

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM]

I.T.(SS).A No. 84/Kol/2015

Assessment Year : 2011-12

ACIT, CC-3(1), Kolkata

-vs- M/s Visa Minmetal Limited.

[PAN: AADCV 1426 H]

(Appellant)

(Respondent)

For the Appellant : Shri A. K. Tulsian, AR

For the Respondent : Shri G. Mallikarjuna, CIT DR

Date of Hearing : 24.05.2018

Date of Pronouncement : 01.08.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-21, Kolkata [in short the Id CIT(A)] in Appeal No. 445/CC-3(1)/CIT(A)-21/14-15 dated 13.03.2015 against the order passed by the DCIT, Central Circle-1, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 28.03.2013 for the Assessment Year 2011-12.

2. The only issue to be decided in this appeal is as to whether the Id CITA was justified in deleting the addition made towards unexplained cash credit in the facts and circumstances of the case.

3. The brief facts of this issue are that a search and seizure operations was conducted u/s 132 of the Act in the case of VISA group of assessees in Orissa, West Bengal and Chattisgarh on 11.11.2010. The assessee company is one of the assessee belonging to the group searched. The assessee filed its original return of income for the Asst Year 2011-12 on 28.9.2011 declaring total income of Rs 4,67,129/- . Since the previous year 2010-11 was the year of search, the case for the Asst Year 2011-12 was selected for scrutiny and accordingly statutory notices u/s 143(2) and 142(1) of the Act was issued for the said year. The assessee was requested to furnish various details, information, evidences and clarifications etc which were considered necessary to complete the assessment proceedings. All the details and documents that were called for were duly filed by the authorized representative of the assessee and the same were examined by the ld AO.

4. The ld AO observed that the assessee during the previous year received a total amount of Rs 7,00,00,000/- from different parties. In its written submissions, the assessee claimed this amount to be unsecured loans. The assessee was asked to furnish the names and present postal addresses of the concerned creditors. The assessee was also asked to produce all the loan creditors in order to verify their creditworthiness as well as the genuineness and correctness of the loan transactions in question. The assessee produced the loan creditors on different dates and they were interrogated and their relevant accounts were examined by the ld AO.

4.1. The ld AO observed in his order as under:-

Illustration - 1

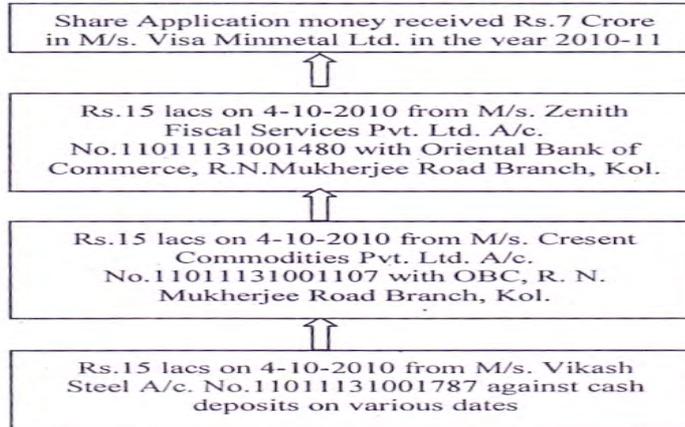
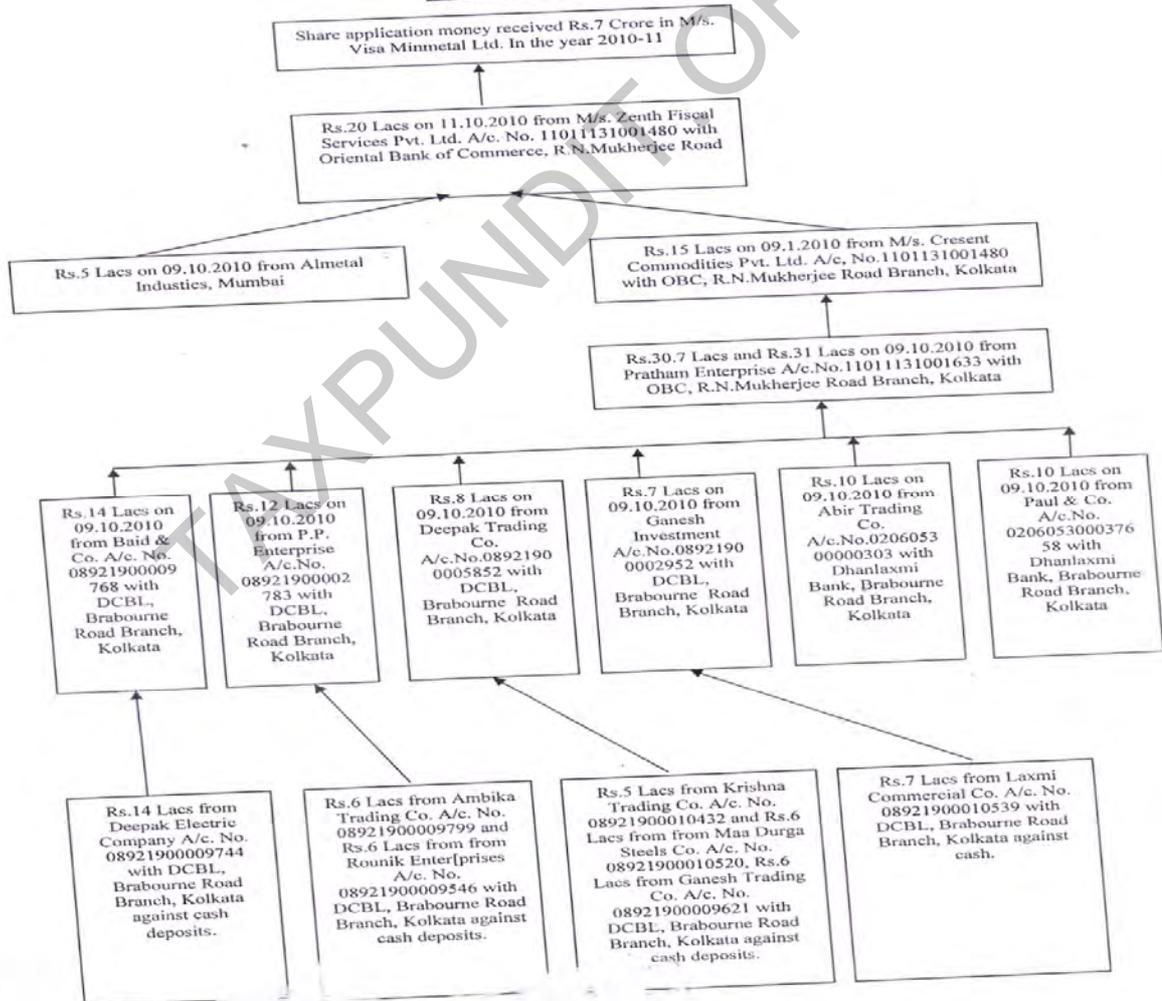


Illustration - 2



4.2. The Id AO observed that from the plain observation of the schematic diagram shown above, it becomes evident that few of the creditors below the first layer of the network, through which the impugned loan amounts came to the assessee, gave the monies to the companies lying in the upper layers to the network in cash. The details of cash that ultimately received by the assessee as unsecured loan by cheque(s) through multi layered transactions are as follows:-

Table from illustration-1

Sl. No.	Name of the company		Amount of Cash
1.	M/s. Vikash Steel	----	Rs.15,00,000/-
	Total		Rs.15,00,000/-

Table from illustration-2

Sl. No.	Name of the company		Amount of Cash
1.	M/s. Deepak Electric Company	----	Rs.14,00,000/-
2.	M/s. Ambika Trading Co.	----	Rs.6,00,000/-
3.	M/s. Rounik Enterprises	----	Rs.6,00,000/-
4.	M/s. Krishna Trading Co.	----	Rs.5,00,000/-
5.	M/s. Maa Durga Steels Co.	----	Rs.6,00,000/-
6.	M/s. Ganesh Trading Co.		Rs.6,00,000/-
7.	M/s. Laxmi Commercial Co.		Rs.7,00,000/-
	Total		Rs.50,00,000/-

4.3. The assessee was asked to produce the above mentioned parties. The Id AO observed that the assessee did neither produce the concerned parties nor offer any cogent explanation in this regard to disprove the contention of the department that the cash transactions were not genuine. He observed that the cash elements involved gave rise to a doubt about genuineness of those particular transactions, the onus shifted to the assessee to prove beyond doubt that the transactions in question are genuine by producing the related parties for examination of their credentials as well as their creditworthiness. Since the assessee failed to do so, the Id AO proceeded to treat the

unsecured loans to the tune of Rs 65,00,000/- (Rs 15,00,000/- of table 1 + Rs 50,00,000/- of table 2) as assessee's own unexplained income and added the same u/s 68 of the Act.

5. The Id CITA deleted the addition towards unsecured loan by observing as under:-

"5. I have considered the submission of the appellant and perused the assessment order. I have also gone through the assessment record maintained by the AO. 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 taken unsecured loans from various parties which were squared off during the year itself. As apparent from the assessment order, in the course of assessment proceedings, the AO asked the appellant company to produce all the concerned loan creditors before him in order to verify their creditworthiness as well as genuineness and correctness of loan transactions in question. As per the AO, the appellant company produced all the loan creditors before him on different dates and these loan creditors were interrogated and their relevant accounts were examined by him. However, in the next paragraph it has been mentioned by the AO that the investigation wing of the department conducted post search enquiries and explored the trail of money that ultimately came to the appellant company in the form of unsecured loan. According to him the said post search enquiry in respect of some of the loan transactions revealed that the loans were received by the appellant through multi-layered transactions between complex networks of companies/parties. Thereafter, in the assessment order he gave schematic diagram of two illustrations showing some cash deposit in the bank accounts of some companies/parties below the line and the movement of fund through the bank accounts or many other companies/parties, then to the loan creditors of the appellant company and, thereafter, transfer of money in the bank account of the appellant company. According to the AO, as per illustration- 1 there was cash deposit of Rs.15 lakh in the account of one M/s Vikash Steel, which was transferred to M/s Crescent Commodities Pvt. Ltd. and from there it went to the account of M/s Zenith Fiscal Services Pvt. Ltd., who advanced the said amount of Rs.15 lakh to the appellant company. Thus, on the basis of aforesaid flow, it is held by the AO that the cash of Rs. 15 lakh which was deposited in the bank account of M/s Vikash Steel was the appellant's money which was received by him in the form of unsecured loan. Thus, the AO added this sum of Rs.15 lakh in the hands of appellant company u/s 68 of the Act.

5.1 Similarly, as per the illustration-2 given on page no. 4 of the assessment order, cash of Rs.14 lakh was deposited in the bank account of M/s Deepak Electric Company, cash of Rs.6 lakh was deposited in the bank account of M/s Ambika Trading Co., cash of Rs.6 lakh was deposited in the bank account of M/s Rounik Enterprises, cash of Rs. 5 lakh in the account of M/s Krishna Trading, cash of Rs.6 lakh was deposited in the account of M/s Maa Durga Steels Co., cash of Rs.6 lakh was deposited in the account of M/s

Ganesh Trading Co. and the cash of Rs.7 lakh was deposited in the bank account of M/s Laxmi Commercial Co. Thus, as per the AO, the cash aggregating to Rs. 50 lakh was deposited in the bank accounts of above mentioned seven parties. From the bank accounts of these seven parties' whole or part of the funds were transferred in the bank accounts of four parties namely M/s Baid & Co., M/s P.P. Enterprises, M/s Deepak Trading Co. and M/s Ganesh Investment. As per the schematic diagram, the fund from the said four parties was transferred to the account of one M/s Pratham Enterprises. In the bank account of Pratham enterprises, the money was also received from M/s Abir Trading Co. and M/s Paul & Co. though there were no cash deposits in these accounts. Further, out of Rs.61.7 lakh deposited/transferred in the bank account of M/s Pratham Enterprises, sum of Rs. 15 lakh was transferred to the account of M/s Crescent Commodities Pvt. Ltd. which was transferred to M/s Zenith Fiscal Services Pvt. Ltd. In the account of Zenith Fiscal Services Pvt. Ltd. sum of Rs 5 lakh was transferred from the account of one M/s Almetal Industries, Mumbai. In this manner, M/s Zenith Fiscal Services Pvt. Ltd. received sum of Rs.20 lakhs from Crescent Commodities Pvt. Ltd. and M/s Almetal Industries, Mumbai and the said sum of Rs.20 lakh was advanced to the appellant company. Whereas, as mentioned above, the total cash deposits in the bank accounts of seven parties were of Rs.50 lakh and, hence, it had been concluded by the AO that the appellant company had given cash of Rs.50 lakhs to various parties who deposited the same in their bank accounts and thereafter received the money in the form of unsecured loan. In other words, the AO was of the opinion that the cash of Rs.50 lakh was the appellant's own money which was deposited in various bank accounts, routed through other various bank accounts and ultimately reached to the appellant company. Hence, he made addition of Rs.50 lakh in the hands of appellant company u/s 68 of the Act. In this manner, the AO made addition of Rs.65 lakh u/s 68 of the Act on account of unsecured loan taken by the appellant company from M/s Zenith Fiscal Services Pvt. Ltd. i.e. to the extent of cash deposits in various bank accounts (Rs.15 lakh + Rs.50 lakh). As per the AO the appellant company was asked to produce the parties in whose bank accounts cash was deposited to prove their credentials and creditworthiness because the involvement of cash element gave rise to a doubt that the transactions in question are not genuine. The AO was also of the view that the onus was on the appellant company to prove beyond doubt that the transactions in question were genuine by producing the related parties for examination. However, the appellant company did not produce these parties. On the other hand, in the course of appellate proceedings the appellant company contested the addition of Rs.65 lakh on various grounds and simultaneously it was also argued by the appellant that it had taken loan from M/s Zenith Fiscal , Services Pvt. Ltd. to the extent of Rs.35 lakh only and not Rs.65 lakh as held by the AO. In support of its claim, the appellant company submitted the copy of ledger account of M/s' Zenith Fiscal services Pvt. Ltd. in its books of account which shows that the sum of Rs.15 lakh was received on 04.10.2010 and the sum of Rs.20 lakh was received on 11.10.2010. The loan amount of Rs.35 lakh was refunded by the appellant company to the creditor on 24.11.2010. Thus, in any case the AO has made excess addition of Rs.30 lakh u/s 68 of the Act in the hands of appellant company which is directed to be deleted.

5.2 During the course of appellate proceedings it is argued by the appellant that as far as the appellant company is concerned it has produced all the loan creditors from whom loans were taken, before the AO, as he wanted to verify the creditworthiness of the loan creditors as well as the genuineness and correctness of the loan transactions. As per the AO's own admission, all the loan creditors were appeared before him and he interrogated them and also examined their relevant 'accounts. It is submitted by the appellant that in the course of assessment proceedings the AO has recorded the statements of all the loan creditors produced before him. Thereafter, in the assessment order, he has not made any adverse comment in respect of any of the loan creditors either about their creditworthiness or the genuineness of the loan transactions. It means that after interrogating the loan creditors and examining their relevant accounts, the AO was fully satisfied with the creditworthiness of the creditors and the genuineness of the loan transactions. Thus, appellant company has discharged the primary onus cast upon on him to prove the identity and creditworthiness of the creditors as well as the genuineness of the transactions. Hence, the AO was not justified in making the addition of Rs.65 lakh u/s 68 of the Act in respect of one creditor i.e. M/s zenith Fiscal Services Pvt. Ltd. from whom the loan of Rs.35 lakh only was taken; on the basis of alleged post search enquiries and cash deposits in the bank accounts of third parties alleging that the cash deposited in the accounts of third parties was the appellant's money. It is also argued by the appellant that on page no. 5 of the assessment order the AO has mentioned that he asked the appellant company to produce the parties as mentioned in Table from illustration-1 and Table from illustration-2 i.e. the parties in whose bank accounts the alleged cash was deposited and that the appellant company neither produce the concerned parties nor offer any cogent explanation in this regard. It is contended by the appellant that the AO was told in the course of assessment proceedings that the appellant company did not have any control over the third parties with whom the appellant company had no transactions at all and that, the appellant company did not know these parties at all and did not have their addresses etc. It is argued by the appellant that on the direction of the AO the appellant produced all the loan creditors before him because the onus was on the appellant to prove the identity and creditworthiness of the creditor from whom loans were accepted. The appellant also proved the genuineness of loan transactions by producing the creditors who also produced all the relevant documents and details before the AO and examined by him. It is submitted by the appellant that as to how the AO could have asked or compel the appellant company to produce any of the third parties with whom the appellant company had no business relation or business transactions and also did not have their addresses etc. The appellant company have no control over the parties mentioned in table-1 and table-2 and, therefore, as to how these parties could be produced by the appellant company before the AO. It is submitted by the appellant company that in the course of assessment proceedings the AO never provided the copies of bank statements on the basis of which the flow diagrams of movement of fund were made by him, He also did not provided copy of statement recorded of these third parties to ascertain as to whether they had stated that the cash deposited in their bank accounts was given by the appellant company to them. The appellant company was never allowed any opportunity to submit its explanation in respect of alleged enquiries and cash deposits in the accounts of third parties alleging that it was appellant's money which was received by

the company in the form of unsecured loan. It is further submitted by the appellant company that there is no evidence on record which may support the allegation of the AO that the cash deposited in the bank accounts of the third parties was the appellant's money. Further, as may be found from the questionnaire issued by the AO in the course of assessment proceedings, even during the course of search operation no material was found which may link the appellant company with the cash deposited in the bank accounts of the third parties. Hence, the conclusion drawn by the AO that the cash deposited in the bank accounts of the parties as per Table-1 and Table-2 was the appellant's money; is baseless and mere presumption without any evidence and no addition could be made u/s 68 of the Act in the hands of appellant company on the basis of baseless allegation.

5.3. In order to verify the contention of the appellant company that the AO did not provide the copy of statements recorded of third parties in whose bank accounts cash was deposited and that as to whether any opportunity of rebuttal was provided to the appellant and as to whether there was any material on record to support the view taken by the AO; in the course of appellate proceedings a letter vide No. CIT(A)-21/Visa Minmetal/2014-15/1110 dated 18.02.2015 was issued to the AO. In the said letter he was asked to inform that as to whether the parties, in whose bank accounts cash was deposited, were examined either by the investigation wing in the course of post-search enquiries or by the AO in the course of assessment proceedings and as to whether their statements were recorded, about source of cash deposited in their bank accounts and their relation with the assessee company. That, as to whether the copies of the bank statements of various parties on the basis of which the flow diagrams of movement of funds have been prepared were given to the assessee company for its comments and as to whether in the course of assessment proceedings opportunity was allowed to the assessee company to explain as to why addition u/s 68 of the Act should not be made in its hands. In response the present AO submitted the reply vide a letter F. No. ACIT/CC-3(1)/Kol/Visa Minmetal/CIT(A)- 21/813 dated 04.03.2015. It is submitted by the present Aa that none of the parties in whose bank accounts cash was deposited, were examined. However, the assessee was given opportunity to produce the parties in whose bank accounts cash was deposited before the then assessing Officer. It is further submitted by the Aa that as per the assessment records, no show cause notice was issued to the assessee in respect of the parties in whose accounts cash was deposited. It is to be mentioned that in the letter issued to the AO, he was also asked to inform that as to whether in the course of search or post search enquiries or in the course of assessment proceedings any evidence or material was gathered which may link the assessee company with the parties in whose bank accounts cash was deposited. To this, the AO replied that he has to examine the seized material and assessment records for which he sought for the time. From the above reply it is apparent that at the third or fourth stage below the line some cash deposits were found in the bank accounts of some third parties by the investigation wing and an inference was drawn that the cash deposited in those accounts was given by the appellant company to them and taken back in the form of unsecured loan. However, both the investigation wing as well as the AO chose not to summon the parties in whose bank accounts cash was deposited to interrogate them about the source of cash deposited in their bank accounts and as to whether they have

any relation with the appellant company. It is not known that as to how without examining the source of cash deposits, it could be inferred that the cash belonged to the appellant company. Neither the investigation wing nor the AO knows that as to whether the said cash was accounted cash or unaccounted cash in the hands of respective parties. If the parties in whose bank accounts cash was deposited were having cash in hand as per their books of account then as to how it could be said that the cash deposited in their accounts was handed over by the appellant company to them and if it was unaccounted, then, before drawing any adverse inference in the hands of appellant company some material has to be brought on record to link the said cash with the appellant company. However, there is nothing on record to prove the inference drawn by the AO in the hands of appellant company. Even the copies of bank statements on whose basis inference was drawn against the appellant company were not provided to him. No show cause notice was issued to the appellant before making addition u/s 68 of the Act. When no enquiry at all had been made from the parties in whose bank accounts cash was deposited to know the source of cash then as to how only on the basis of bank statements it could be concluded that the cash was appellant's money. Nothing was provided to the appellant company to seek for its explanation to rebut the inference drawn. Under the circumstances, the bank statements of the third parties cannot be considered as evidence against the appellant company. In this regard the reliance is placed on the decision of the Hon'ble Supreme Court in the case of Kishinchand Chellaram vs. CIT, 125 ITR 713 (SC). In the said case the assessee firm had offices at Bombay and Madras. On receiving information that the assessee had remitted Rs.1,07,350/- by two telegraphic transfers through a bank, from Madras to Bombay, the ITO wrote two letters, dated 14.01.1955 and 10.02.1955, to the manager of the bank, making enquiries about remittance. These two letters were neither disclosed to the assessee nor brought on record. The manager replied by letter dated 18.02.1955, to the effect that a telegraphic transfer of Rs.1,07,350/- sent by the assessee from Madras was received by bank at Bombay and the amount was paid to 'N' being the assessee's employee, on the same day. This letter was also not disclosed to the assessee. The application for the telegraphic transfer was signed by one 'T' describing himself as 'T' c/o M/s K. Chellaram". There were, at the relevant time two employees of that name, both of whom left service long back. There was another letter dated 09.03.1957, from Madras office, favouring 'N' and this amount was remitted by the assessee through their Madras office. In a copy of this letter forwarded to the ITO, there was an endorsement referring to summons, dated 03.02.1951, issued by the ITO, which was also not disclosed to the assessee. Relying upon those two letters, the Tribunal held that the impugned remittance was undisclosed income of the assessee for the reason that the assessee could not show that the amount did not belong to it, which it could have done by examining the respective employees and bank officers. On reference, the High Court held that there was material before the Tribunal to justify the finding that the impugned remittance was the undisclosed income of the assessee. On appeal to the Supreme Court, Held;

"The letters, dated 14.02.1955 and 09.03.1959, did not constitute any material evidence which the Tribunal could legitimately take into account of the purpose of arriving at the finding that the amount of Rs.1,07,350/- was remitted by the assessee from its Madras

Office, and if these two letters were eliminated from consideration, there was no material evidence at all before the Tribunal which could support its finding. What the manager of the bank wrote in his letters could not possibly be based on his personal knowledge but was based on here say. The revenue authorities ought to have called upon the manager to produce the documents and papers on the basis of which he made the statement and confronted the assessee with those documents and papers. No explanation has been furnished by the revenue as to what happened when the manager appeared to obedience to the summons and what statement he made.

It was not possible to hold, in the face of the application for remittance signed in the name of T, that amount was remitted by the assessee and the finding to that effect reached by the Tribunal must be held to be unreasonable and perverse. Even assuming that these letters were to be taken into account, those letters would at the highest establish that T, an employee, remitted the amount from Madras and N, another employee, received it at Bombay. From this it did not follow that the remittance was made at Madras and received at Bombay on behalf of the assessee, The burden was on the department to show that the one" belonged to he assessee by bringing proper evidence on record and the assessee could not be expected to call T and N, who left the service at the time when the assessment was reopened, in evidence to help the department: to discharge the burden that lay upon it.

Therefore, there was no evidence on the basis of which the Tribunal could come to the finding that the impugned amount was remitted by the assessee and that it represented its undisclosed income,"

5.4 The principle lay down by the Hon'ble Supreme Court in the case of Kishinchand Chellaram (supra) is squarely applicable in the present case. In the present case the investigation wing/AD collected certain information from the banks and found that in some of the bank accounts there was cash deposits. From those accounts certain amounts were transferred in the bank accounts of other companies/parties in two-three steps and thereafter some amount was received by the appellant company in the form of loan. Without examining any of the parties either in whose accounts cash was deposited or the parties in whose accounts fund was transferred from the accounts of cash depositing parties, it was concluded by the AD that the cash deposited in the bank accounts of third parties was the unexplained income of the appellant company. Though, there is no material on record to arrive on such conclusion. It is a fact on record that neither the investigation wing nor the AO provided copies of bank statements collected from the banks to the appellant company. Neither the investigation wing nor the AO examined any of the parties in whose bank accounts cash was deposited to know about the source of cash. No opportunity was allowed to the appellant company before drawing adverse inference in the hands of appellant company invoking the provisions of section 68 of the Act. The AO having found certain cash deposits in the bank accounts of third parties jumped to the conclusion that the cash. In the course of assessment proceedings the AO asked the appellant to produce the parties in whose bank accounts cash was deposited because he was of the opinion that it was the onus on the appellant company to produce those parties and prove the

source of cash deposits in their bank accounts. However, as per law, I am of the opinion that the AO's view was not correct because the appellant was not having any burden on it to produce the third parties with whom he had no business relation or transactions. The appellant was not required to prove the source of the cash deposits in the bank accounts of third parties with whom it had no relation at all. On the contrary, the onus was on the AO to prove that the cash deposited in the bank accounts of third parties was unaccounted and it was deposited by the appellant company in their bank accounts. The AO cannot shift his onus on the appellant company asking it to produce such parties before him for examination. It was the investigation wing/AO who collected information from the banks and drawn an adverse inference in the case of appellant and, hence, such parties whose bank statements were collected were the witnesses of the AO and not the appellant company. The onus was on the AO to call for the parties in whose bank accounts cash was deposited to know the source of cash and confronted the assessee with that material. As held by the Hon'ble Supreme Court in the case of Kishinchand Chellaram (supra), the burden was on the AO to show that the cash deposited in the bank accounts belonged to the appellant company by bringing proper evidence on record and the appellant could not be expected to call/produce those parties, with whom it had no relation, in evidence to help the AO to discharge the burden that lay upon him.

As far as the material and evidence on record to link the appellant company with the parties in whose bank accounts cash was deposited is concerned, on examination of the assessment records it is observed that there was no such material or' evidence on record and, therefore, in the assessment order also the AO has not mentioned any such material or evidence. Had there been any such material or evidence, it would have find place in the assessment order to substantiate the addition u/s 68 of the Act made by the AO. Further, on peru al of questionnaire dated 09.11.2012 issued by the AO in the course of assessment proceedings it is observed that there was no incriminating material this regard for which an explanation was called for from the appellant company and, hence, the AO has not discussed anything in the assessment order.

5.5 I find substance in the submission of the appellant that as far as the appellant company is concerned it was required to prove the identity, capacity and genuineness of transactions in respect of only those parties in whose names credits were appearing in its books of account. It was not required to prove the identity or creditworthiness of any other parties with whom it had no relation or transactions. In compliance thereof the appellant company had produced all the loan creditors appearing in its books of account and admittedly these creditors were examined by the AO and did not draw any adverse inference after examination. Thus, the appellant had satisfied all the three ingredients of cash credits i.e. the identity and creditworthiness of the creditors and genuineness of the transactions. It is important to mention that on examination of the sssessment record it is observed that Shri Rajendra Agarwal, Director of M/s Zenith Fiscal Services Pvt. Ltd. appeared before the AO on 20.03.2013 and he recorded his statement. Shri Rajendra Agarwal confirmed that the company M/s Zenith Fiscal Services Pvt. Ltd. had given short term loan of Rs.35 lakh to the appellant company on 04.10.2010 and 11.10.201and the same-was returned in that financial year itself on

24.11.2010. He produced all the relevant documents and the bank statement etc. including the loan confirmation to prove the creditworthiness and the genuineness of the loan transaction. The AO examined everything and accepted the same without making any adverse comments. It is observed that the AO did not ask any question from him about any of the third parties whose names have been mentioned in table-1 and table-2. If, the A would have been having any doubt about the creditworthiness of M/s Zenith Fiscal Services Pvt. Ltd., or the genuineness of the transactions, then, he would have ask further questions from him about sources of fund. It means, the AO was satisfied about the creditworthiness of the creditor and genuineness of the transactions. But, without further questioning the creditor or the third parties the adverse inference had been drawn in the hands of appellant company which is, in my opinion, is not correct. Since, appellant had discharged its onus by proving three ingredients of cash credit i.e. the identity of loan creditor, creditworthiness of the creditor and genuineness and hence no adverse inference be drawn against the appellant without any further material or evidence on record. There is no evidence on record to hold that the cash deposited in the bank accounts of third parties with whom the appellant company had no relation transaction, belonged to the appellant company to invoke the provisions of section 68 of the Act in the case of appellant company. In the case of appellant the addition u/s 68 of the Act has been made by the AO only on presumption that the cash deposited in the bank accounts of third parties was appellant's own money taken in the garb of unsecured loan whereas the loan was squared off during the year itself and there is no material on record to support the inference drawn by the AO. The AO himself is 'not aware as to whether the cash deposited in the bank accounts of third parties was accounted for in their books of account or not and, hence, there is no question of drawing adverse inference in the hands of appellant company alleging that the cash deposited in the bank accounts was the appellant's money. In the case of Commissioner of Income- tax vs. Baishnab Charan Mohanty 212 ITR 199 (Orissa), the Hon'ble High Court has held as under:

"When a question arises as to whether a cash credit appearing in the books of account of an assessee has to be accepted or to be rejected and addition to be made on accordance with section 68 of the Income- tax Act, 1961, the assessee is required to establish the identity of his creditor, the capacity of the creditor to advance the money and the genuineness of the transaction. If the assessee establishes the aforesaid three pre-conditions, then it would be for the Department to disprove the same. "

The similar issue was decided by the Hon'ble Gujarat High Court in the case of DCIT vs. Rohini Builders, 256 ITR 360 (Gujarat). The head note is as under:

"Section 68 of the Income-tax Act, 1961 - Cash Credits - Assessing Officer made addition of Rs.12,85,000/- as unexplained cash credits in respect of loans taken by the assessee from 21 parties - Assessee had discharged initial onus by providing identity of all creditors by giving their complete address, GIR numbers/permanent account numbers and copies of assessment orders wherever readily available - Assessee had also proved capacity off creditor by showing

that amounts were received by account payee cheques drawn from bank accounts of creditors - Repayment of foams and interest thereon was also made by account payee cheques by assessee and tax also had been deducted at source on interest payment and remitted - Whether assessee was not expected to prove genuineness of cash deposited in the bank accounts of creditors, because under law, assessee can be asked to prove source of credits in its books of account but not source of source - Held, yes - Whether merely because summons issued to some of creditors could not be served or they failed to appear before Assessing Officer, could not be ground to treat those creditors as non-genuine -Held, yes - Whether considering totality of facts and circumstances of case, especially fact that Assessing Officer had not disallowed interest claimed/paid in relation to those creditors in assessment year under consideration or even in subsequent assessment years, and tax at source had been deducted out of interest paid/credited to creditors, Tribunal was justified in deleting addition made - Held, yes Whether as there was no substance in appeal and no substantial question of law arose, appeal was liable to be dismissed - Held yes.”.

The SLP filed by the Revenue before the Hon'ble Supreme Court against the order of the High Court of Gujarat in the above mentioned case was dismissed/rejected by the Apex Court.

5.6 The facts in the case of Rohini Builders are similar to the facts in the present case. The appellant company produced all the loan creditors before the AO who examined them to find out their creditworthiness and genuineness of loan transactions. The AO recorded the statements of all the creditors and examined their documents including the bank statements. Being satisfied he did not draw any adverse inference and did not questioned either the creditors or the appellant company any further. The appellant had discharged the "pr mary onus cast upon it and the AO cannot ask the appellant to prove the genuineness the cash deposited in the bank accounts of third parties from whom even the creditors of the appellant company had not received any amount directly. Thus, I am of the opinion that no adverse inference can be drawn in the hands of appellant company within the meaning of section 68 of the I.T. Act.

5.7 I find support of my view from the decision of the Hon'ble Delhi High Court in the case of CIT-V vs Real Time Marketing (P) Ltd., 306 ITR 35 (Delhi), wherein exactly similar issue as involved in the present appeal was decided. The facts of the said case are that the assessee was a Private Limited Company. During the previous year, it had taken unsecured loan of Rs.2S lakhs from M/s Aishwaray Capital Lease Finance Ltd. (hereinafter referred to as 'ACL'). The AO asked the assessee to file a copy of income-tax return along with the audited profit and loss account and balance sheet with annexures and copy of bank statement of M/s ACL. The assessee furnished the same accordingly. On perusal of the bank statement of M/s ACL, the AO noticed that the funds were transferred through internal transfer on 28.03.2001 to M/s ACL and then in the same manner in the bank account of the assessee company. The AO called for information from the bank under section 133(6) of the Act to locate the true nature of

these internal transactions and the exact source of funds. It was revealed on information furnished by the bank;

a) that on 28.03.2001 cash of Rs.22,97,000/- was deposited in account No. 4142 pertaining to M/s Fair Business Security and Leasing Pvt. Ltd. (hereinafter referred to as 'FBSL').

b) from this account No. 4142 a sum of Rs.25 lakhs was transferred to account No. 4016, which stood in the name of M/s Breeze Trade Links (P) Ltd.. (hereinafter referred to as 'BTL') on the same day.

c) on the same day, Rs.25 lakhs were transferred from account No. 4016 to M/s ACL, having account No. 4144 and,

The AO also noticed that all the three companies referred to above had same address, i.e. B-258, Naraina Industrial Area, Phase-I, Delhi, further no interest was charged by any of these transferees. The AO was thus of the view that the entire transaction was a sham transaction and asked the assessee to show cause as to why cash deposit of Rs.22,97,000/- made into the account of M/s FBSL be not added as taxable income of the assessee for the year under consideration. The assessee submitted his reply and filed confirmation from M/s ACL. The assessee also submitted that the cash deposited by M/s FBSL was not its money and that it was from the books of the said company.

The AO however, held that it was the assessee's money of Rs.22,91,000/- which was deposited in cash into account of M/s FBSL and the same was routed through different accounts and received as unsecured loan by the assessee company and thus made an addition of Rs.15 lakhs as unexplained cash credit under section 68 of the Act.

On appeal filed by the assessee, the CIT(A) held that the assessee had discharged its burden of proving the identity, capacity and genuineness of transaction and in the circumstances the addition made by the AO was not justified. It was also observed by the CIT(A) that the AO had not chosen to issue summons to M/s FBSL, M/s ACL or M/s BTL before coming to the conclusion that all the transactions were from and out of the money provided by the assessee.

Being aggrieved by the order of the CIT(A), the revenue preferred an appeal before the Tribunal and vide impugned order the Tribunal dismissed the appeal of the revenue.

On further appeal to the High Court, it had been contended by the Ld. counsel for the revenue that the assessee has used circular route to receive the loan in its account and the same is merely a device being used to evade tax and as such, loan is taxable under section 68 of the Act.

The Hon'ble High Court observed and held that there is a finding of fact given by two authorities namely the CIT(A) and the Tribunal to the effect that:

"The confirmation of M/s ACL has been filed by the assessee. The said company was assessed to tax. The source of ACL had been explained as out of transfer of funds from the account of M/s BTL. Thus, the assessee discharged its burden of proving identity, capacity and genuineness of transaction. The AO has not brought any material to show that the funds to ACL were provided by the assessee. Under the circumstances, it cannot be said that the cash credit in question has remained unexplained. There is absolutely no material to link the assessee with the sum of fres.22,97,000/- deposited in cash in the bank account of M/s FBSL."

On the above facts, it is held by the Hon'ble High Court of Delhi that in view of the concurrent finding of fact given by the two authorities that there is no material to link the assessee with a sum of Rs.22,97,000/- deposited in cash in the bank account of M/s FBSL, as such, no case is made out for making addition under section 68 of the Act, since there was no material, with the AO to come to the conclusion regarding any genuineness or fictitious identity of the entries or non-capacity of the lender. Under these circumstances, we do not find any infirmity or perversity in the order passed by the Tribunal and in our opinion no substantial question of law arises in this case. With the result, the present appeal is not maintainable and the same is hereby dismissed."

5.8 Thus, it may be observed that the facts in the case of M/s Real Time Marketing (P) Ltd., (supra) before the Hon'ble Delhi High Court were exactly similar to the facts in the case of present appellant company. In this case also the AO has made addition u/s 68 of the Act alleging that the cash deposited in the bank accounts of third parties was the appellant's own money whereas he has brought no material on record to link the appellant company with the companies/parties in whose bank accounts cash was deposited. The AO had not chosen to examine the parties in whose bank accounts cash was deposited or thereafter the funds were transferred in the accounts of other parties by issuing summon to them. On the contrary, he put the burden on the appellant company to produce such parties whereas the appellant company was not having any relation with them. The burden on the appellant company was limited to the extent that it was required to prove the identity, capacity and genuineness of transactions only in respect of the parties in whose names cash credit was appearing in its books of account. In compliance thereof the appellant company produced all its creditors before the AO along with their relevant documents and confirmations. These creditors were examined by the AO as admitted by him in the assessment order. Thus, the appellant company had discharged its burden of proving identity, capacity and genuineness of transactions. Under the circumstances, no addition can be made u/s 68 of the Act in the case of appellant company, In view of above facts and respectfully following the principle laid down in the above discussed judicial decisions specifically the decision in the case of M/s Real Time marketing (P) Ltd. (supra), it is held that the AO was not justified in making the addition on account of unexplained cash credit u/s 68 of the Act and the same is directed to be deleted. The ground no. 1 is allowed."

6. Aggrieved, the revenue is in appeal before us.

7. We have heard the rival submissions and perused the materials available on record. The facts stated herein above are not reiterated for the sake of brevity. We find that the dispute is with regard to addition made u/s 68 of the Act on merits as well as the quantum of addition made thereon. At the outset, we find that the Id AO himself had recorded in page 3 of his order that the assessee was asked to produce all the concerned loan creditors before him and that they were duly produced before the Id AO. The said loan creditors were duly interrogated by the Id AO and their accounts were examined as mentioned in page 3 of assessment order. Later the Id AO in the very same assessment order at page 5 states that the parties were not produced before him for examination which ultimately formed the basis of making addition u/s 68 of the Act as according to him, his suspicion about the subject mentioned loan transactions were not clarified by the assessee. Whether the parties were produced by the assessee before the Id AO is a question of fact. In this regard, we find from pages 4 & 5 of the paper book, that a statement on oath has been recorded from Shri Rajendra Agarwal of M/s Zenith Fiscal Services Private Limited (which is one of the loan creditor) on 21.3.2013 in connection with the assessment proceedings of the assessee, by the Id AO.

7.1. We also find at page 6 of the paper book filed before us containing order sheet entries which states as under:-

21.3.2013 – Shri Ankit Todi, Director of M/s Link Towers Pvt Ltd was produced and statement recorded from him in connection with the unsecured loan transaction with the assessee and placed in a separate folder.

21.3.2013 – Shri Rajendra Agarwal, Director of M/s Zenith Fiscal Services Pvt Ltd was produced and statement recorded from him in connection with the unsecured loan transaction with the assessee and placed in a separate folder

21.3.2013 – Shri Vinod Kumar Sharma, Director of M/s Link Point Dealcom Pvt Ltd was produced and statement recorded from him in connection with the unsecured loan transaction with the assessee and placed in a separate folder

21.3.2013 – Shri Sanjay Kumar Ram Gond, Executive of M/s Glorious Holdings Pvt Ltd was produced and statement recorded from him in connection with the unsecured loan transaction with the assessee and placed in a separate folder

7.2. We find that the entire details called for by the Id AO were filed by M/s Zenith Fiscal Services Pvt Ltd which are enclosed in pages 7 to 59 of the paper book filed before us comprising of (i) relevant page of bank statement of Zenith Fiscal Services Pvt Ltd (page 7 of paper book) ; (ii) loan confirmation from Zenith Fiscal Services Pvt Ltd together with their PAN and to prove that the transactions had happened only through cheques (page 8 of paper book) ; (iii) Company master data of Zenith Fiscal Services Pvt Ltd downloaded from Registrar of Companies (page 9 of paper book) ; (iv) PAN and income tax jurisdiction of Zenith Fiscal Services Pvt Ltd as per income tax e-filing website (page 10 of paper book) ; (v) audited financial statements of Zenith Fiscal Services Pvt Ltd as on 31.3.2011 together with detailed schedules (pages 11 to 34 of paper book) ; (vi) fresh fresh certificate of incorporation issued by Registrar of Companies consequent to change of name from Minsulate Engineers Private Ltd to Zenith Fiscal Services Pvt Ltd with effect from 10.3.1993 (page 35 of paper book) ; and (vii) Memorandum and Articles of Association of Zenith Fiscal Services Private Ltd (pages 36 to 59 of paper book).

7.3. We find that the Id CITA had elaborately analysed the entire factual matrix of the case and the entire movement of funds together with the respective sources which completely remain uncontroverted by the revenue before us. None of the factual findings of the Id CITA were controverted by the revenue before us. We find that the Id CITA had relied on various high court and supreme court decisions in support of the assessee. The revenue was not able to furnish any decision to the contrary. The loan creditors were also examined by the Id AO and statement on oath were also recorded from them by the Id AO. No adverse inference was drawn by the Id AO from the said statements recorded from the loan creditors doubting their creditworthiness or the genuineness of the transactions. Identity of the loan creditors stood clearly established by their physical presence before the Id AO. Hence we hold that all the three ingredients of section 68 of the Act were duly proved by the assessee beyond any doubt. Hence there cannot be any addition that could be made u/s 68 of the Act in the peculiar facts of the instant case. Accordingly, the grounds raised by the revenue are dismissed.

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

Order pronounced in the Court on 01.08.2018

Sd/-

[S.S. Godara]
Judicial Member

Sd/-

[M.Balaganesh]
Accountant Member

Dated : 01.08.2018

SB, Sr. PS

