the company. The Ld. CIT(A) further observed that the genuineness and the credit worthiness of the investors could have been examined by the AO which he has not made. Drawing support from the decision of the Hon'ble Supreme Court in the case of Loevely Exports Pvt. Ltd. 216 CTR 195, the Ld. CIT(A) deleted the addition*

holding that the AO has not justified in adding the increase in share capital alongwith share premium as unexplained cash credit u/s. 68 of the Act."

In fact, this decision was approved by the Hon'ble Bombay High Court in the case of CIT vs. Gagandeep Infrastructure P. Ltd. (2017) 394 ITR 680 (Bom) as follows: -

"We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. 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 by the impugned order of the Tribunal and on facts it was found satisfied. 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 assessee's income as unexplained cash credit."

Therefore, charging of share premium cannot be questioned in isolation than that of share capital. Once it is established that the share subscribers are genuine, their creditworthiness is established and the genuineness of the transaction is not doubted, the AO cannot justifiably claim to put himself in the arm-chair of the appellant or in the position of the Board of Directors and assume the role to decide how much premium is reasonable in the given circumstances. This is another reason for which the addition on this account will fail the test of reason.

10. Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the A/R that the appellant has proved its case that the identity of the share applicants are established beyond doubt and there is no adverse finding reached by the AO on this aspect. Admittedly, all the share applicants are existing assessees under the Act and that some of them were subject to scrutiny assessment during the same period establish the identity and authenticity of the share applicants. About the genuineness of the transactions there is neither any adverse finding in the assessment order nor one which is contrary to

the facts brought on record by the appellant during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by the source as apparent from their audited balance sheet, return and bank statement. The net worth of such subscribers are in excess of the amounts invested by each of them with the appellant. The addition made by AO is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and rejected the evidence adduced during the course of the assessment proceedings by the appellant out of hand. Thus, it is held that the investment by the share applicants in the share capital of the appellant do not warrant the inference that such share application along with premium received is unaccounted cash credit. There is no material brought on record to that effect and wild speculation of this genre cannot be passed off as gospel truth. Hence, I am inclined to accept the submissions made by the AR of appellant in this respect. In view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances and accordingly, direct him to delete such addition of Rs.7,26,50,000/- made on this count. Thus, Ground Nos. 1, to 4 of the appeal is allowed.

11. Ground no. 5 is general in nature which requires no adjudication.
12. In the result, the appeal of the appellant is treated as allowed."

12. After going through these detailed finding and examining the same in the light of the documents filed before us, we notice that all the 9 (nine) shareholder are body corporates and annual returns have been regularly filed on the Ministry of Corporate Affairs portal. All the share applicant companies are regularly assessed to tax. From perusal of the financial statements of the share subscribing companies, we notice that they had sufficient share capital and accumulated Reserves and surplus which are sufficient enough to cover up the share application money invested by them in the equity of the assessee company. In the above given facts and circumstances, we are inclined to hold that the assessee has successfully explained the nature and source of alleged sum and even the source of source has been proved by providing details of the funds received from other sources through banking channel which has

subsequently been used to make investment in the equity capital of the assessee company.

13. The ld. D/R has merely given a general statement that these companies are paper/shell companies but no concrete evidence is filed on record which could prove the substance in such submissions failing which the issue in hand can be decided only on the basis of documentary evidence available on record and which clearly states that the assessee has explained the nature and source of the alleged sum thereby proving the identity and creditworthiness of the share subscribers and genuineness of the transactions. So far as the reliance of the Ld. DR on the decision of the Hon'ble Supreme Court in the case of "*PCIT v/s NRA Iron & Steel (P) Ltd.*" (supra) is concerned, we note that the Hon'ble Supreme Court in the said case has taken note of the observations made by the Supreme Court in the *"the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan Di Hatti v. CIT [1977] 107 ITR 938 (SC) laying down the proposition that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source."*

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

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

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

13.1. The Hon'ble Supreme Court, thus, has held that once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness of the subscribers, then the AO is duty bound conduct to conduct an independent enquiry to verify the same. However, as noted above, the Assessing Officer in this case has not made any independent enquiry to verify the genuineness of the transactions. The assessee having furnished all the details and documents before the Assessing Officer and the Assessing Officer has not pointed out any discrepancy or insufficiency in the said evidences and details furnished by the assessee before him. As observed above, the assessee having discharged initial burden upon him to furnish the evidences to prove the identity and creditworthiness of the share subscribers and genuineness of

the transaction, the burden shifted upon the Assessing Officer to examine the evidences furnished and even made independent inquiries and thereafter to state that on what account he was not satisfied with the details and evidences furnished by the assessee and confronting with the same to the assessee. In view of this, even applying the ratio laid down by the Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron and Steel Pvt. Ltd. (supra),* impugned additions are not warranted in this case.

14(a). Our view is further supported by the following judicial pronouncements:-

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

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

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

> *9. We have considered the rival submissions., We are of the view that order of CIT(A) does not call for any interference. It may be seen from the grounds of appeal raised by the Revenue that the Revenue disputed only the proof of identity of the shareholder. In this regard it is seen that for A Y.2004-05 Shree Shyam Trexim Pvt. Ltd., was assessed by ITO, Ward- 9(4), Kolkata and the order of assessment u/s/143(3) dated 25.01.2006 is placed in the paper book. Similarly Navalco Commodities Pvt. Ltd., was assessed to tax u/s 143(3) for A Y.2005-06 by I TO, Ward- 9(4), Kolkata by order dated 20.03.2007.*

Similarly Jewellock Trexim Pvt. Ltd was assessed to tax for A Y.2005-06 by the very same ITO- Ward- 9(3), Kolkata assessing the Assessee. In the light of the above factual position which is not disputed by the Revenue, it cannot be said that the identity of the share applicants remained not proved by the assessee. The decision of the Hon'ble Allahabad High Court as well as ITA T Kolkata Bench on which reliance was placed by the learned counsel for the assessee also supports the view that for non production of directors of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been established. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal of the Revenue. "

c) Further the co-ordinate bench in the case of *ITO vs. Forceful Estates Pvt. Ltd.* in *ITA No. 2558/Kol/2018; Assessment Year 2012-13, order dt. 08/02/2023*, and for necessary reference, the facts and findings of the Tribunal read as follows:-

"5. The ld. counsel has further invited our attention to the impugned order of the CIT(A) to submit that the ld. CIT(A) has categorically noted that the assessee during the year had raised share capital including share premium amounting to Rs.7,60,00,000/- from six share subscribers. The Assessing Officer had issued notices u/s 133(6) of the Act to the share applicants and in response, they all confirmed the transactions and furnished details/documents as called for including source of fund in their hands. The ld. CIT(A) has considered the evidences and details on record and found that the assessee has been able to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction. The relevant part of the order, for the purpose of ready reference, is reproduced as under:

"5. Conclusion:

Ground No.1 & 2

I have considered the order of the A.O as well as the submission of the appellant. I have also considered the judicial decisions relied upon by the appellant. The facts of the case have already been discussed as above. It is observed that in the year under consideration the appellant company had raised share capital of Rs.7,60,00,000/-from 6 parties. In the course of the assessment proceedings, to verify the receipt of share capital, the AO issued notices u/s.133(6) to all the 6 share applicants and in response, they all confirmed the transactions submitted the details/document in respect of the subscription of shares of the appellant. In the course of the appellate proceedings, the appellant filed copy of each of the assessment orders passed in all the 6 cases of the shareholders for that year in which the share subscription amount has been received by the assessee company. Besides, the income-tax return filing acknowledgment, Audited Balance and sheets as on 31.03.2012, relevant bank, copy of the notices issued u/s 133(6) to the shareholders and reply thereof were also submitted.

It is observed form the details & documents furnished by the appellant that in the cases of 2 share holders, namely 1) M/s Alfort Merchants Private Limited, 2) M/s Sharekhan Merchants Private Limited, the Assessment Orders u/s 143(3) for Lne AY 2012-13 were passed u/s. 143(3) without taking any adverse view. Therefore, it can be assumed that the respective Assessing Officers have all verified the accounts and therefore any amount that is credited from these two companies to the assessee company is fully explained. The assessment in the case of the other 4 share holders, namely, 1) M/s. Dhanamrit Commercial Private Limited, 2) M/s Jealous Commercial Private Limited, 3) M/s Mutual Merchants Private Limited, 4) Winsom Vanijya Private Limited were also passed u/s.143(3) where additions u/s 68 & u/s.14A of the Act were made. Therefore, the entire capital of all the above mentioned share holders had been added in its hands u/s 68 of the I.T. Act Thus, once an amount is already taxed, whatever investment is being made out of it in the assessee company can be treated as explained and the Same cannot be taxed again. Further, it is apparent from the records that the notices u/s.133 (6) issued to the shareholders were served on the their respective address by the postal authorities and in response, they confirmed the transactions and also submitted the details of the source of funds for making investment. Hence, the identity & creditworthiness of the shareholders are not in doubt. Further, all the share application money was received through banking channels. Therefore, the issue for my consideration now is -whether the share capital of Rs.7,60,00,000/- raised during the year by the appellant can be treated as unexplained cash credit u/s. 68 of the I.T Act or not.

When the identity & creditworthiness of the shareholders have been clearly established because all of them were scrutinized u/s 143(3) and thus the source of the share capital and the share premium are clearly established and the transactions have all taken place through banking channels, merely for failure of the directors of the assessee and the shareholders to appear before AO in person in response to the summons issued to them u/s.131 of the Act, the addition cannot be in my considered opinion, unjustified. Where the corpus becomes technically explained in the eyes of law, how can, the credits arising out of the same corpus can be viewed as unexplained u/s 68 of the IT Act.

In view of the facts & circumstances of the case it is held that the addition of Rs.7,60,00,000/- for the share capital raised by the appellant from 6 share applicants as unexplained cash credit u/s 68 of the Act was not justified and the same is directed to be deleted. The appeal of the assessee company on Grounds No.1 & 2 are treated as allowed.

Ground no. 3 is general in nature, which does not require adjudication.

6. In the result, the appeal of the assessee is treated as allowed."

6. A perusal of the above concluding part of the order of the CIT(A) reveals that the ld. CIT(A) has not only taken note of the accounts of the share subscribers but also, noted that all the six share subscribers were assessed u/s 143(3) of the

Act. Out of which, no additions were made in case of two share subscribers. However, in the case of other four share subscribers, the additions were made regarding their source of income. Now, it is settled law, once the addition has been made in the hands of the share subscribers, the investments by which share subscribers in the hands of the other company whose shares have been subscribed stood explained then no additions in such a case would be warranted in the hands of the assessee company as it would amount to double additions of the same amount. Even if the said addition stand confirmed in the appeal or stand deleted, in both the instances, the investment in the hands of the assessee company will stand proved.

Reliance has been placed in this respect on the decision of the Coordinate Kolkata bench of the Tribunal in the case in the case of DCIT vs. M/s Maa Amba Towers Ltd. in ITA No.1381/Kol/2015 vide order dated 12.10.2018. The aforesaid decision has been further relied upon by the coordinate Kolkata bench of the Tribunal in the case of "Steelex India (P) Ltd vs. ITO, Ward-3(2), Kolkata"I.T.A. No.2666/Kol/2019 decided vide order dated 09.09. 2022.
7. Further, a perusal of the Assessment order would reveal that the AO has duly acknowledged the receipt of the relevant documents/evidences not only from the assessee, but also from the subscriber companies. However, he insisted for personal appearance of the directors of the subscriber companies without even going through and discussing about the discrepancies, if any, in the documents furnished by the assessee as well as by the share subscriber companies to prove the identity and creditworthiness of the subscribers and the genuineness of the transaction. The AO has not pointed out in the Assessment Order as to what further enquiries he wanted to make from the directors of the subscribers to insist for their personal presence.

The Assessee in this case, as noted above, explained about the identity, creditworthiness and financials etc. of each of the share subscriber company individually. However, we note that in the assessment order that the AO has not even mentioned the names of the share subscriber companies and even has not mentioned a word as to which of the share subscriber company or the corresponding transaction thereof was not genuine and on what grounds. The AO, in our view, could have taken an adverse inference, only if, he would have pointed out the discrepancies or insufficiency in the evidences and details received in his office and pointed out as to on what account further investigation was needed by way of recording of statement of the directors of the subscriber companies. Even if the directors of the subscriber companies have not come personally in response to the summons issued by the AO, in our view, adverse inference cannot be taken against the assessee solely on this ground as it is not under control of the assessee to compel the personal presence of the directors of

the shareholders before the AO. The Ld. Counsel for the assessee has rightly placed reliance upon the decision of the Hon'ble Bombay High Court in the case of PCIT, Panji vs. Paradise Inland Shipping Pvt. Ltd. reported in (2017) 84 taxman.com 58 (Bom) wherein the Hon'ble High Court has held that once the assessee has produced documentary evidence to establish the existence of the subscriber companies, the burden would shift on the revenue to establish their case. Further the jurisdictional Calcutta High Court in the case of "Crystal networks (P) Ltd. vs CIT" (supra) has held as under:

"We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter creditworthiness. As rightly pointed out by the learned counsel that the CIT(Appeals) has taken the trouble of examining of all other materials and documents viz., confirmatory statements, invoices, challans and vouchers showing supply of bidi as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued in our view is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the produce of the assessee or not. When it was found by the CIT(Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."

8. As the ld. CIT(A), in this case, has not only duly examined the facts and explanation as furnished by the assessee but also has given a categorical finding that the identity and creditworthiness of the share subscribers and genuineness of the transaction stood established.

9. The ld. DR could not point out any distinct facts warranting our interference in the order of the CIT(A).

10. In view of the above, we accordingly upheld the order of the CIT(A). The appeal of the revenue is, therefore, dismissed."

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

"Section 68 of the Income-tax Act, of 1961, deals with cash credits. It states that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source

thereof or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The crucial words in the provision are "the assessee offers no explanation". This would mean that the assessee offers no proper, reasonable and acceptable explanation as regards the amount credited in the books maintained by the assessee. No doubt the Act places the burden of proof on the taxpayer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their confirmations, the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit to be justified in referring to section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee submits the explanation concerning the cash credit, the Assessing Officer should consider it objectively before he decides to accept or reject it. Where the assessee furnishes full details regarding the creditors, it is up to the Department to pursue the matter further to locate those creditors and examine their creditworthiness. While drawing the inference, it cannot be assumed in the absence of any material that there have been some illegalities in the assessee's transaction.

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

15. Respectfully following the above decisions, which in our view are squarely applicable on the facts of the instant case, we find that the assessee has successfully discharged the burden of proof primarily casted upon it to explain the identity and creditworthiness of all the alleged share applicants and genuineness of the share transactions and

correctness of such details has not been disputed by the Revenue Authorities except making general observations. Therefore, considering the evidences placed by Ld. A/R to explain the nature and source of the alleged share application money, we find no reason to interfere with the detailed finding on facts by the ld. CIT(A) deleting the addition of Rs.7,26,50,000/- made u/s 68 of the Act.

16. In the result, appeal of the revenue is dismissed.

Order pronounced in the Court on 8th February, 2024 at Kolkata.

Sd/-	*Sd/-*
(SANJAY GARG)	**(DR. MANISH BORAD)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Kolkata, Dated 08/02/2024
SC Sarkar

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

1. **अपीलार्थी / The Assessee**
2. **प्रत्यर्थी / The Respondent**
3. **संबंधित आयकर आयुक्त / Concerned Pr. CIT**
4. **आयकर आयुक्त (अपील) / The CIT(A)-**
5. **विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण,** कोलकाता**/DR,ITAT, Kolkata,**
6. **गार्ड फाई/ Guard file.**

आदेशानुसार/ BY ORDER
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata