आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

IT(SS)A No.99-101/Kol/2018 Assessment Years :2010-11 to 2012-13

M/s Max Movers Pvt. Ltd., Room No. 206, 2nd Floor, Centre Point, 21, Hemant Basu Sarani, Kolkata-700001 [**PAN No.AAFCM 6575 N**]	**V/s**.	DCIT, Central Circle-4(3), Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Mahavir Atal, FCA
राजस्व की ओर से/By Revenue	Shri Ajoy Kumar Singh, CIT-DR
सुनवाई की तारीख/Date of Hearing	26-11-2018
घोषणा की तारीख/Date of Pronouncement	30-11-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These three assessee's appeal(s) for assessment years 2010-11, 2011-12 &2012-13 arise from the Commissioner of Income Tax (Appeals)-21,Kolkata's separate orders; all dated 27.07.2018 passed in case No.10658, 10686 &10706/DCIT,CC-4(3)/CIT(A)-21/KOL/2017-18, upholding the Assessing Officer's action both in involving sec. 153A proceedings as well as addition unexplained share capital / premium of ₹25 lac, ₹57 lac and ₹70 lac (assessment year-wise); respectively, to be bogus lacking genuineness / creditworthiness, in proceedings u/s. 153A r.w.s.143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. It emerges from a combined perusal of all these three cases that the assessee has raised identical twin substantive ground therein. Its former grievance is that both the lower authorities have erred in law as well as on facts in initiating sec. 153A proceedings in absence of any incriminating material found or seized during the course of search. This follows its challenge to correctness of the impugned sec. 68 addition on the three folded facets of identity, genuineness and creditworthiness of the investor parties.

3. The CIT(A)'s identical findings in all three assessment years(s) under challenge read as follows:-

> "05. FINDINGS & DECISION:
> 1. I have carefully considered the action of the Ld. AO in making an addition of Rs.2S,00,000/-, as unexplained credit ujs 68 of the Income Tax Act, 1961. After an exhaustive discussion and elaborating the factual and legal matrix, I find that the Ld. AO has held that the claim of the appellant of having raised share application monies was to be denied to the assessee-company, and was to be assessed as unexplained cash credit u/s 68 of the I T Act. The Ld. AO has placed on record the entire gamut of findings, and there is, in my considered view no further requirement for elaboration from this forum. In my view of the facts there are elaborate and direct evidence to clearly indicate that that the entire transactions undertaken by the appellant were merely accommodation entries taken for the purpose of fiving a legal facade to the moneys which were entering the appellant s books of accounts in the grab of Share application Money. I also agree with the Ld. Aa that the findings of the assessment were based on incriminating documents as the entire modus operandi of the activities of the assessee- company was located on the basis of the search action, and therefore the findings of the Ld. AO are also based on incriminating details found during the course of the search operation. Therefore none of the judicial precedents relied upon by the appellant in so far as stating that no incriminating documents were found during the course of the search to warrant any additions come to the assistance of the appellant. These arguments are accordingly rejected.
>
> 2. The Ld. AO has made necessary attempts at enquiry, and there has been continuous non- compliance even to summons by the share applicants. The appellant-company has failed to discharge its onus and has not produced the applicants who were well known to it. I find that the burden has not been discharged by the appellant.
>
> 3. I find that in similar circumstances, when the Ld AO has conducted proper enquiries or attempted to do so, as in the case at hand, and then made the additions, merely because the amounts of share application / Share Premium money has been routed through banks, the assessee could not have been said to have discharged the onus cast upon him in the surrounding circumstances of the case. Such ratio emanates from the decision of the Hon'ble High Courts of Delhi in the case of CIT Vs Ultra Modern Exports (P) Ltd reported in [2013] 40 taxmann.com 458 (Delhi). The head notes in the said case are as under:
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> > IT: Where in order to ascertain genuineness of assessee's claim relating to receipt of share application money, Assessing Officer sent notices to share applicants which returned unserved, however, assessee still managed to secure documents such as their income tax returns as well as bank account

particulars, in such circumstances, Assessing Officer was justified in drawing adverse inference and adding amount in question to assessee's taxable income under section 68

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[2013] 40 taxmann.com 458 (Delhi) HIGH COURT OF DELHI Commissioner of Income-tax v. Ultra Modern Exports (P.) Ltd.*

S. RAVINDRA BHAT AND R.V. EASWAR, JJ.

IT APPEAL NO. 262 OF 20121 DECEMBER 11, 2012
Section 68 of the Income-tax Act, 1961 - Cash credits [Share application money] - Assessment year 2007-08 - In course of assessment, Assessing Officer noticed that assessee received share application money from nine applicants - Upon enquiry, five out of nine notices issued to share applicants under section 133(6) were returned unserved - Furthermore, materials on record in form of returns of income of share applicants furnished by assessee disclosed that applicants had very merger income - In such circumstances, Assessing Officer added amount of share application money to assessee's taxable income under section 68 - Commissioner (Appeals) as well as Tribunal took a view that documentary evidence furnished by assessee such as PAN numbers, detailed particulars of addresses, audited accounts and bank statements of share applicants etc., sufficiently proved identity and creditworthiness of share applicants - Accordingly, addition made by Assessing Officer was deleted - Whether information that assessee furnishes would have to be credible and at same time verifiable - Held, yes - Whether in view of fact that notices to five share applicants returned unserved and still assessee was able to secure documents such as their income tax returns as well as bank account particulars, it would itself give rise to a circumstance in which Assessing Officer rightly proceeded to draw adverse inference - Held, yes - Whether, therefore, Commissioner (Appeals) and Tribunal fell into error in holding that Assessing Officer could not have added back said amount under section 68 - Held, yes [Para 9] [In favour of revenue]
4. I also have to record that the factual matrix of the case clearly points out that the contributions received by the assessee-company from the contributors of Share Capital / Share Premium were from persons who did not have the means to be creditworthy, and cou d not establish their credit-worthiness. In such a situation, the assertions of the appellant were to be disbelieved, as brought forth in the ratio emanating rom he case decided by the Hon'ble High Court of Madras by their recent order dated 24th April, 2017, in B R Petrochem (P) Ltd Vs ITO, Ward-I{l), Chennai reported in [2017] 81 taxmann.com424 [Mad] . The head notes in the said case are as under:
IT : Where assessee received share capital from various contributors, in view of fact that those contributors were persons of insignificant means and their creditworthiness to have made contributions had not been established, impugned addition made by authorities below in respect of amount in question under section 68 was to be confirmed .

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[2017] 81 taxmann.com 424 (Madras) HIGH COURT OF MADRAS B.R. Petrochem (P.) Ltd. v. Income-tax Officer, Ward 1(1), Chennai
HULUVADI G. RAMESH AND DR. ANITA SUMANTH, JJ. TAX CASE (APPEAL) NO. 1498 OF 20071 APRIL 24, 2017
Section 68 of the Income-tax Act, 1961 - Cash credits (Share application money) - Assessment year 2001-02 - During relevant year, assessee received share capital from various contributors - In course of assessment, Assessing Officer found various discrepancies in dates and amounts of contributions vis-a-vis statements recorded from contributors and details furnished by assessee - It was further noted that

contributors to share capital were persons of insignificant means and their creditworthiness to have made contributions had not been established - Assessing Officer thus added said amount to assessee's taxable income - Tribunal confirmed addition made by Assessing Officer - Whether since assessee failed to establish genuineness of cash contributions as well as capacity of persons to have made such contributions, impugned order passed by Tribunal did not require any interference - Held, yes [Para 16][In favour of revenue]

5. Similarly, in the case of CIT Vs Nipun Builders & Developers Pvt Ltd, reported in [2013] 30 taxmann.com292 (Delhi) the Hon'ble High Court of Delhi has taken a view that where an assessee has failed to prove the identity and capacity of the subscriber companies to pay share application money, the amount so received was liable to be taxed under Sec 68 of the Income Tax Act, 1961. The relevant portion of the judgement being produced as below:

[Quote

6. The revenue has filed the present appeal impugning the aforesaid order of the Tribunal. The following substantial question of law is framed:

"Whether the Tribunal was right in law in upholding the order of the CIT (A) deleting the addition made u/s. 68 of the Act on the ground that the assessee has proved the nature and source of the share subscription amounting to Rs. 1,47,00,000/- and has established the identity and creditworthiness of the share subscribers and the genuineness of the transactions?"

The revenue contends that the Tribunal failed to appreciate that the assessee could not establish satisfactorily the nature and source of the monies received as share capital nor could it discharge the onus of proving the identity and creditworthiness of the share subscribers and the genuineness of the transactions which are the fundamental requirements of section 68

7. We are in agreement with the contention of the revenue. Under Section 68 the onus is upon the assessee to prove the three ingredients, i.e., identity and creditworthiness of the person from whom the monies were taken and the genuineness of the transaction. As to how the onus can be discharged would depend on the facts and circumstances of each case. It is expected of both the sides - the assessee and the Assessing authority - to adopt a reasonable approach. The assessee here is a private limited company. It cannot issue shares in the same manner in which a public limited company does. It has to generally depend on persons known to its directors or shareholders directly or indirectly to buy its shares. Once the monies are received and shares are issued, it is not as if the share-subscribers and the assessee-company lose touch with each other and become incommunicado. Calls due on the shares have to be paid; if dividends are declared, the warrants have to be sent to the shareholders. It is a continuing relationship, even granting that it may not be of the same degree in which it exists between a debtor and creditor. The share-subscribers in the present case have each invested substantial amounts in the assessee's shares, as the chart at pages 2-3 of the assessment order would show. Most of them, barring two or three, are themselves private limited companies. It cannot therefore be contended, as was contended before us on behalf of the assessee, that if the summons issued u/s. 131 to the subscribing companies at the addresses furnished by the assessee returned unserved, the AO is duty-bound to enforce their attendance with all the powers vested in him. The unreasonableness of such a general proposition is writ large in the face of the contention. The assessee-company received the share monies; it even says that the communications sent by it at the addresses did not return unserved, yet when the AO requested it - that too only after trying to serve the summons unsuccessfully - to produce the principal officer of the subscribing companies, the assessee developed cold feet and said it cannot help if those companies did not appear and that it was for the assessing officer to enforce their attendance. It needs to be remembered that the AO did not merely stop with issuing

summons; he followed it up with a visit by the inspector who confirmed that no such companies functioned from the addresses furnished by the assessee. Let us see the attitude of the assessee towards discharging its onus in such circumstances. It says that the AO may get the addresses from the ROC's website. We do not think that an assessee can take such an unreasonable attitude towards his onus u/s. 68, little realising that when the finding is that the subscribing companies have not been found existing at the addresses given by the assessee, it is open to the AD to even hold that the identity of the share-subscribers has not been proved, let alone their creditworthiness and the genuineness of the transactions. It was not open to the assessee, given the facts of this case, to direct the AO to go to the website of the company law department/ROC and search for the addresses of the share-subscribers and then communicate with them for proof of the genuineness of the share subscription. That is the onus of the assessee, not of the AO.

8. S0 far as the creditworthiness of the share subscribers is concerned, the contention of the assessee before us is that it was proved by the bank statements of those subscribers submitted before the AO. The AO has not referred to them in the assessment order but it is not in dispute that the copies of the bank statements were furnished before him. Even assuming that the bank statements were filed before the AO, that by itself may not be sufficient to prove the creditworthiness without any explanation for the deposits in the accounts and their source. The usual argument in all such cases, including the present case, is that it is not for the assessee to prove the source of source and origin of origin of the receipts We are alive to the difficulty that may be faced by an assessee to unimpeachably establish the creditworthiness of the share subscribers but at the same time we are of the opinion that mere furnishing of the copies of the bank accounts of the subscribers is not sufficient to prove their creditworthiness. There must be in our opinion, some positive evidence to show the nature and source of the resources of the share subscriber himself and therefore it is necessary for him to come before the AO and confirm his sources from which he subscribed to the capit l. In the present case the assessee did not produce the principal officer of the companies who subscribed to the shares; it merely filed a letter at the "dak" counter of the AO, stating that the communications sent by it to the share subscribers have not come back unserved. This is not compliance with the direction of the AO who had issued notice to the assessee to produce the principal officers of the subscribing companies. As is well known, in the case of private limited companies, it cannot be denied. that there is a continuing contact and relationship with the share holders and if the assessee was serious enough to establish its case, it ought to have produced the principal officers of the subscribing companies before the AO so tha they can explain the sources from which the share subscription was made. That would also have taken care of the difficulty of the assessee in proving the creditworthiness of the subscriber companies. It was, therefore, in the assessee's own interest to have actively participated and cooperated in the assessment proceedings and complied with the direction of the AO to produce the principal officers of the subscribing companies. Instead, the assessee took an adamant, if we may use that expression, attitude and failed to comply with the direction of the AO; not only that, it challenged the AO's finding that the summons sent to the companies came back unserved with the remark "no such company", which was also supported by the report of the inspector who made a visit to the addresses. The assessee thus took a very extreme stand which was in our opinion not justified; certainly it did nothing worthwhile to discharge the onus to prove the creditworthiness of the subscribing companies.

9. We referred to the argument of the assessee that it is not part of its onus to prove the source of source and origin and origin of the share subscriptions. In addition to what we had said with reference to that argument in the preceding paragraph we cannot also help observing that the basis of the argument is perhaps the judgment of the Madras High Court in S. Hastimal v. CIT [1963J 49 ITR 273. That was a case of

reassessment commenced in the year 1957 calling upon the assessee to explain a credit in his favour in the books of account of the firm, made in the year 1947. The assessee explained that he had borrowed the amount from one V in order to provide the monies to the firm. The explanation was not accepted right up to the Tribunal. Commenting on the order of the Tribunal, a Division Bench of the Madras High Court observed as under:

> "The Tribunal however has not chosen to accept the assessee's case on grounds which we are unable to appreciate. The Tribunal commenting upon the fact that the books of account of the assessee were kept only at Phalodi, that pakka and katcha roker of the assessee at Phalodi had not been produced, and that the necessary link between the borrowing of Vijayaram and the money brought to Coonoor had not been established. As stated already, with regard to the sum of Rs. 15,000, the assessee produced indisputable documentary evidence to show that the amount came out of his borrowing at Jodhpur whether it was from Vijayaram Ganeshdas or from Gowri Shankar Bagdy. The assessee has been able to point out a source for this sum of Rs. 15,000 and this cannot be refuted by a mere steady disability on the part of the department or the Tribunal. After the lapse of ten years the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of his capital contribution but the origin of origin and the source of source as well."

The quoted observations will clearly explain the context and setting in which they were made. They cannot, therefore, be understood as placing an embargo on the power of the AO to ask the assessee to prove the creditworthiness of the creditor/share holder for the purpose of Section 68. In an appropriate case, if the facts and circumstances justify, it would be open to the AO to seek information from the assessee as to the creditworthiness of the creditor/share subscriber which may include information as to the sources of the creditor/share subscriber. If proving the creditworthiness of the creditor/ ubscriber is now judicially accepted as one of the ingredients of the onus cast on the assessee under Section 68, we do not see how proof of the resources of the creditor/share subscriber can be completely excluded from the sweep of the burden. It may not be required of the assessee to give in-depth particulars and details about the resources of the creditor or the share subscriber, but the minimum required of him would be, in our opinion, information that will prima face satisfy the AO about the creditworthiness. Mere furnishing of the bank statements of the share subscribers without any explanation for the deposits in the accounts may not meet the requirements of Section 68. It may be necessary to know the business activities of the share-subscribers in order to ascertain whether they are financially sound and are able to purchase shares for substantial amounts; if they have borrowed monies for making the investment, whether they were capable of repaying them having regard to the nature of their business, volume of the business, etc. These are very relevant, in our opinion, to establish the creditworthiness of the investors. It is for this purpose that it is necessary for the assessee, in appropriate cases where the facts and surrounding circumstances justify, to seek the assistance of the principal officer of the subscribing companies and present him before the AD so that he will be in a position to explain in detail the source from which the shares were subscribed. A curious aspect of the matter which cannot be lost sight of is that the record reveals the assessee's ability to procure the share applicant's bank statement. This speaks volume about its conduct, and belies the argument about its inability to ensure the presence of such company's principal officers.

10. It was further argued for the assessee that the investigation report on the basis of which the assessment was reopened and which allegedly contained information that the share subscriptions received by the assessee were in fact accommodation entries was not put to the assessee for rebuttal in the course of the reassessment proceedings and so the assessee did not have any opportunity to rebut the findings

therein. It is true that the assessment order does not show that the investigation report was placed before the assessee for rebuttal. But the addition cannot be deleted merely on that ground. The investigation report which permitted the reopening of the assessment was only a starting point for the enquiry. It was not the sole basis for making the addition. Based on the material contained in the investigation wing's report, the AO had initiated an enquiry into the genuineness of the share subscription. It is because of the suspicion justifiably based on the fact that the investigation wing's report contained information as to the complicity of the companies from whom the assessee received share subscription in the racket of providing accommodation entries for commission, that the AO wanted to enquire into the matter since it is from those companies that the assessee had shown receipt of monies as share capital. In making assessments, including reassessments, the AO has to act on information or material in his possession. If he wants to make use of the material or information, it is certainly necessary according to the principles of natural justice that the information be put to the assessee for rebuttal. There is no requirement that the report of the investigation wing itself should have been put to the assessee because the report only contained material which implicated the companies from whom the assessee claimed to have received share monies in the business of providing accommodation entries for commission It was, therefore, necessary for the AO to have the information verified because the assessee also has shown receipt of share monies from those companies. The AO had issued summons to the companies in an attempt to verify their ident ty, existence and the genuineness of the transaction. It was only when he failed to find the companies at the addresses furnished, that he called upon the assessee to produce the principal officers of those companies so that he can elicit the truth behind the assessee's claim. In these circumstances, it was not necessary to have put the report of the investigation wing to the assessee for rebuttal. The as essee can hardly raise the issue, having itself failed to comply with the direction of the AO and having taken an unreasonable attitude towards the discharge of its onus. We, therefore, hold that the non-furnishing of the report of the investigation wing to the assessee was not fatal to the validity of the addition.

11. It was then contended on behalf of the assessee with considerable vehemence that there was nothing to show that the monies represented the undisclosed income of the assessee brought in under the guise of share subscription. It was submitted that it was incumbent upon the AO to show that the monies emanated from the coffers of the assessee in order to sustain the addition under Section 68. We are afraid that these are untenable propositions and were rejected at least on three occasions by the Supreme Court. In A. Govindarajulu Mudaliar .v, CIT [1958] 34 ITR 807 such a contention was rejected in the following words:-

> "Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been, it was clearly open to the Income-tax Officer to hold that the Income must be concealed income. There is ample authority for the position that where an assessee fails to prove

> satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs. "

Again in CIT v. M. Ganapathi Mudaliar [1964] 53 ITR 623 the Supreme Court held as follows: -

> "Once it is held that an amount credited in the account books of the assessee is the income of the assessee it is not necessary for the department to locate its exact source. "

Vishwanath Prasad [1969] 72 ITR 194 wherein Shah, J. (as His Lordship then was) held as follows: -

> "The question again assumes that it was for the Income-tax Officer to indicate the source of the income before the income could be held taxable and unless he did so, the assessee was entitled to succeed. That is not, in our judgment, the correct legal position. Where there is an explained cash credit, it is open to the Income-tax Officer to hold that it is income of the assessee and no further burden lies on the Income-tax Officer to show that that income is from any particular source. It is for the assessee to prove that even if the cash credit represents income it is income from a sou ce which has already been taxed. "

The law as stated above has not undergone any change because of the introduction of Section 68 in the Income Tax Act, 1961. As observed by S. Ranganathan J in Yadu Hari Dalmia v. CIT [1980J 126 ITR 48 (Delbt), a decision of a Division Bench of this Court: -

> "It is well known that the whole catena of sections starting from s. 68 have been introduced into the taxing enactments step by step in order to plug loopholes and in order to place certain situations beyond doubt even though there ~ere judicial decisions covering some of the aspects. For example, even long prior to the introduction of s. 68 in the statute book, courts had held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the ITO, not satisfactory, the sums so credited could be charged to income-tax as income of the assessee of a relevant previous year. Section 68 was inserted in the I. T. Act, 1961, only to provide statutory recognition to a principle which had been clearly adumbrated in judicial decisions. "

Section 68 thus only codified the law as it existed before 1.4.1962 and did not introduce any new principle or rule. Therefore the ratio laid down in the three Supreme Court Judgments is equally applicable to the interpretation of Section 68 of the 1961 Act. We may also state that the learned counsel for the assessee vaguely referred to some decisions taking the view that it was necessary for the AO, before making the addition under Section 68, to prove that the share application monies actually emanated from the assessee and represented undisclosed income of the assessee. He, however, did not cite any of those decisions. In any case the law having been laid down by the Supreme Court in the judgments cited above, we do not think that there is any merit in his submission.

12. A perusal of the order of the Tribunal shows that it has gone on the basis of the documents submitted by the assessee before the AO and has held that in the light of those documents, it can be said that the assessee has established the identity of the parties. It has further been observed that the report of the investigation wing cannot conclusively prove that the assessee's own monies were brought back in the form of share application money. As noted in the earlier paragraph, it is not the burden of the

AO to prove that connection. There has been no examination by the Tribunal of the assessment proceedings in any detail in order to demonstrate that the assessee has discharged its onus to prove not only the identity of the share applicants, but also their creditworthiness and the genuineness of the transactions. No attempt was made by the Tribunal to scratch the surface and probe the documentary evidence in some depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee has discharged its onus under Section 68. With respect, it appears to us that there has only been a mechanical reference to the case-law on the subject without any serious appraisal of the facts and circumstances of the case.

13. We, therefore, answer the substantial question of law framed by us in the negative, in favour of the revenue and against the assessee. The appeal of the revenue is allowed with no order as to costs. "

[Unquote]

6. It is also pertinent to mentioned that the adjudication of the Hon'ble High Court bearing jurisdiction is also against the appellant in a similar set of facts and circumstances. The Hon'ble Jurisdictional High Court has observed in the case of CIT Vs Nivedan Vanijya Niyojan Ltd reported in [130] Taxman 153 (Calcutta) that the main ingredient that has to be satisfied by the taxpayer is to establish the identity of the share subscribers the creditworthiness and the genuineness of the transactions. Mere bank entries and PAN would not be sufficient to discharge the onus, when the surrounding circumstances and probabilities point against the appellant. The relevant portion of the said order of the Hon'ble High Court is as under:

[Quote]

2. So far as the first question is concerned, it relates to addition of Rs. 3,93,000 on account of the subscription to share cap tal being held as in-genuine transaction under section 68 of the Income-tex Act, 1961. The law with regard thereto has since been crystallized. Similar question was involved in Hindusthan Tea Trading Co. Ltd. v. CIT [IT Reference No. 20 of 1996, dated 11/12-3-2003J and CIT v. Ruby Traders & Exporters Ltd. [IT Reference No. 78 of 1995, dated 11/12-3-2003J. The principal ingredient that has to be satisfied is to establish the identity of the subscribers and prove their creditworthiness and the genuineness of the transaction. We have gone through the order of the Assessing Officer at pages 9-13 of the paper book. It appears that the assessee had failed to establish any of these three ingredients in respect of the said amount. The Commissioner (Appeals) modified the order to Rs. 83,000 and accepted the balance simply because income-tax file numbers of the other subscribers were disclosed. It appears from pages 36-37 of the paper book containing the order of the Commissioner (Appeals) that these few persons who had subscribed 8,300 shares were not income-tax assessees. Therefore, only these were added.

3. Mr. Som had relied on a decision in CIT v. Korlay Trading Co. Ltd. [19987232 ITR 820 (Cal.), where it was held that furnishing of income-tax file number is not sufficient to discharge the burden. The proposition may be correct. But when some material is produced, it is incumbent on the revenue to enquire into the same. In this case after the initial onus was discharged by the assessee, the income-tax authority had made enquiries and had communicated the result of the enquiry to the assessee and required the assessee to produce the subscribers and establish its case. But the assessee did not do so. Therefore, we do not think that the Commissioner (Appeals) had rightly approached the case. The principle is already laid down in the aforesaid two decisions namely Hindusthan Tea Trading Co. Ltd. 's case (supra) and Ruby Traders & Exporters Ltd. 's case (supra).

4. The learned Tribunal, however, proceeded on the basis of the ratio decided in CIT v. Stellar Investment Ltd. [19917192 ITR 287J (Delhi). According to the learned Tribunal, if the subscribers were not available, in that event, it can be assessed at the

hands of such subscribers, not at the hands of the assessee. But this decision was overruled by the Full Bench decision in CIT v. Sophia Finance Ltd. [19947 205 ITR 982 (Delhi).

Therefore, the ratio decided in Stellar Investment Ltd.'s case (supra) is no more a good law. Though an SLP was preferred against Stellar Investment Ltd.'s case (supra) and the SLP was dismissed - CIT v. Steller Investment Ltd. [20017 251 ITR 2633, yet the order of the Apex Court while dismissing the SLP is not a ratio decided binding under article 141 of the Constitution of India, as we have held in the said decisions in Ruby Traders & Exporters Ltd.'s case (supra) and Hindusthan Tea Trading Co. Ltd.'s case (supra). The learned Tribunal, therefore, proceeded on the basis of a wrong proposition of law.

5. Therefore, we are of the view that the order passed by the Assessing Officer was in accordance with law and that of the Commissioner (Appeals) cannot be sustained to the extent, which is contrary to the finding of the Assessing Officer. We, therefore, hereby set aside the order of the learned Tribunal and that of the Commissioner (Appeals) and affirm the order of the Assessing Officer and answer the question No. 1 in favour of the revenue in the negative.

[Unquote]

7. Hon'ble Courts have also observed that then the pe sons working behind the companies (Investing, as in this case) do not appear before the AD and are evasive in approach, the matter of due discharge of onus by the assessee-company is not fulfilled. Such ratio emerges in the case of the order of the Hon'ble High Court of Delhi in the case of CIT Vs N R Portfolio (pvt) Ltd, reported in [2014] 42 taxmann.com 339 (Delhi). The relevant portion of the order of the Hon'ble High Court is worth reproducing in the necessary detail, as under:

[Quote]

1.4. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken. We shall now come to the merits and the findings recorded by the Commissioner (Appeals), which as noted above, have been simply affirmed by the tribunal without verifying or referring to the facts.

15. In the present case, the undisputed position is that the respondent had received share application money of Rs. 68,30,1 00/- and Rs.75,60,200/- in the Assessment Years 2002-03 and 2003-04 respectively. For the Assessment Year 2002-03, the Assessing Officer had taken the share application money received in the year as Rs.1,20,34,100/-, which included Rs.32,80,000/- and Rs.19,24,000/- related to previous years or was the opening share capital. As noted above, addition of Rs.4, 50, 0001- has been sustained in the Assessment Year 2002-03. Thus, the Commissioner (Appeals) and the tribunal have deleted additions of Rs. 63,80,100/- and Rs.75,60,200/- in the two assessment years. Before the Commissioner (Appeals), the respondent-assessee had furnished name of the share applicants which mostly consisted of companies. It was accordingly submitted that the respondent had been able to establish identity of the shareholders, their creditworthiness and also genuineness of the transaction as the payments were received through banking channels. Thus, the respondent had discharged the primary onus and there was no evidence or material to show that unaccounted for money was recycled and introduced in the books as share application money. The Commissioner (Appeals) has recorded that verification of PAN numbers was done in the present case and was found to be correct except in the case of Technochem

Associates Private Limited and M/s Yogesh Gupta from whom share application money of Rs.1,50,000/-each was raised but no PAN details were furnished. Regarding Ganga Infin Private Limited, PAN number furnished was found to be incorrect and accordingly addition of Rs. 1,50,000/- was justified. With regard to others, the Commissioner (Appeals) has recorded that the assessing officer had not affected inquires to bring on record and establish that the other parties had given accommodation entries and the money, i.e., the share application money was assessee's own undisclosed income. It was further recorded that the respondent had not been provided an opportunity to cross-examine the so-called entry providers and the assessing officer simply relied upon the investigation reports/information provided by the Information Wing of the Department.

16. The aforesaid finding of the Commissioner (Appeals), which have been affirmed by the tribunal, ignores the finding of the Assessing Officer that the Assessee had failed to attend the assessment proceedings, explain and put forward their stand and stance. To this extent, there is contradiction in the order passed by the Commissioner (Appeals), which was ignored and not taken note of by the tribunal.

17. The Commissioner (Appeals) thereafter proceeded on the basis that even if the subscribers to the share capital were not genuine, the amount received cannot be regarded as undisclosed income of the respondent-assessee. Reference was made to the decision of the Delhi High Court in Lovely Exports (P.) Ltd. (supra). Reference was made to some decision of the tribunal. It would be here relevant to highlight and note what was recorded by the Assessing Officer in the assessment order. The Assessing Officer has mentioned that the subscribers belonged to Mahesh Garg group of entry operators, which included 51 companies/ persons, who were operating more than 100 bank accounts in different banks/branches. Their modus operandi was to provide accommodation entries to different persons/beneficiaries. Reference was made to the bank statements of the entry operators that showed substantial deposit of cash in the bank accounts and subsequent issue of cheques to the beneficiaries. This was the only activity of these companies/persons. The said companies/persons were not carrying on any other business activity i.e., manufacturing or trading activity. The assessment order has quoted and referred to the bank account statements in support of the said assertion and finding. The Assessing Officer has mentioned that the respondent-assessee was a private limited company, closely held and there should be proximate relationship between the promoter directors and the shareholders. Closely held companies usually receive share capital subscriptions from friends, relatives and not from unrelated/ unknown third parties/ general public. There was no relationship or connection between the subscribers and the respondent-assessee, for subscribers to become investors. Assessment order records that to establish identity and availability of funds, it was necessary to have at least some idea if not complete details of the actual business undertaken and engaged in by the respondent-assessee and explained how and why these unrelated and unconnected third parties decided to become investors in the absence of public issue or advertisement.

18. In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. The word "identity" as defined, it was observed meant the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN number or assessment particulars did not establish the identity of the person. The actual and true identity of the person or a company was the business undertaken by them. This according to us is the correct and true legal position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions.

PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. An person, who would invest money or give loan would certainly seek return or income a consideration. These facts are not adverted to and as noticed below are true and correct. The are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

20. Vicky Chaurasia, additional director of the respondent company was asked to appear before the Assessing Officer pursuant to the letter by the Commissioner (Appeals) directing the Assessing Officer to go through the submissions and submit a report after carrying out necessary inquiries. He was asked to produce books of accounts and evidence in support. By letter dated 12th October, 2009, the respondent-assessee was asked to furnish details/ nformation. These included details of dividend paid to the shareholders and to show and establish creditworthiness of the parties. Statement of Vicky Chaurasia recorded under Section 131 of the Act dated 5th November 2009 has been placed on record by the responder: in ITA No. 1019/2011. He has stated that he along with Sandeep Chaurasia had been director of the company since June, 2003 and the company was engaged in investment and finance, but he could not !Jive details of the subscribed share capital of Rs.2 crores as it was stated that this was before he became the director. He could not also give details of how share capital go subscribed in a private limited company. Specific question was put to him regarding verification of the shareholders as the summons issued to them had by and large remained uncomplied for want of correct addresses. In response, he had stated that the company had supplied addresses of shareholders as per share application forms and in the absence of dividend or any form of return on the investment, the company was not in a position to call the subscribers for cross- examination. The company had not received any letter for change of address etc. Vide; Chaurasia stated that according to him the subscribers, who were allotted shares, continue and had not ceased to be shareholders. With regard to the past directors, he had stated that they had resigned and he was not in a position to produce the same. In the remand report, it was specifically mentioned that books of accounts were neither produced on 5th November, 2009 nor during the course of remand proceedings.

21. The Assessing Officer had issued notices by speed post to 31 parties as per addresses given by the respondent-assessee requiring them to appear for personal deposition, produce books of accounts with complete vouchers and bills and statement of bank accounts for the relevant period. In respect of 22 parties, the notice summons were received back with postal remarks "**No such firm/company/person**" or a few "**Left without address**" and a very few "**Refused to accept**". Remaining 9 parties neither attended and filed any application for adjournments nor filed details. Thus, it was observed that the identities had been only proved on paper, i.e., in form of neutral documents like PAN number, ITR, Registrar of Companies registration, but without full details as to the actual business activities undertaken by these companies, the reason why these companies had made

investment in a private limited company etc. This coupled with the fact that there was cash deposits in their bank accounts and withdrawals were highlighted.

22. In the rejoinder filed to the remand report, it was stated that the share applicants were required to appear in person on 17th November, 2008 in response to summons under Section 131 dated 23rd October, 2009. Subsequently, fresh summons dated 30th October, 2009 were issued requiring compliance by 7th November, 2009, but the Assessing Officer had sent the remand report on 6th November, 2009 without waiting for compliance of summons. The said submission is without merit as we notice that the order of the Commissioner (Appeals) is dated 1st October, 2010, i.e., much after the date 7th November. 2009. A wrong year was mentioned in the earlier summons dated 23rd October, 2009. It was typographical error and a response or reply from the shareholder would have been sufficient.

23. The contention that the Revenue must have evidence to show circulation of money from the assessee to the third party is fallacious and has been repeatedly rejected, even when Section 68 of the Act was not in the statute. In A. Govindarajulu Mudaliar v. CIT {1958 7 34 ITR 807 (SC), Supreme Court observed that it was not the duty of the Revenue to adduce evidence to show from what source, income was derived and why it should be treated as concealed income. The assessee must prove satisfactorily the source and nature of cash received during the accounting year. Similarly observations were made in CIT v. M. Ganapathi Mudaliar [1964] 53 ITR 623 (SC)' inter alia holding that it was not necessary for the Revenue to locate the exact source. This principle was reiterated in CIT v. Dev Prasad Vishwanath [1969772 ITR 194 ~ wherein the contention that the Assessing Officer should indicate the source of income before it was taxable, was described as an incorrect legal position. Thus when there is an unexplained cash credit, it is open to the Assessing Officer to hold that it was income of the assessee and no further burden lies on him to show the source. In Yadu Hari Dalmia v. CIT 09807126 ITR 4814 Taxman 525 (Delhi), a Division Bench of Delhi High Court has observed:-

> "It is well known that the whole catena of sections starting from s. 68 have been introduced into the taxing enactments step by step in order to plug loopholes and in order to place certain situations beyond doubt even though there were judicial decisions covering some of the aspects. For example, even long prior to the introduction of s. 68 in the statute book, courts had held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the ITO, not satisfactory, the sums so credited could be charged to income-tax as income of the assessee of a relevant previous year. Section 68 was inserted in the I. T. Act"1961, only to provide statutory recognition to a principle which had been clearly adumbrated in judicial decisions. "

24. We are conscious of the doctrine of 'source of source' or 'origin of origin' and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of "source of source' or "origin of origin' cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counter- productive and contrary to

equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest facade and smokescreens which masquerade as pretence should be exposed and not accepted.

25. In Lovely Exports Ltd. (supra), a Division Bench examined two earlier decisions of this court in CIT v. Steller Investment Ltd. [19917 192 ITR 287159 Taxman 568 (Delhi) and eIT v. Sophia Finance Ltd. [19947 205 ITR 98([19937 70 Taxman 69 (Delhi) (FB). The decision in Steller Investment's case (supra) was affirmed by the Supreme court but, by observing that the conclusion was on the facts and no interference was called for. Lovely Exports Ltd. (supra) was a case of public limited company where shares were subscribed by public and it was accordingly observed:

> "This reasoning must apply a fortiori to large scale subscriptions to the shares of a public Company where the latter may have no material other than the application forms and bank transaction details to give some indication of the identity of these subscribers. It may not apply in circumstances where the shares are allotted directly by the Company/assessee or to creditors of the assessee. This is why this court has adopted a ve y strict approach to the burden being laid almost entirely on an assessee which receives a gift.

26. Thereafter reference was made to Full Bench decision in the case of Sophia Finance Ltd.'s (supra) wherein it has been observed that if the shareholders exists then, "possibly", no further enquiry needs to be made and that the Full Bench had not reflected upon the question of whether the burden of proof rested entirely on the assessee and at which point this burden justifiably shifted to the assessing officer. The Full Bench has observed that they were not deciding as to on whom and to what extent was the onus to show that the amount credited in the books of accounts was share capital and when the onus was discharged, was not decided. The standard of proof might be rigorous and stringent and was dependent upon nature of the transaction and where there wa evidence that the source of investment cannot be manipulated, it was material. Similarly, it was observed that assessee could scarcely be heard to say that he did not know the particulars of a donor in case of a gift. It was held:-

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

Assessing Officer . lift the veil' and enquire into the real nature of the transaction. CIT v. Ruby Traders and Exporters Ltd. [20037 263 ITR 300 (Cal.). CIT v. Nivedan Vanijya Niyojan Ltd. [20037 263 ITR 623 (Cal.) and CIT v. Kundan Investment Ltd. [2003] 263 ITR 626 (Cal.) are the other three.

In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. 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 assessed. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee; and (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/ subscriber the genuineness of the transaction and the veracity of the repudiation. "

27. The decision in the case of Lovely Exports Ltd (supra) was considered in Nova Promoters and Finlease (P) Ltd. (supra) and it was elucidated:-

'38. The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' egister, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "**accommodation entry providers**", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "**entry providers**". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan - a smokescreen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or

enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary. '

28. In Nova Promoters & Finlease (supra), it was held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN number, acknowledgement of income tax returns of the entry provider, bank account statements etc. was not sufficient to discharge the onus.

29. In CIT v. Nipun Builders & Developers (P.) Ltd. [20137350 ITR 4071214 Taxman 429/30 taxmann.com 292 (DelhO, this principle has been reitereted holding that the assessee and the Assessing Officer have to adopt a reasonable approach and when the initial onus on the assessee would stand discharged depends upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. CaJl monies, dividends, warrants etc. have to be sent and the relationship is/was a continuing one. In such cases, therefore, the assessee cannot simply furnish details and remain quiet even when summons issued to shareholders under Section 131 return unserved and un complied. This approach would be unreasonable as a general proposition as the assessee cannot plead that they had received money, but could do nothing more and it was for the assessing officer to enforce share holders attendance. Some cases might require or justify visit by the Inspector to ascertain whether the shareholders/subscribers were functioning or available at the addresses, but it would be incorrect to state that the assessing officer should get the addresses from Registrar of Companies' website or search for the addresses of shareholders and communicate with them. Similarly, creditworthiness was not proved by mere issue of a cheque or by furnishing a copy of statement of bank account. Circumstances might equire that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment, acted as angel investors, after d e diligence or for personal reasons. Thus, finding or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unimpeachably establish creditworthiness of the shareholders.

30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them.

31. The respondent herein is a Private Limited Company. It is not the case of the respondent that the Directors or persons behind the companies making the investment in their shares were related or known to them. It is highly implausible that an unknown person had made substantial investment in a private limited company to the tune of Rs.63,80100/- and Rs.75,60,200/- in two consecutive assessment years 2002-03 and 2003-04 respectively without adequately protecting the investment and ensuring appropriate returns. Other than the share application forms, no other agreement between the respondent and third companies had been placed on record. The persons behind these companies were not produced by the respondent. On the other hand respondent adopted prevaricate and non- cooperation attitude before the

Assessing Officer once they came to know about the directed enquiry and the investigation being made. Evasive and transient approach before the Assessing Officer is limpid and perspicuous. Identity, creditworthiness or genuineness of the transaction is not established by merely Showing that the transaction was through banking channels or by account payee instrument. It may, as in the present case required entail a deeper scrutiny. It would be incorrect to state that the onus to prove the genuineness of the transaction and creditworthiness of the creditor stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to each; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the object and purpose for which payment/investment was made etc. These facts are basically and primarily in knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious. What is unmistakably visible and apparent, cannot be spurred by formal but unreliable pale evidence ignoring the patent and what is plain and writ large.

32. In view of the aforesaid discussion the substantial question of law framed in the two appeals is answered in favour of Appellant Revenue and against the Respondent- assessee. The appeal is accordingly allowed to the extent indicated above. The Appellant is also entitled to costs which is assessed at Rs.20,000/-

[Unquote]

8. In another recent judgment oaf the Hon'ble High Court of Delhi, the case of Riddhi Promoters (Pvt) Ltd Vs CIT-7, Delhi, reported in [2015] taxmann.com 367, the Hon'ble High Court has held that merely establishing the identity of the share applicant would not suffice, the assessee is bound to bring on record and satisfy Revenue about the genuineness of the transaction, as well as the creditworthiness of the share applicant. The head notes are as under:

> IT : Establishing identity of share applicant is not sufficient to discharge initial onus that lay on assessee under section 68; assessee has to further satisfy revenue as to genuineness of transaction and creditworthiness of share applicant or individual who is advancing amounts •••

[2015] 58 taxmann.com 367 (Delhi) HIGH COURT OF DELHI Riddhi Promoters (P.) Ltd. v. Commissioner of Income-tax-7.* S. RAVINDRA BHAT AND R. K. GAUBA, JJ. IT APPEAL NO. 227 OF 20151 MARCH 27, 2015

Section 68 of the Income-tax Act, 1961 - Cash credit (Share application money) - Assessment year 2002-03 - Whether establishing identity of share applicant or creditor is not sufficient for assessee to discharge onus under section 68; assessee has to further satisfy revenue as to genuineness of transaction and creditworthiness of share applicant or individual who is advancing amounts - Held, yes - Whether creditworthiness of share applicants has to be seen in context of assertion made by them or materials presented before Assessing Officer at relevant time - Held, yes [P.ara 6] [In favour of revenue]

9. I also find that all the submissions made by the appellant during the course of the appeal point towards the elaborate documentation, meaning thereby that the appellant has produced papers relating to application for the shares, the allotment of the shares, the share certificates, payments by cheque and the necessary papers filed before the Registrar of companies, where the name of the assessee has been reflected as a shareholder. The appellant has also filed proof of amalgamation of the companies wherein tile shareholding has changed hands. It is also the contention of the appellant that it has proceeded copies of the bank statement, bank contract notes

and delivery instructions to the broker by way of proof that all these transactions were genuine. However, in my considered view of the matter, it is precisely this elaborate paperwork that strengthens the matter relating to the bogus benefit of the LTCG, which clearly has been schemed, pre-planned and executed with mala fide intelligence and precision. Therefore all these papers are mere documents and not any evidence. The whole gamut of transactions are unnatural and highly suspicious, and therefore the rules of SUSPICIOUS TRANSACTIONS to apply in the instant case. There are grave doubts in the story before the authorities below. None of the material produced before the Ld. AO by the assessee-appellant are enough to justify the humongous gains accruing to the assessee by way of Capital Gains. In my considered view the banking documents are mere self serving recitals. The law in the matter of self-serving recitals has been long established by the Hon'ble apex Court. In the case of CIT vs P.Mohankala 291 ITR 278, the Hon'ble Supreme Court held that" the money came by way of bank cheque and was paid through the process of banking transactions was not by itself of any consequences." The burden of proof is on the assessee in the matter of justification of receipts which are of suspicious and dubious nature. In the case of CIT vs. Durga Prasad More (1971)82 ITR 540 (SC), their Lordships laying down the Significance of human probabilities held as under: "in a case where a party relied on self serving recitals in documents, it was for that party to establish the truth of those recitals: the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals." Similarly in the case of Sumati Dayal vs. CIT (1995) 214 ITR 801 Se), heir Lordships held as under: "In view of section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assesses of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case, there is prima facie, evidence against the assessee viz. the receipt of money, and if he fails -to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature." In the case of Sajjan Das & Sons vs. CIT (2003) 264 ITR 435 (Delhi), their Lordships of the High' Court of Delhi, while considering a case in which gifts were received by the assessee through banking channels laid importance on the capacity of the donor for making he gift and his identity as well as importance of relationship between the donor and donee in determination of genuineness of gift held as under: "That a mere identification of the donor and showing the movement of the gift amount through banking channels was not sufficient to prove the genuineness of the gift. Since the claim of the gift was made by the assessee, the onus lay on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it had actually been received as a gift from the donor. "In my considered view wherever documents are relied upon they should pass the test of normal behaviour of the assessee in the course of business viz., human conduct, preponderance of probability and surrounding circumstances. In my considered view, even if documentary evidence is produced, the same must pass the test of human probabilities and surrounding circumstances if they do not, then addition justified. Reliance on such matters is placed on the case of Smt Phoolwati Devi 314 ITR (AT) 1 (Del.)

10.In the case of Rajmandir Estate Pvt Ltd and a decision in favour of the revenue has been made as above in GA No 509 of 2016. It is held as under:-

> "(21) After hearing the learned advocates, we are of the opinion that the following questions arise for consideration ;- (a) Whether in the light of the views expressed in the case of Lovely Exports (supra) & Steller Investment (supra) the order under Section 263 directing further investigation is legal? (b) Is the finding of the Commissioner of Income Tax that unaccounted money was or could have been laundered as clean share capital by creating facade of paper work, routing the money through several bank accounts and getting

it the seal of statutory approval by getting the case reopened under Section 143(3) /147 of the Income Tax Act is erroneous and also prejudicial to the interest of the revenue? (d) Whether the impugned judgment of the learned Tribunal is perverse?

[22J We shall consider the second question first. In a commentary on the Prevention of Money Laundering Act,-2002 by Dr.M.C. Mehanathan published by texis Nexis, 2014, the steps of moneys laundering are described as follows:- "STEPS OF MONEY - LAUNDERING" Although money-laundering often involves a complex series of transactions, it generally includes the following three basic steps: 1. Placement It involves introduction of the proceeds of crime into the financial system. This is accomplished by breaking up large amounts of cash into smaller sums that are then deposited directly into a bank account, or by purchasing monetary instruments, transferring the cash overseas for deposit in banking /financial institutions, use for purchase of high value things such as gold, precious stones, art works etc. and reselling the same through cheques or bank transfer etc. 2. Layering This involves formation of complex layers of financial transactions which distance the illicit proceeds from their source and disguise the audit trail. In this process a series of conversions or transactions are involved for moving the funds to places such as offshore financial centres operating in a liberal regulatory regime. Often "front" companies are formed to accomplish this task. These companies obscure the real owners of money through the bank secrecy laws and attorney-client privilege. The techniques used for the purpose are to lend the proceeds back to the owner as loans, gifts and etc. under invoicing the items exported to the real owner or etc. cases, the transfers may be disguised as payments for goods or services, thus giving them a legitimate appearance. 3. Integration This involves investment in the legitimate economy so that the money gets the colour of legitimacy. This is achieved by techniques such as lending the money through "front" companies etc. he may be invested in real estates, business and etc. The stages at which money- laundering could be easily detected are those where cash enters into the domestic financial system, either formally or informally where it is sent abroad to be integrated into the financial systems of tax haven countries and where it is repatriated in the form of transfers". The role of the revenue authorities in tackling the menece of laundering black money was commented by the learned author as follows:- " It has to be kept in view that India has a problem of black economy, which is unaccounted and many a time the holders of black money also launder the black money in order to acquire legitimate assets. Legal or illegal income which evades tax and illegal income that comes with n the exempted taxation slab constitute the unreported the Gross Domestic Product or black economy. Laundering the black money and laundering proceeds of crime are two different issues, although there is frequent overlap between the two. While laundering the black money is to be handled through taxation laws or similar laws, the laundering of proceeds of crime is to be handled through special anti-money-laundering laws. "

[24] From the aforesaid evidence the following, prima facie, inferences can safely be drawn:- 9(a) The promoter/directors of the assessee and their close relatives and friends has united with the common object of creating at least twenty (19+1) companies apparently having a large capital base, but, in fact these are mere paper companies having no real worth. The transaction of sale and purchase of shares was nominal rather than real. (b) The allegation, in response to the notice to show-cause u/s. 263 that "it bears importance to state here that the investor companies of shares were interested to subscribe shares of the assessee company as , according to them, the assessee company had prospect in future," is a plan lie. (c) The blank share application forms etc. tabulated above go to show that the alleged application for shares and the alleged allotment were not in the usual course of the business. (d) In the light of the aforesaid pieces of evidence and the prima facie finding, we are emboldened to say that the three requirements: (A) identity of the share-holders; (B)

genuineness of the transaction and (C) the creditworthiness of the share-holders repeatedly impressed, by Mr.Poddar, upon us, have not been satisfied. Identity of the alleged share-holders is known but the transaction was not a genuine transaction.
The transaction was nominal rather than real. The creditworthiness of the alleged share holders is also not established because they did not have any money of their own. Each one of them received from somebody and that somebody received from a third person. Therefore, prima facie, the share-holders are mere name lenders.
[25J For the reasons discussed in the preceding paragraph, we are satisfied that the judgement in the case of CIT-Vs-Steller Investment (supra) has no manner of application to the facts and circumstances of this case. The question as to whether there has been a device adopted for money laundering also did not crop up for consideration in that case. The Prevention of Money Laundering Act, 2002 was not also there on the statute at that point of time. Before the appeal in Steller Investment Ltd. was dismissed by the Apex Court, the question had cropped up in the case of Sophia Finance Ltd. reported in (1994) 205ITR 98 wherein a special bench held as follows: -"As we read section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income -tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation is regard thereto is given by the assessee, then it is for the Income-tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, the Income-tax Officer may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name-lender or not. Be that as it may it is clear that the Income-tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum credited in the books of account of an as essee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income- tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money." In the case of Sumati Dayal-Vs- CIT reported in (1(95) 214 ITR 801 (SC) Their Lordships held that a capital receipt can become taxable if the explanation offered by the assessee about the nature and source thereof is not satisfactorily explained. The Judgement in the case of CIT-Vs- Lovely Exports Pvt. Ltd. reported in (2008) 299 ITR 268 lends no assistance to the assessee because in that case the Division Bench reiterated that omission to make an enquiry, where such an exercise is provoked, shall render the order to the assessing officer both erroneous and prejudicial to the revenue. The Division Bench went on to hold that the revenue should not harass the assessee where "the preponderance of evidence indicates absence of culpability". In the present case there exists reasonable suspicion if not prima facie evidence of culpability.
[26] The learned Tribunal in the impugned judgement in paragraph 3,4, and 5 observed, inter alia as follows ;- "We have heard the rival submissions and perused the relevant material on record. It is relevant to mention that we have disposed of more than 500 cases involving same issue through certain orders with the main order having been passed in a group of cases led by Subhlakshmi Vanijya Pvt. Ltd -Vs. CIT (ITA No. 1104/Kol/2014) dated 30.07.2015 for the A. Y. 2009-10. Both the sides have fairly admitted that facts and circumstances if the cases under consideration are mutatis mutandis similar to those decided earlier, except for certain issues which we will advert to a little later. In out aforesaid order in Subhalakshmi Vanijya Pvt. Ltd, Vs.

CIT (ITA No. 1104/Kol/2014 A. Y. 2009-10), we have drawn the following conclusion: -

> *** It is noticed that all or some of the above conclusions are applicable to the appeals in this batch. "The appellant has disclosed a copy of the judgement delivered by the learned Tribunal in Subhalakshmi Vanijya Pvt. Ltd, -Vs. - CIT. The learned Tribunal in paragraph 17 .ii opined as follows :- "All the cases under consideration have the same common feature of passing assessment orders in undue haste. When we consider the above factual matrix, there can be no escape from an axiomatic conclusion that in all these cases the enquiry conducted by the AO's is exceedingly inadequate and hence fall in the category of 'no enquiry' conducted by the AO, what to talk of charactering it as an 'inadequate enquiry'. In our considered opinion, the highly inadequate enquiry conducted by the AO resulting in drawing incorrect assumption of facts, makes the orders erroneous and prejudicial to the interest of the revenue.
>
> [28] We have indicated above the pieces of evidence which go to show that the Commissioner had reasons to entertain the belief tha1:-.this was or could be a case of money laundering which went unnoticed because the assessing officer did not hold requisite investigation except for calling for the records. The evidence which we have tabulated above and the prima facie inference drawn by us is deducible from the documents also submitted before the assessing officer. The fact that the assessing officer did not apply his mind to those pieces of evidence would be evident from the assessment order itself.

[28] We find no substance in the submission that the order of the learned Tribunal is perverse, after examining all the submissions advanced by Mr.Poddar.

[29] Whether receipt of share capital was a taxable event prior to 1st April, 2013 before introduction of Clause (VII b) to the Sub- section 2 of Section 56 of the Income Tax Act; whether the concept of arms length pricing in a domestic transaction before introduction of Section 92A and 92BA of the Income Tax Act was there at the relevant point of time are not questions which arise for determination in this case. The assessee with an authorised share capital of Rs. 1.36 crores raised nearly a sum of Rs. 32 crores on account of premium and chose not to go in for increase of authorised share cap tal merely to avoid payment of statutory fees is an important pointer necessitating investigation. Money allegedly received on account of share application can be roped in under Section 68 of the Income Tax Act if the source of the receipt is no satisfactorily established by the assessee. Reference in this regard may be made to the judgement in the case of Sumati Dayal vs. CIT(supra) wherein Their Lordships held that any sum "found credited in the books of the assessee for any previous year, the same may be charged to income tax ". We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd (supra) opined that "the use of words" any sum found credited in the books "in Section 68 indicates that the said section is very widely worded and an Income - Tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of CIT -Vs. -Nove Promoters and Finlease (P) Ltd (supra).Similar views were expressed by this Court in the case of CIT-Vs. Precision Finance Pvt. Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd(supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to

be correct. We find no substance in the submission that the exercise of power under Section 263 by the Commissioner was an act of reactivating stale issues. In the case of Gabriel India Ltd(supra) the CIT was unable to point out any error in the explanation furnished by the assessee. Whereas in the present case we have tabulated the evidence which officer did not attach any importance to that aspect of the matter as discussed above by us. The judgment in the case of Leisure Wear Exports Pvt. Ltd (supra) relied upon by Mr. Poddar has no applicability because the evidence furnished by the assessee in this case does suggest a cover up. We also have held prima facie that neither the transaction appears to be genuine nor are the applicants of share are creditworthy. The judgment in the case of Omar Salay Mohamed Sait (supra) cited by Mr. Poddar has no application for reasons already discussed. It is not true that the Commissioner in this case has merely on the basis of suspicion held that this was or could be a case of money laundering. We as a matter of fact have discussed this issue in great detail and need not reiterate the same. The order passed by the Commissioner is by no means an act of substituting his own views to that of the assessing officer. It is true that the assessing office had requisitioned the necessary details by his notice u/s. 142 (1) but he thereafter did not apply his mind thereto. The judgement in the case of J.L.Morrion (India) Ltd. has no manner of application because in that case the question essentia ly was whether the receipt was of capital or revenue nature. The facts and circumstances were not in dispute. Moreover the view taken by the assessing officer was not shown nor was held by the Court to be an erroneous view. Whereas in this case we have demonstrated in some detail as to why is the order of the assessing officer erroneous and prejudicial to the revenue. The judgement in the Malabar Industrial Co. Ltd. (supra) and Max India Ltd. do not apply to the facts of this case for reasons already discussed by us. From the judgement of the learned Tribunal in the Subholaxmi, placed before us in grea detail by Mr. Poddar, we find that all important placed for consideration by no other than Mr. Poddar himself were duly considered by the learned Tribunal.

The Hon'ble Calcutta High Court has discussed the issue in detail with referent Money Laundering Act, provision of section 68 and the case of creditors being name lenders. The Hon'ble High Court while passing the above decision has taken into consideration the findings given by the Apex Court in the case of Lovely Export (P) Ltd (216 CTR 195) to come to the conclusions that it does not help the case of the petitioner. The SLP filed by the petitioner against the order of the Hon'ble Calcutta High Court in Rajmandir Estate Pvt. Ltd. (Supra) has now be dismissed by the Hon'ble Supreme Court; therefore the observations in the above order has now attended finality.

11.It must also be stated here that in Commissioner of Income Tax vs NR Portfolio Pvt Ltd on 22 November, 2013, the Hon'ble Delhi High court has held .....

> "The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars. This may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be

just, fair and should not cause any harassment to the assessee or third persons form whom confirmation or verification is required. The verification and investigation should be one with the least amount of intrusion, inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The ultimate finding of the assessing officer should reflect due application or mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and indeed this Court. The reasoning and the grounds given in any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant aspects. When an assessee does not produce evidence or tries to: avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken".

12.In this connection, I would al o wi h to refer to the decision of the Hon'ble ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.Y. 1983-84) in the case of M/s. Mont Blane Properties and Industries Pvt Ltd which was upheld by the Hon'ble Supreme Court. The Hon'ble Tribunal held hat the word 'evidence' as used in sec. 143(3) covered circumstantial evidence also. The word 'evidence' as used in sec.143 (3) obviously could not be confined to direct evidence. The word 'evidence' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word 'evidence' might recall the oral and documentary evidence as may be admissible under the Indian Evidence Act the use of word 'material' in Sec.143(3) showed that the assessing officer, not being a court could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. Court often took judicial notice of certain facts which need not be proved before them. The plain reading of section 142 and 143 clearly suggests that the assessing officer may also act on the material gathered by him. The ward 'material' clearly shows that the assessing officer, is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking be accepted evidence in court of law.

13.The Hon'ble Supreme Court in CIT v. Durga Prasad More[1971] 82 ITR 540 at pages 545-547 made a reference to the test of human probabilities in the following fact situation It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals. Otherwise it will be very easy to make self- serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favor then the door will be left wide-open to evade tax. A

little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents .

14. It is a well settled principle of law as declared by the Hon'ble Supreme Court in the case of Sumati Dayal Vs.CIT (214 ITR 801)(SC) that the true nature of transaction have to be ascertained in the light of surrounding circumstances. It needs to be emphasized that standard of proof beyond reasonable doubt has no applicability in determination of matters under taxing statutes. In the present case, it is clear that apparent is not the real as evidenced from the investigation report. Further, the Hon'ble Supreme Court, in the case of Chuhar Mal V CIT (1988) 172 ITR 250, highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by the Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills v CIT (1954) 261 TR 775. The Hon'ble Supreme Court, in the case of Chuhar Mal V CIT (supra) held that what was meant by saying that evidence Act did not apply to the proceedings under Income-tax Act,1961, was that the rigors of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary principle of common law, jurisprudence viz, where a person was found in possessing of anything, the onus of proving that he was not its owner, was on that person. Thus, this principle could be attracted o a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.

15. I am in agreement with the Ld. AO that the transactions relating to the claim of LTCG as made by the Ld. AO come within the ambit of "suspicious transactions", and therefore the rules of suspicious transactions would apply to the case. Payment through Banks, performance through stock exchange and other such features are only apparent features. The real features are the manipulated and abnormal price of off load and the sudden dip thereafter. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the Ld.AO fall in the realm of "suspicious" and "dubious transactions. The Ld. AO has therefore necessarily to consider the surrounding circumstances, which he indeed has done in a very meticulous and careful manner. In the case of Win Chadha Vs CIT (International Taxation) in ITA No.3088& 3107/Del/200S, the Hon'ble Delhi ITAT "B"-Bench has observed, on 31.12.2010 as under:

"SUSPICIOUS AND DIBIOUS TRASANCTION HOW TO BE DEAL T WITH:

6.1.1.. The tax liability in the cases of suspicious transactions, is to be assessed on the basis of the material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available with AO.

6.1.2. In the case of SumatiDayal V. CIT (1.995) 80 Taxman 89 (SC), the Hon'ble Supreme Court has dealt with the relevance of human conduct, preponderance of probabilities and surrounding circumstance, burden of proof and its shifting on the Department in cases of suspicious circumstances, by following observations:

" ..... It is, no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But in view of section 68, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing

Officer, not satisfactory. In such case there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being un-rebutted, can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably.

..... 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. The majority opinion after considering surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winning from races, was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amounts had been rejected unreasonably and that the finding that the said amounts were income of the appellant' from other sources was not based on evidence. "

CIRCUMSTANTIAL EVIDENCE HOW TO BE USED

6.13. It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence in income tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It is evidence of various facts, other than the fact in issue which are so associated with the fact in issue, that taken toge her, they form a chain of circumstances leading to an inference or presumpt on of the existence of the principal fact. In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are -

(1) the circumstances alleged must be established by such evidence, as in the case of other evidence

(2) the circumstances proved must be of a conclusive nature and not totally inconsistent with the circumstances or contradictory to other evidence.

(3) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced ; some of these links may have to be nferred from the proved facts;

(4) in drawing those inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.

(5)The circumstantial evidence can, with equal facility, be resorted to in proof of a fact in issue which arises in proceedings for the assessment of taxes both direct and indirect, circumstantial evidence can be made use of in order to prove or disprove a fact alleged or in issue. In fact, in whatever proceedings or context inferences are required to be drawn from the evidence or materials available or lacking, circumstantial evidence has its place to assist the process of arriving at the truth. "

6.14. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstance in the income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee is not forthcoming with proper or complete facts or his statement or explanation is contradictory, drawing of suitable inferences and estimation of facts is inevitable. Courts generally will not interfere with such estimate of facts, unless the inferences or estimates are perverse or capricious.

6.15. The Assessee's technical contentions about admissibility and reliance on material available on the AO's record are in the nature of contentions challenging criminal or civil liabilities in a court of law. We are dealing with a process of adjudication of assesses tax liability i.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings. As held by the Hon 'ble Supreme Court in the case of S.S. Gadgil (supra) no 'lis' is involved in adjudication of tax liability. The Assessee's contention that there was no new material before the AO

> after the CIT(A)'s setting aside order cannot be accepted. New information and material did indeed come on record. In our view, in a sensitive matter like this, even a single clue or revelation can be of great importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of investigation agencies like CBI, ORI, EO whose were in the offing, as the relevant investigations were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf The Assessee's contentions and objections in this behalf that the material available on record was not admissible as evidence and that it cannot be relied on by the AO, are devoid of any merit and are rejected outright…."
>
> In view of the above discussion, I find no infirmity in the orders of the Ld. AO, and I confirm the same. These grounds -7 are therefore dismissed."

4. We have heard rival contentions. It emerges with the assistance of Learned authorized representative appearing at assessee's behest that this assessee / company had filed its regular returns u/s. 139(1) of the Act on 22.09.2010, 15.09.2011 and 19.09.2012 for all three impugned assessment years stating nil income(s). Learned CIT DR fails to dispute the fact that no notice u/s. 1433(2) had been issued within the time stipulated i.e. six months from the end of the financial year of the filing of these three returns. This followed the impugned search dated 01.12.2015 conducted in official and residential premises of the assessee belonging to M/s Bhalotia group. The Assessing Officer then initiated sec. 153A proceedings finally culminating in the impugned addition(s) of unexplained share capital/premium of ₹25 lac, ₹57 lac and ₹70 lac u/s 68 of the Act.

5. We afforded sufficient opportunities to the Revenue for high any incriminating material found or seized during the course of impugned search forming foundation of sec. 153A proceedings in issue. Mr.Singh has taken a lot of pains to highlight that assessee had declared nine investors for the impugned share capital out of which 5 are stated to have not even been found during scrutiny. Four of them stood served. All of the said four parties chose not to respond. He vehemently contends that all these nine investors are shell companies and therefore, both the lower authorities have rightly made the impugned addition(s).

6. We again emphasised to the Revenue as to what was incriminating material found or seized during the course of search against the assessee.

Mr. Singh argues that assessee's bank accounts particularly from the relevant incriminating material. We find no merit in Revenue's instant arguments as all relevant details including assessee's bank account / statements duly recorded in its books at the time of filing regular returns (supra).

7. We next notice that the quarters as to whether sec. 153A proceedings can be initiated in absence of any incriminating material found or seized during the course of search stands answered in assessee's favour as per this tribunal's co-ordinate bench's decision in ACIT vs. M/s Sethia Agrotech Ltd. IT(SS() No.91/Kol/2017 decided on 01.12.2017 as follows:

"5. We also notice that the CIT(A)'s findings extracted in preceding paragraphs have made it clear that the said seized documents were not in the nature of incriminating material which could be used against the instant taxpayer. We make it clear that the assessee's stand time and again in furtherance to sec. 153C notice has disputed the said documents' nature to be incriminating as per copies o necessary correspondence in this regard dated 14.10.2015, 13.11.2015 & 04.03 2016 filed in paper book at pages 93 to 126. It is therefore clear that both the lower authorities have framed impugned assessment in the absence of any incriminating materials found or seized during the course of search in issue. This tribunal's co ordinate bench's decision in ACIT vs. M/s Sethia Agrotech Ltd. **IT(SS)A No.91/Kol/2017** decided on 01.12.2017 pertaining to the very search has quashed similar assessments to be unsustainable as under:-

"*8. We have heard the rival submissions. We find it would be necessary to address the preliminary issue of whether he addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act and the time limi for issuance of notice u/s 143(2) of the Act had expired and hence it falls under concluded proceeding , as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience*:-

"[Assessment in case of search or requisition

153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply

accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"

8.1. We find that the Co-ordinate Bench of Delhi Tribunal in the case of Dy. CIT v. Aggarwal Entertainment (P.) Ltd reported in [2016] 72 taxmann.com 340 (Delhi - Trib.) had addressed this aspect. The relevant headnotes is reproduced below:-

"Section 153A, read with section 143, of the Income-tax Act, 1961-Search and seizure - Assessment in case of (in case of section 143(1) assessment)-Assessment year 2004-05- Whether assessment in respect of which return has been processed under section 143(1), cannot be regarded as pending for purpose of section 153A as Assessing Officer is not required to do anything further about such a return and, thus, said assessment cannot be reopened in exercise of power of section 153A-Held yes (Paras 10 and 12) (In favour of assessee)*."*

8.2. We find that the Co-ordinate Bench of this tribunal in the case of ACIT vs Kanchan Oil Industries Ltd in ***ITA No. 725/Kol/2011*** *dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL had explained the aforesaid provisions as below -*

*"*6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

(a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.

(b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.

(c) In respect of conc uded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.

(d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be -

(i) assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;

(ii) assessment years where assessments are already completed u/s. 143(3) of the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

6.4.2 The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.

6.4.3 The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-

'**assess**' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'**reassess**' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year.''

8.3. We also find that recently the Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) held as under:-

*'*37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

(i) Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

(ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the LD AOs as a fresh exercise.

(iii) The LD AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The LD AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

(iv) Although Section 153A does ot say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the LD AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

(v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to complete assessment proceedings.

(vi) Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the LD AO.

(vii) Completed assessments can be interfered with by the LD AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

8.4. We find that the decision relied upon by the ld DR in the case of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) does not in any manner advance the case of the revenue as admittedly the Hon'ble Delhi High Court in para 24 of its order had held as under:-

> *"*24. We are not concerned with a case where no incriminating material was found during the search conducted under section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open."

8.5. The ld DR also relied on the recent decision of the Hon'ble Kerala High Court in the case of E.N.Gopakumar vs CIT reported in (2016) 75 taxmann.com 215 (Kerala) in support of his contentions. We find that the decision of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) had duly considered the decisions of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (De HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB).
We also find that against the decision of the Hon'ble Delhi High Court in 380 ITR 573 (Del) , the revenue preferred Special Leave Petition before the Hon'ble Supreme Court and the same was dismissed by the apex court which is reported in 380 ITR (St.) 4 (SC). Hence it could be safely concluded that the decision of Hon'ble Delhi HC in the case of Kabul Chawla upra would have to be considered on the impugned issue and in any case, the Hon'ble Supreme Court in the case of CIT vs Vegetable Products Ltd reported in 88 ITR 192 (SC) had held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted.
8.6. We also find tha the Hon'ble Jurisdictional High Court recently in the case of Principal CIT vs M/s Salasar Stock Broking Ltd in G.A.No. 1929 of 2016 ITAT No. 264 of 2016 dated 24 8.2016 had endorsed the aforesaid view of Hon'ble Delhi High Court in Kabul Chawla's case and also placed reliance on its own decision in the case of CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC).
8.7. We find that the provisions of section 132 of the Act relied upon by the ld DR would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the ld AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the ld AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act, as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance.

Hence the arguments advanced by the ld DR in this regard deserves to be dismissed.

8.8. In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessment framed u/s 143(1) of the Act for the Asst Year 2010-11, which was unabated / concluded assessment, on the date of search, deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly the addition made on account of share capital u/s 68 of the Act is hereby directed to be deleted. Since the issue is addressed on preliminary ground of absence of incriminating materials, we refrain to give our findings on the merits of the addition u/s 68 of the Act for the Asst Year 2010-11. Accordingly the grounds raised by the revenue in this regard are dismissed."

8. We adopt the above detailed reasoning mutatis mutandis to hold that the both the lower authorities' action in initiating sec. 153A proceedings against this taxpayer in absence of any incriminating ma erial found or seized during the course of search is not sustainable in the eyes of law. We thus quash all these three assessment(s). The assessee succeeds in its former legal substantive ground. Its latter substantive ground on merits (supra) is rendered infructuous.

9. These three assessee's appeals are allowed accordingly.

Order pronounced in the open court 30/11/2018

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(Dr. A.L. Saini)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 30/11/2018 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Max MoversPvt.Ltd. R.No.206, 2nd Fl,Centre Point, 21, Hemant Basu Sarani, Kolkata-01
2. राजस्व/Revenue-DCIT, Central Circle-4(3), Kolkata
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।