IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri A T Varkey, JM, & Shri M.Balaganesh, AM]

I.T.A No. 2444/Kol/2016

Assessment Year : 2012-13

ITO, Ward-12(4), Kolkata	-vs-	M/s Saktideep Suppliers Pvt. Ltd. [PAN: AAOCS 2268 P]
(Appellant)		(Respondent)

For the Appellant : Shri P.K. Srihari, CIT DR

For the Respondent : Shri Soumitra Choudhury, Advocate

Date of Hearing : 12.11.2018

Date of Pronouncement : 30.11.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-4, Kolkata [in short the ld CIT(A)] in Appeal No. 823/CIT(A)-4/Ward-12(4)/15-16 dated 18.10.2016 against the order passed by the ITO, Ward-12(4), Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 25.03.2015 for the Assessment Year 2012-13.

2. The only issue to be decided in this appeal is as to whether the ld CITA was justified in deleting the addition made towards share capital u/s 68 of the Act in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee issued part of the equity shares during the year at a premium of Rs 249 per share. The total share capital and share premium issued during the financial year 2011-12 was Rs 6,00,00,000/-. The assessee allotted shares to the following persons:-

S.N.	Name of the Company	PAN	Address	Number of Shares allotted
1	Looksharp Dealer Pvt. Ltd.	AABCL7806M	63/3B, Sarat Bose Road, Kolkata – 700025	50,00,000
2	Neelgiri Commodeal Pvt. Ltd.	AADCN2748N	195, Block – J, New Alipore, Kolkata – 700053	50,00,000
3	Anamika Dealcomm Pvt. Ltd.	AAICA4631Q	AD-76, Sec-1, Salt Lake, Kolkata – 700064	80,000
4	Newzone Dealer Pvt. Ltd.	AADCN7058F	63/3B, Sarat Bose Road, Kolkata – 700025	40,000
5	Mastermind Shoppers Pvt. Ltd.	AAHCM3534B	AD-76, Sec-1, Salt Lake, Kolkata – 700064	40,000
6	Fairlink Mercantile Pvt. Ltd.	AABCF7790E	AD-76, Sec-1, Salt Lake, Kolkata – 700064	40,000

The ld AO issued notice u/s 133(6) of the Act to the aforesaid share applicant companies asking them to submit bank statements, ledger account, copy of returns and other documents in respect of investments made with assessee company. All the share applicant companies complied with the same. The ld AO later issued summons u/s 131 of the Act to the Director of the assessee company on 10.2.2015 which returned unserved. Later Inspector was also deputed to serve the summons to the Director of the assessee company who also failed to serve the same. The ld AO accordingly proceeded to treat the entire share capital and share premium received during the year to the tune

of Rs 6,00,00,000/- as unexplained cash credit and added the same to the total income of the assessee.

4. Before the ld CITA, the assessee contended that the contentions of the ld AO based on report of Inspector that summons could not be served on the assessee company and accordingly the assessee company was not in existence at all was factually incorrect in as much as the notices u/s 143(2) and 142(1) of the Act issued by the Income Tax Department were duly served on the assessee company at the same address. The assessee had also duly responded to the said notices before the ld AO which fact is not disputed by the ld AO. It was argued that if the summons could not be served on the assessee by registered post, then there are alternative mechanisms provided in the Act u/s 282 of the Act viz by electronic mode or as per the manner provided by the Code of Civil Procedure in Order V Rule 17 wherein the service of summons could be made by affixture. The ld AO had not made any efforts to make service of summons as per the procedure prescribed by law. The assessee further submitted that during the assessment proceedings, it had submitted all the relevant documents viz ITR acknowledgement, final accounts and bank statements of the assessee as well as the share applicant companies to prove the fact that the share capital and share premium raised by the assessee were genuine. Moreover, the independent notices issued u/s 133(6) of the Act to the share applicant companies, were duly responded by them directly before the ld AO together with supporting evidences. Hence the transactions of the assessee company ought not to have been doubted by the ld AO. It was also submitted that the detailed documents submitted by the share applicants explained the sources from which the funds, utilized in acquiring shares of the assessee company. It was also pleaded that all the share applicant companies had sufficient net worth in their balance sheet and that the investment made in the assessee company was less than their net worth. All the share applicant companies were duly assessed to income tax and had filed their returns of income for the Asst Year 2012-13 on regular basis. It was pleaded that the assessee had

duly proved the three ingredients viz. identitiy, creditworthiness and genuineness of the transactions. The assessee among several other decisions placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs Orissa Corporation P Ltd reported in 159 ITR 78 (SC) wherein it was held that where the assessee has discharged its onus of proving the identity and creditworthiness of the creditor as well as the genuineness of the transaction, no addition is called for on the ground that nobody has appeared in response to summon issued u/s 131 of the Act.

5. The ld CITA deleted the addition by observing as under:

"4.4 It is observed from the Paper Book that the AO had issued notices u/s 133(6) of the Act, to each of the share applicants. Such notices were duly served upon the respective share applicants at their respective addresses on the records. Service of such notices u/s 133(6) of the Act to each of the share applicants at their respective known addresses proves their respective identities. It is further observed that the corporate share applicants are registered under the Companies Act, 1956 and are on the records of Registrar of Companies functioning under Ministry of Corporate Affairs , Government of India and the individuals are having Permanent Account Numbers. In fact, each of the share applicants has duly responded to the statutory notices issued to them u/s 133(6) of the Act. In their respective replies the share applicants had disclosed, inter alia, their Permanent Account Numbers along with the acknowledgment of submission of their return of income and furnished audit report and financial statements which in my humble opinion proves their identities beyond any doubt. It is also observed that each of the share applicants maintained bank accounts; and details of their respective bank accounts f om which they made payments to the appellant for subscribing to the shares i sued to them, was filed by each of them before the AO. Further, each of the share applicants accepted the fact that they had subscribed to the shares issued by the appellant; and that such transactions were duly reflected in their respective books of accounts, as well as in their audited Balance Sheets. These facts, in my opinion, clearly prove the genuineness of the transactions.

4.5. It is further observed that each of the share applicants explained the source of funds in their respective replies to notice u/s 133(6) of the Act, from which they made payments to the appellant for subscribing to its share capital. The facts furnished on record by the share applicants, in my opinion, clearly prove their source of funds, and their capacity for making such payments and accordingly, the criteria of their creditworthiness is proved. The AO has not found any defect and/or deficiency in the source of funds explained by the share applicants through their replies to the statutory notices issued u/s 133(6) of the Act to them and accordingly, this precondition is also satisfied in the circumstances.

4.6. It is also observed that every share applicant in their respective replies to the statutory notices issued u/s 133(6) of the Act, furnished copies of their income tax acknowledgments evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheets wherein such investments made by each of them in the subscription of share capital issued by the appellant are duly reflected as also copies of their bank statements for the relevant period from which such subscription monies were paid by them respectively and copy of the allotment advise received by them from the appellant in respect of shares allotted to them. It is further observed that the net worth of the each of the share applicants, as disclosed in their Balance Sheets, far exceeded the amount of investments made by them in the shares of the appellant company. It is accordingly observed it adequately prove their creditworthiness to make investment in the share capital of the appellant. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their capacity and source of funds, as well as the genuineness of the transactions in relation to the share capital issued by the appellant which was subscribed to by each of them. Thus it is proved any doubt of dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant, in the impugned previous year relevant to the assessment year under appeal, and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which lay on the appellant, in relation to s. 68 of the Act, has been duly discharged by it and nothing further remains to be proved by it on this issue. There is no evidence on record to show that the identities of the share applicants are not proved and/or that the introduction of share capital by them was not genuine and/or the source of investment was not fully explained to the satisfaction of the AO. Since the conditions precedent for discharging of burden under the provisions of s. 68 of the Act are met with adequate evidence, the addition made under such pretext deserves to be deleted.

4.7. Further the Apex court in CIT vs. Lovely Exports Ltd. (2008) 216 CTR 195 (SC) wherein has held as under: -

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

In other words, it is observed that if share application money is received by an assessee from subscribers, whose names are given to the AO, are allegedly bogus. then the Revenue is free to proceed to reopen their individual assessments in accordance with law. The facts of the present are on a better footing to the one as decided above. In the instant case, all the share applicants had confirmed their investment with the appellant and as such, there was no basis for the AO to come to any adverse conclusion and accordingly, the entire amount received by the appellant on account of share

application as well as share premium monies cannot be regarded as undisclosed income u/s 68 of Act.

4.8. Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AR that the appellant has made its cases that the identity of the share applicants are established beyond doubt and on enquiries made by the A.O. there is no adverse finding reached on this aspect. Admittedly, all the share applicants are existing assessee's under the Act which establish the identity and authenticity of the share applicants. About the genuineness of the transactions there is no any adverse finding in the assessment order which is distinct to the facts brought on record by the appellant during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by submission of their return, audited annual accounts, their bank statement and replies to notices u/s 133(6) of the Act as depicted hereinabove. The net worth of such subscribers is in excess of the amount invested by each of them as explained hereinabove. The addition made by AO is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidence adduced during the course of the assessment proceedings by the appellant and the replies of the share applicants in respect of the share capital do not warrant the inference that such share application monies received is unaccounted cash credit. Hence, I am inclined to accept the arguments tendered by the AR of the appellant in this respect.

4.9. I find that one of the reason for which share application money has been considered as unexplained u/s 68 of the Ac is that summon u/s 131 could not be served upon the appellant company, I find from the assessment order that the AO has observed from the inspector's report that the inspector could not find the appellant company at the given address. The AO also observed that the identity of the appellant is not proved as it was not found at the stated address. I find from the record that all the notices issued have been complied with by the appellant from the same address. The return of income was selected from the same address. The appellant has filed its Income Tax returns as well as ROC returns from the same address. Thus this finding of the AO is not substantiated and I find that this can be no reason to make addition of entire share capital raised by the appellant company particularly when the primary onus on the appellant has been duly discharged by it. I also agree with the submissions of the AR of the appellant that when the summons could not be served by registered post the AO ought to have resorted to other means. I find no effort was made by the AO to serve the summon u/s 131 to the appellant by registered post. Further I also agree with the contentions of the AR of the appellant that Order V rule 17 of. CPC states that where a person is not found, the service of summon is required to be made by affixture. I find that no such effort was also made by the AO. I also agree with the contentions of the AR of the appellant that since the appellant company was formed in the preceding year only and it did not have any business activity, there is no question of earning of such huge amount of unaccounted money by the appellant. Thus from the evidences filed on record I do not have any hesitation to hold that the appellant is not a bogus entity. In view of this non-service of summon to the appellant has nothing to do with share application received by it and it

cannot be a ground to invoke the provisions of section 68 of the Act. The AR of the appellant has relied upon a plethora of decisions of the Apex Court, High Court as well as jurisdictional ITAT which I find are very much relevant to the facts of the present case. Respectfully, I hold that the AO was not justified in invoking the provisions of section 68 of the facts and circumstances of the case and therefore the addition of Rs. 6,00,00,000/- stands deleted. These grounds are allowed."

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

7. We have heard the rival submissions. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. It is not in dispute that the assessee had furnished all the details of all the share subscribing companies that were sought for by the ld AO. The ld AO issued notices u/s 133(6) of the Act on al the share subscribing companies and the same were duly served. All the shareholders responded to notice u/s 133(6) of the Act directly by sending the requisite details to the ld AO. The assessee received share capital of Rs 1,00,00,000 comprising of 10000000 equity shares of Re 1 each ; Rs 5,00,00,000/- comprising of share capital of 200000 equity shares of Re 1 each and share premium of Rs 249 per share. The total share capital and share premium received during the financial year 2011-12 was Rs 6,00,00,000/-. We find that all the shareholders had duly confirmed the transactions with the assessee company. The evidences which were filed before the ld AO with regard to this issue are as under:-

a) Income Tax Return of the shareholders

b) Audited financial statements of shareholder companies.

c) Share Allotment Letters

d) Copy of the bank account of the shareholders

e) Transactions with the assessee duly highlighted in the bank statement.

f) Evidences of source of source of the shareholders.

g) Form of Application for Equity Shares

h) Board Resolution for making investment in assessee company

i) Memorandum and Articles of Association of the shareholder companies

j) Certificate of Incorporation

These evidences are enclosed in pages 16 to 395 of the paper book filed before us.

7.1. From the aforesaid details, we find that in case of all the share applicants –

a) The share application form and allotment letters are available.

b) The share applicants are income tax assessees and had filed their income tax returns regularly.

c) The investment in share application money were made out by account payee cheques.

d) The bank accounts of the share applicants reveal that there were no deposits of cash before issue of cheques to the assessee company.

e) The share applicants are having substantial creditworthiness in the form of free reserves and capital in their balance sheet

7.2. As per the mandate of section 68 of the Act, the nature and source of credit in the books of the assessee company has been duly explained by the assessee. The credit is in the form of receipt of share capital and share premium from share applicants. The nature of receipt towards share capital is well established from the entries passed in the respective balance sheets of the companies as share capital and investments, as the case may be. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. The identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and income tax returns. With regard to the creditworthiness of share applicants, these companies are having capital in several crores of rupees and the investment made in the assessee company is a small part of their capital. These

transactions are also duly reflected in the balance sheets of the share applicants. By this, the creditworthiness of share applicants is also proved beyond doubt. With regard to genuineness of transactions, the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their respective bank accounts. We find that the assessee had even proved the source of money deposited into the respective bank accounts of share applicants, which in turn had been used by them to subscribe to the assessee company as share application. Hence the source of source of source is also proved in the instant case though the same is not required to be done by the assessee as per law. The share applicants have confirmed the fact of investment in share capital and share premium in response to notice u/s 133(6) of the Act and have also confirmed the payments wh ch are duly corroborated with their respective bank statements and all the payments are by account payee cheques. Reliance in this regard is placed on the decision of the *Hon'ble Supreme Court in the case of Orissa Corporation P Ltd reported in 159 ITR 78 (SC) and Hon'ble Gujarat High Court in the case of DCIT vs Rohini Builders reported in 256 ITR 360 (Guj)* , wherein it was held that onus of the assessee (in whose books of account, the credit appears) stands fully di charged, if the identity of the creditor is establishd and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of 'cash deposited in the bank accounts of the creditors' , the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word 'may' in section 68 of the Act. Relevant observations of Hon'ble Gujarat High Court at pages 369 & 370 are as under :-

> *"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation (1986) 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and*

mere non- compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.

Further, we may point out that section 68 under which the addition has been made by the Assessing Officer reads as under:

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

The phraseology of Section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the asse see of that previous year. In this case the legislative mandate is not in terms of the words "shall be charged to income tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in Section 69 has held that in creating the legal fiction the phraseology employs the word 'may' and not 'shall'. Thus the unsatisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of CIT vs. Smt. P K. Noorjahan [1999] 237 I TR 570."

It would be pertinent to note that against the said decision of Hon'ble Gujarat High Court, the Special Leave Petition (SLP in short) preferred by the revenue was dismissed by the Hon'ble Supreme Court.

7.3. Undisputedly the Share Applicants in this case are the bank account holder in their respective banks in their own name and are sole owner of the credits appearing in their bank account from where they issued cheques to the appellant. For the proposition that a Bank Account holder himself is the 'owner' of 'credits' appearing in his account (with the result that he himself is accountable to explain the source of such credits in whatever

way and form, the same have emerged) support can be derived from section 4 of Bankers Book Evidence Act 1891 which reads as under:-

> *"4. Mode of proof of entries in bankers' books Subject to the provisions of this Act, a certified copy of any entry in a bankers' book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every cases where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."*

Following the said provisions, the co-ordinate bench of *Allahabad Tribunal in the case of Anand Prakash Agarwal reported in 6 DTR (All-Trib) 191* held as under:-

> *"The question that remains to be decided now is whether the subject matter of transfer was the asset belonging to the transferor/donors themselves. There is enough material on record which goes to show that there were various credits in the bank accounts of the donors, prior to the transaction of gifts, which undisputedly belonging to the respective donors themselves, in their own rights. No part of the credits in the said bank' accounts was generated from the appellant and/or from its associates, in any manner. The certificates issued by the banks are construable as evidence about the ownership of the transferors or their respective bank accounts, as per s.4 of the Bankers' Books evidence Act 1891, which read as under:*
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> *"4. Where an extract of account was duly signed by the agent of the bank and implicit in its was a certificate that it was a true copy of an entry contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book was in the custody of the bank, it was held admissible in evidence. Radheshyam v. Safiyabai Ibrahim AIR 1988 Bom. 361 : 1987 Mah. 725: 1987 Bank J 552."*
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> *In view of the position of law as discussed above, it is always open for a borrower to contend, that even the "creditworthiness" of the lender stands proved to the extent of credits appearing in his Bank Account and he should be held to be successful in this contention."*

7.4. In the case of Nemi Chand Kothari vs CIT reported in 264 ITR 254 (Gau), the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of *onus* on assessee under section 68, by holding that the same should be decided by taking into consideration the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually

taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the report are reproduced herein below:-

"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:

"Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden) of proving that fact is upon him. "

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What, thus, transpires from the above discussion is that white section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s)of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee

himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and IT is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor the burden of the assessee to prove the genuineness of the transact ons as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the c edi or. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-c editors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been. eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub- creditors, for, these aspects may not be within the special knowledge of the assessee. "

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" ... If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his

special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor… "

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"In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor had actually been received by the sub-creditor from the assessee …."

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"Keeping in view the above position of law, when we turn to the factual matrix of the present case, we find that so far as the appellant is concerned, he has established the identity of the creditors, namely, Nemichand Nahata and Sons (HUF) and Pawan Kumar Agarwalla. The appellant had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from. undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness."

7.5. We find that the *Hon'ble Jurisdictional High Court in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata reported in 347 ITR 347(Cal)* wherein the Court held as follows:

> *"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.*
>
> *16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."*

7.6. We find that the *Hon'ble Jurisdictional High Court in yet another case of Crystal Networks (P) Ltd vs CIT reported in 353 ITR 171 (Cal)* had held that when the basic evidences are on record, the mere failure of the creditor to appear before the Assessing Officer cannot be the basis to make addition. The relevant observations of the Hon'ble Court are as under:-

> *8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both*

favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).

9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of Udhavdas Kewalram v. CIT [19671 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.

10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness As ightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by he Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:

> *"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "*

11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

12. Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed."

7.7. It is not in dispute that all the share applicant compan es in the instant case before us are assessed to income tax. We find that the assessee had duly proved the source of source of source in the instant case. Even if the creditworthiness of the share applicants are to be doubted , then it would be the duty of the ld AO of the assessee to make enquiries through the ld AO of the concerned share applicants. Once the relevant details are filed by the assessee before the ld AO to prove the creditworthiness of share applicants, then the same cannot be questioned / disputed by the ld AO of the assessee as the same would be travelling beyond his jurisdiction. In other words, the creditworthiness of the shar applicant companies would have to be examined by the Assessing Officer of tho e companies and not by the Assessing Officer of the assessee herein. However, it would be incumbent on the part of the ld AO of the assessee herein , to trigger the said verification process on the side of the department. It would be interesting to note in this regard that the *Hon'ble Jurisdictional High Court in the case of CIT Kolkata III vs M/s Dataware Private Limited in ITAT No. 263 of 2011 dated 21.9.2011* had held as under:-

"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction

has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."

7.8. We find that the *Hon'ble Jurisdictional High Court in the case of CIT vs Roseberry Mercantile (P) Ltd in ITAT No. 241 of 2010 dated 10 1.2011* , while relying on the Hon'ble Supreme Court in the case of Lovely Exports reported in 216 CTR 295 (SC) , had held :-

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT (A) ought to have held that the assessee had not established the genuineness of the transaction. "

It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4, 00, 000/- and Rs 20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00, 000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.

On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

7.9. We also find that the *Hon'ble Jurisdictional High Court in the case of CIT vs Leonard Commercial (P) Ltd in ITAT No. 114 of 2011 dated 13.6.2011* had held as under:-

"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share applica ion was contributed. It further appears that all the payments were made by the appl cants by account payee cheques.

It appears f om the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.

In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under section 68 of the Income- tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

7.10. We also find that the co-ordinate bench of this tribunal in the case of *VSP Steel P Ltd (formerly M/s Tikmani Metal P Ltd) in ITA No. 741/Kol/2014 for Asst Year 2010-11* had held as under:-

"We have heard the rival submissions. We find that the ld DR argued that the assessee had not proved the source of source of share applicants who had invested share application monies in the assessee company and accordingly prayed that the addition has been rightly made u/s 68 of the Act. He also placed reliance on the decision of this tribunal in the case of Subhlakshmi Vanijya (P) Ltd vs CIT reported in (2015) 60 taxmann.com 60 (Kolkata – Trib.) dated 30.7.2015. In response to this, the ld AR argued that there is no mandate in law that the assessee has to prove the source of source of share applicants. He argued that in the instant case, the assessee had duly discharged its complete onus by furnishing the requisite details. In case if the ld AO has got some doubts, he should have verified the same from the AO of those share applicants. We find from the plain reading of section 68 of the Act, the duty cast on the assessee is to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share application money from five share applicants. The nature of receipt towards share application money is well established from the entries passed in the respective balance sheets of the companies as investments. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. In the instant case, we find that the identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns . With regard to the creditworthiness of share applicants, the ld AO himself states that the five share applicants had invested in assessee company's shares by taking money from some other companies. Hence the source of the share applicants for making investment in share application monies of assessee company is also proved. By this, the creditworthiness of the share applicants is also proved beyond doubt. Third ingredient is genuineness of the transactions. We find that the five share applicants had paid the monies to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts, which are quite evident from the bank statements enclosed in the paper book. We agree with the arguments of the ld AR that the source of source of share applicants need not be proved by the assessee herein. We hold that the decision rendered by this tribunal in

Subhalakshmi Vanijya relied upon by the ld DR was rendered in the context of validity of revision proceedings u/s 263 of the Act and not on the merits of the case. This tribunal in that case decided the validity of invoking revisionary jurisdiction u/s 263 of the Act by the ld CIT and whether adequate enquiries were made by the ld AO in the facts and circumstances of that case. This tribunal in Subhalakshmi Vanijya case supra never had an occasion to look into the merits of the addition proposed to be made towards share capital in the facts and circumstances of that case and no decision was rendered thereon on merits of the issue. Hence the reliance placed thereon by the ld DR does not advance the case of the revenue. In the instant case, we find that the share applicants have not denied the fact of making investment in share application monies in assessee company, which is evident from the fact that they had confirmed in writing in response to notice issued u/s 133(6) of the Act which was admittedly done behind the back of the assessee. There is no whisper in the entire assessment order o doubt the veracity of the transactions and genuineness of share applicants and the transactions herein. In the instant case, the assessee had indeed proved the identity of the share applicants, creditworthiness of share applicants and genuineness of transactions beyond doubt. We find that the entire addition has been made by the ld AO based upon suspicion, surmises and conjectures and not upon proper evaluation and appraisal of the evidences and documents filed before him. We place reliance on the decision of the Hon'ble Apex Court in this regard in the case of Dhakeshwari Cotton Mills Ltd vs CIT reported in 26 ITR 775 (SC) wherein it has been held that no addition can be made without material and on mere suspicion.

In these facts and circumstances, there is no need to treat the receipt of share application money from five share applicants as unexplained u/s 68 of the Act. Hence we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by he revenue are dismissed."

7.11. We find that the co-ordinate bench of this tribunal recently in the case of *ITO vs Wiz-Tech Solutions Pvt Ltd in ITA No. 1162/Kol/2015 dated 14.6.2018* had held as under:-

28. From the details as aforesaid which emerges from the paper book filed before us as well as before the lower authorities, it is vivid that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income, (iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements, (vi) in none of the transactions the AO found deposit in cash before issuing cheques to the assessee company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above.

29. As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share capital with premium from share applicants. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and investments. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. For proving the identity of share applicants, the assessee furnished the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, as we noted supra, these Companies are having capital in several crores of rupees and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse iew could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application. Hence the source of source of source is proved by the assessee in the instant case though the same is not required to be done by the assessee as per law as it stood/ applicable in this assessment year. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act nd have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.

*30. ******

*31. ******

32. We would like to reproduce the Hon'ble High Court order in CIT vs. Gangeshwari Metal P.Ltd. in ITA no. 597/2012 judgement dated 21.1.2013, the Hon'ble High Court after considering the decisions in the case of Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169 and judgement in the case of CIT vs. Lovely Exports 319 ITR (St) 5(SC) held as follows:-

> *"As can be seen from the above extract, two types of cases have been indicated. One in which the Assessing Officer carries out the exercise which is required in law and the other in which the Assessing Officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer after noting the facts,*

merely rejected the same. This would be apparent from the observations of the Assessing Officer in the assessment order to the following effect:-

> *"Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tries to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance4 sheet etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remain unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.5~50/000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income/ penalty proceedings under Section 271(1)(c) are being initiated separately.*

The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Cou t decided in favour of the revenue in that case. However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under Section 68 of the Income Tax Act 1961. Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law"

33. The case on hand clearly falls in the category where there is lack of enquiry on the part of the A. O. as in the case of Ganjeshwari Metals (supra).
b) In the case of Finlease Pvt Ltd. 342 ITR 169 (supra) in ITA 232/2012 judgement dt. 22.11.2012 at para 6 to 8/ it was held as follows.

> *"6. This Court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income Tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the ROC in relation to the share application affidavits of the directors, form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing Officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the*

inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr.Mahesh Garg that the income sought to be added fell within the description ofS.68 of the Income Tax Act 1961. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (supra).

The decision in this case is based on the peculiar facts which attract the ratio of Lovely Exports (supra). Where the assessee adduces evidence in support of the share application monies, it is open to the Asses ing Officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators, such a link was shown to be present in the case of Nova Promoters & Finlease (P) Ltd. (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under Section the ratio of Lovely Exports (supra) is attracted, ir espective of the facts, evidence and material. "

34. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we hold that an addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to uphold the order of the Ld. Commissioner of Income Tax (Appeals)

35. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do not want to interfere in the impugned

order of Ld. CIT(A) which is confirmed and consequently the appeal of Revenue is dismissed.

7.12. We find that the *Hon'ble Supreme Court in the case of M/s Earthmetal Electricals P Ltd vs CIT & Anr. reported in 2010 (7) TMI 1137 in Civil Appeal No. 21073 / 2009 dated 30.7.2010* arising from the order of Hon'ble Bombay High Court had held as under:-

ORDER

Delay condoned.

Leave granted.

Heard learned counsel on both sides.

We have examined the position. We find that the shareholders are genuine parties. They are not bogus and fictitious. Therefore, the impugned order is set aside.

The appeal is allowed accordingly.

No order as to costs.

In the instant case before u , the share subscribing companies are duly assessed to income tax. It is not in dispute that the share subscribing companies are in existence. It is not in dispute that the share subscribing companies are duly assessed to income tax and their income tax particulars together with the copies of respective income tax returns with their balance sheets are already on record . Hence it could be safely concluded that they are genuine shareholders and not bogus and fictitious. Accordingly, the ratio laid down by the Hon'ble Apex Court in the case of M/s Earthmetal Electricals P Ltd supra would be squarely applicable to the facts of the instant case.

7.13. We would like to add that receipt of share capital for a company is not a prohibited transaction, as that is one of the main source of raising funds for a company to run its intended activities. The ld CITA had categorically given a finding that the ld AO did not bring on record sufficient tangible and cogent material to support his

conclusion that the amount credited in the assessee's books in the form of share capital and share premium actually represented assessee's undisclosed income. This factual finding remain uncontroverted by the revenue before us. Once the replies to notices issued u/s 133(6) of the Act were received from the share subscribing companies, if at all, the ld AO had any doubt that the details filed thereon warranted further examination, nothing prevented him from issuing summons u/s 131 of the Act to the directors of the share subscribing companies or carry out examination through the Assessing Officer of the share subscribing companies. The assessee could only furnish the relevant details to prove its primary onus. Thereafter the onus shifts to the revenue to decide whether to make further examination or not in the given set of facts and circumstances. The shifting of onus is like a pendulum clock between the a sessee and the ld AO. The ld AO after carrying out the requisite verification on his part independently, should confront the assessee, if necessary, based on he materials gathered against the assessee and then the procedure of cross examination, if sought for by the assessee, needs to be provided in order to bring the entire enquiries and examination to the logical end. In the instant case, the ld AO called for a l the relevant details from the assessee which were duly provided in time. Then the onus shifts to the ld AO. The ld AO later issued summons u/s 131 of the Act to the Director of the assessee company on 10.2.2015 which returned unserved. Later Inspector was also deputed to serve the summons to the Director of the assessee company who also failed to serve the same. The ld AO accordingly proceeded to drew adverse inference against the company and treated the entire share capital and share premium received during the year to the tune of Rs 6,00,00,000/- as unexplained cash credit. The assessee had already rebutted this fact that the ld AO was able to serve the notices issued u/s 143(2) and 142(1) of the Act at the same address of the assessee which were duly complied with. We find that the reliance placed by the ld DR on the decision of Hon'ble Calcutta High Court in the case of Rajmandir Estates supra was distinguishable on facts as the said decision was rendered in the context of validity of revisionary jurisdiction u/s 263 of the Act by the Learned

Administrative Commissioner. This fact has already been addressed by this tribunal in the case of VSP Steel P Ltd supra. No decision whatsoever was rendered by the Hon'ble Jurisdictional High Court in the case of Raj mandir Estates P ltd on merits of the addition and hence does not come to the rescue of the revenue in the facts of the instant case.

7.14. We also find that the *Hon'ble Apex Court recently in the case of Principal CIT vs Vaishnodevi Refoils & Solvex reported in (2018) 96 taxmann com 469 (SC)* wherein the SLP of the Revenue has been dismissed by the Hon'ble Apex Court. The brief facts were that the addition u/s 68 of the Act was made by the Assessing Officer in respect of capital contributed by the partner of the firm. The Hon'ble High Court noted that when the concerned partner had confirmed before the Assessing Officer about his fact of making capital contribution in the firm and that the said investment is also reflected in his individual books of accounts, then no addition could be made u/s 68 of the Act. The decision of *Hon'ble Gujarat High Court is reported in (2018) 89 taxmann.com 80 (Guj HC)* . The SLP of the revenue against this judgement was dismissed by the Hon'ble Supreme Court.

7.15. To sum up, section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its income of the previous year in which the same was received. In the facts of the present case, both the nature & source of the share capital received with premium were fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed before the ld AO. Accordingly, all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction were placed before the ld AO and the onus shifted to the ld AO to disprove

the materials placed before him. Without doing so, the addition made by the ld AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do not want to interfere in the impugned order of Ld. CIT(A) which is confirmed and consequently the ground no. 1 raised by the revenue is dismissed.

8. The Ground No. 2 raised by the revenue is general in nature and does not require any specific adjudication.

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

Order pronounced in the Court on 30.11.2018

Sd/-	Sd/-
[A T Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 30.11.2018
SB, Sr. PS

Copy of the order forwarded to:
1. ITO, Ward-12(4), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
2. M/s Saktideep Suppliers Pvt. Ltd., 35/3, Somnath Lahiri Sarani, New Alipore, Kolkata-700080.
3. C.I.T(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches