



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No. 160/CTK/2017
Assessment Year : 2006-2007

M/s. Niyati Foods Pvt Ltd., At/PO: Sarbahal Road, Jharsuguda.	Vs.	ACIT, Circle 1(1), Bhubaneswar.
PAN/GIR No.AACCN 1530 B		
(Appellant)	..	(Respondent)

Assessee by : Shri Mahendra Kumar Kedia, AR
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 10/05/ 2018
Date of Pronouncement : 15 /05/ 2018

ORDER

Per N.S.Saini, AM

This is an appeal filed by the assessee against the order of the CIT(A)- 2, Bhubaneswar dated 28.2.2017 for the assessment year 2006-07.

2. The sole issue involved in these grounds of appeal is that the CIT(A) erred in confirming the addition of Rs.66,80,000/- u/s.68 of the Act on account of unexplained share application money.

3. The brief facts of the case are that the Assessing Officer observed that the assessee has claimed to have received share application money from the following persons:



Sr.No.	Name of the shareholders	Share application money
1.	Sri Ajit Keshari	Rs.12,58,000/-
2.	Sri Aman Agarwal	Rs.13,50,000/-
3.	M/s. Auroplast Merchandise Pvt Ltd.	Rs. 6,00,000/-
4.	Safire Export Agency Pvt Ltd.	Rs. 6,00,000/-
5.	M/s. Sun Rays Agencies Pvt Ltd.	Rs.18,00000/-
6.	M/s. Vindya Agencies Pvt Ltd	Rs.10,00,000/-
	Total :	Rs.66,08,000/-

4. The Assessing Officer issued summons to the shareholders but there was no compliance. Further, the Assessing Officer observed that two individual shareholders are from Bhubaneswar and the four company shareholders are from Kolkata. Since, none of the shareholders appeared before the Assessing Officer, the Assessing Officer concluded that genuineness of the transactions, identity, and creditworthiness of the shareholders has not been proved by the assessee added Rs. 66,08,000/- u/s.68 of the Act as unexplained share application money.

5. On appeal before the CIT(A), the assessee submitted that the shareholders could not appear during the assessment proceedings as sufficient time was not given to the shareholders. It was further submitted that four company shareholders are having substantial assets and liabilities and the Assessing Officer's decision to hold that they do not have creditworthiness is not correct. The assessee submitted the following particulars of the four company shareholders:



SI No.	Name	Total Assets	Total Liabilities	Net worth
a)	M/s Auoplast Merchandise (P) Ltd. P-41, Princep Street, 6 th Floor, Kolkata-700072 PAN: AACCA7162J	86150303	5899529	80250774
b)	Saffire Exports Agency(P) Ltd. Mercantile Building, 3rd Floor, 9, Lai Bazar Street, Kolkata-1, PAN.-AAECS0708A	80462456	10612652	69849804
c)	Sun Rays Agencies Private Ltd. Mercantile Building, Room No. 3/A/7, 3 rd Floor, 9, Lai Bazar Street, Kolkata-1,	89198422	6984378	82214044
	Present Address: 9, Jag Mohan Mallick Lane, 4 th Floor, Kolkata-700007 PAN.-AAECS03921			
d)	M/s Vindya Agencies(P) Ltd. Mercantile Building, Room No.3/A/7, 3 rd Floor, 9, Lai Bazar Street, Kolkata-1 PAN: AAACV9891P	79375390	5631141	73744249

6. The CIT(A) called for a Remand Report vide letter dated 5.10.2009 u/s.250(4) of the I.T.Act, 1961. The Assessing Officer in his remand report dated 19.11.2009 stated that two individuals namely Shri Ajit Keshari and Sri Aman Agarwal appeared but they could not explain the source of investment with documentary evidence. It was stated by the Assessing Officer that they could not tell any details of the transactions which are occurred long back through share brokers. They could also not tell the name of the share brokers. Further, it was informed by Shri Aman Agawal, one of the individual shareholder that he had taken Rs.8 lakhs from his friends and relatives, Rs.2.9 lakhs out of sale consideration



of shares, Rs.5 lakhs from his own capital. He submitted the statement of affairs and details of lenders by 15.11.2009 but not turned up.

7. Further with regard to company shareholders from Kolkata, commission u/s.131(d) of the I.T.Act, 1961 was issued to ACIT, Circle-39, Kolkata for conducting necessary enquiry and send the report.

8. In the Remand report, ACIT, Circle-39, Kolkata has stated that summons were issued to four company shareholders viz; (i) M/s. Auroplast Merchandise Pvt Ltd., (ii) M/s. Saffire Export Agency Pvt Ltd., (iii) M/s. Sun Rays Agencies Pvt Ltd., and (iv) M/s. Vindya Agencies Pvt Ltd. In all cases, he was unable to trace these companies on the provided address and even persons living in and around the registered address of these companies claimed and confirmed that they never heard the names of these companies. He further stated in his report that further investigation revealed that all these four concerns are shell companies and one person Naresh Kumar Chhaparia is controller of all these companies. Hence through ITD, he could find out the address and served the summons to Naresh Kumar Chhaparia on 4.10.2016 asking for his personal attendance. But he did not appear. Again another summon as a reminder was issued and served to him at his address on 4.11.2016 asking for his personal attendance on 7.11.2016. Again he did not appear. Further investigation revealed that Shri Naresh Kumar Chhaparia has remained one of the directors in two of the above companies in the duration mentioned below:

- i) M/s. Sun Rays Agencies Pvt Ltd., from 18.2.2005 to 5.5.2009



ii) M/s. Vindya Agencies Pvt Ltd., from 14.1.2005 to 3.3.2011.

9. The list of the companies in which he is the controller was provided in the soft copy. Further, in the remand report, it was stated that as the available record, dubious role was played by Shri Naresh Kumar Chhaparia, non-availability of the individuals/ directors of all these companies, non-existence of these companies on physical verification (Inspector's Report attached); these companies appear to be bogus companies, which are being used as conduit for rotating the money despite no real business or physical existence. Hence, M/s Auroplast Merchandise Pvt Ltd, M/s Saffire Export Agency Pvt Ltd, M/s Sun Rays Agencies Pvt Ltd and M/s Vindya Agencies Pvt Ltd definitely fail on the ground of "Identity" "Credit worthiness" and "Genuineness of Transaction" as these are nothing but shell companies. All efforts to trace the Directors of these companies went in vain and that at the registered address of the companies also, nothing could be found."

10. The CIT(A) has forwarded the remand report of the Assessing Officer to the assessee for filing the rejoinder. The assessee has filed rejoinder vide its letter dated 27.02.2017, wherein, the assessee has stated that the shareholders were not traceable since a lot of time has elapsed since obtaining the share capital from them.

11. Thereafter, the CIT(A) confirmed the addition by passing a detailed order and his findings are quoted as under:

"4.7 I have examined the assessing order, the submission of the appellant during the proceedings, remand report of the Assessing officer and the rejoinder of the appellant. It is seen that none of the share holders



appeared during the assessment proceedings even though summons u/s. 131 of IT. Act, 1961 was issued by the assessing officer. It is further, seen from the assessing officer's remand report dated 14.11.2009, regarding individual share holders that they did not submit the evidence about the source of investment made in to the company. The appellant has filed certain documents during the appeal proceedings. It is seen that Ajit Keshari has filed return of income for A.Y. 2006-07 in which he has disclosed income of Rs. 95,000/-. In the computation of income, he has shown income from salary of Rs. 96,000/-, income from tuitions of Rs. 54,200/- and exempt capital gain of Rs. 13,43,698/-. In the statements of capital gain, it is seen that the capital gain has arisen from trading in the following scripts.

Name of the company	Date of sale	QNTY SOLD	SALE RATE	Date of purchase	PUR RATE	NET GAIN	TOTAL
Sudama Trading & Investment Ltd.	23.11.2005	600	294.1	05.04.2004	6.52	287.5	172518
Shiv Om Investment Ltd.	13.02.2006	2000	197.1	21.06.2004	1.87	195.2	390360
Shiv Om Investment Ltd.	14.02.2006	1000	197	21.06.2004	1.87	195.1	195130
Shiv Om Investment Ltd.	17.02.2006	3000	197.1	24.06.2004	1.87	195.2	585690
Total Long term capital gain Ltd.							1343698

It is seen that the appellant has claimed capital gain of 4410% in the case of Sudama Trading & Investment Ltd and 10435%, in the case of Shiv Om Investment Ltd in nearly one year. Both of these companies are non-descript companies and the sale rates have been pushed through manipulation. Even the fortune 500 companies have not reported such fantastic gains in one year.

4.8 In the case of Aman Agarwal, it is seen from his return of income for A.Y. 200607 that he has shown total income of Rs. 1,20,000/-. It appears that the alleged investment in the company has been made by issue of cheques from his bank account in the State Bank of India (A/c. No.-06190021798), Bapuji Nagar Branch, Bhubaneswar and also from sale of shares of Sudama Trading & Investment. It is seen from these 'bank accounts that immediately before the issue of cheque, there is substantial deposit of cash. Cash of Rs. 1,00,000/- has been deposited on 12.08.2005, 13.08.2005, 20.08.2005, 24.09.2005 and cash of Rs. 40,000/- each has been deposited on 02.01.2006 and 03.01.2006. What is the source of cash deposit in the bank account has not been explained by the appellant. Regarding receipt from sale of shares, it is seen that Aman Agarwal has purchased shares of Sudama Trading and Investment @ Rs. 6.50 paisa on 01.04.2004 through broker Badri Prasad & Sons and



had sold those shares on 23.11.2005 for Rs. 2,94,050/- @ Rs. 294.50 per share through a broker Ashok Kumar Kayan reporting a gain of 4430%. Again such artificial gain is only through manipulation.

4.9 Regarding the 4 alleged company share holders, it seen from their returns of income that M/s. Vindya Agencies (P) Ltd. has declared a loss of Rs. 1,03,190/-, Sunrays Agencies Pvt. Ltd has declared a loss of Rs. 1,53,220/-, Saffire Exports and Agency Pvt. Ltd. has declared a profit of Rs. 1,416/- and Auroplast Merchandise Pvt. Ltd. has declared income of Rs. 7,800/-. I have verified the annual accounts of these companies as well as bank statements through which the alleged investments have been made. I find that there is accumulation of share capital largely on account of huge share premium and the amount has been utilised for investment in share capital and share premium of other companies or for giving loans. The profit and loss account reveals that there is a very small expenditure on running of these companies. For example, the expenditure on account of salary and bonus is Rs. 50,000/- to Rs. 75,000/- and all other expenses put together are less than Rs. 1,00,000/-. The examination of the bank account suggest that the credit entries are on account of transfers from other companies and debit entries are also on account of transfer to other companies. Other than these transfer entries there are hardly any transaction.

4.10 It is important to note that at the time of assessment proceedings, the assessing officer had issued summons to the alleged corporate share holders but they did not appear before the assessing officer. On field enquiries by the Investigation Wing of Income Tax Department, none of these corporate share holders are found to exist. If these 4 corporate share holders are raising genuine capital and investing in the other companies, how could they be untraceable. So much so that nobody in the building has even heard about them. In my opinion, these alleged corporate share holders are nothing but shell companies, about whom only the document have been produced, but there is no substance in their transactions.

4.11 In the following cases when the share holders were not traceable or did not respond to the summon of the assessing officer, the share capital is held as appellant's undisclosed income:

(i) **Commissioner of Income-Tax vs. Youth Construction (P) Ltd. reported in [2014J 44 taxmann.com 364 (Delhi).**

Section 68 of the Income-tax Act, 1961 - Cash credit - Assessment year 2000-01 -Sole fact that share applicants had established their identity by filing confirmation letters and copies of their income-tax returns is not sufficient for purpose of discharging creditworthiness of share applicants and genuineness of transactions [In favour of revenue]

Section 68 applies equally to share application monies received by an assessee and burden is on assessee to prove nature and source thereof to satisfaction of Assessing Officer. It involves three ingredients, namely,



proof regarding identity of share applicants, their creditworthiness to purchase shares and genuineness of transaction as a whole. Sole fact that share applicants had established their identity by filing confirmation letters and copies of their income-tax returns is not sufficient for purpose of discharging creditworthiness of share applicants and genuineness of transactions.

(ii) Vishwanath Clorinate & Chemicals (P.) Ltd. vs. Income-tax Officer, Ward 4(4) Baroda reported in (2011) 130 ITD 358 (Ahd.)

Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2004-05 -

Assessee-company filed return of income for relevant assessment year declaring loss of Rs. 1,850 - In course of assessment proceedings, Assessing Officer noted that assessee had received certain amount as share capital and share premium from shareholders - Assessing Officer issued notice under section 133(6) to shareholder seeking information such as their PAN, mode of transactions for payment made to assessee-company, supporting evidence for payment made to assessee-company, copy of balance sheet reflecting investment made for acquiring shares - Assessing Officer, however, did not receive any of evidences in support of transaction made by any of shareholders for acquiring shares of assessee- Assessing Officer thus considered said **amount** as unexplained cash increasing share capital, reserve and surplus, authorities below rightly considered amount received by assessee as unexplained cash credit - Held, yes

(iii)___In the case of Vaibhav Cotton (P.) Ltd. v. Income-tax Officer, 4(4) Indore reported in [2012] [2012] 26 taxmann.com 352 (Indore).

Section 68 of the Income-tax Act, 1961 - Cash credits - Share transactions -Assesment year 2007-08 - Assessee company had shown in its balance sheet certain amount representing share capital received from a Kolkata based company and some other individual investors - Face value of shares was Rs. 10 and those shares were issued at a premium of Rs. 90 per share - Next year, promoters/directors of assessee-company purchased those shares back at a discount of 90 per cent - In order to ascertain genuineness of share transactions, Assessing Officer issued notices to Kolkata based company and other alleged shareholders which were returned by postal authorities with a remark 'left' - He also visited respective banks through which money was routed by these investors and found that cash was deposited immediately prior to issue of cheque to assessee and accounts of those companies were closed immediately after transfer of funds - Assessing Officer thus taking a view that share transactions were not genuine, added amount in question to assessee's taxable income - Whether on facts, impugned order passed by Assessing Officer did not require any interference - Held, yes [para 9] [In favour of revenue]



(iv) Commissioner of Income Tax vs Ultra Modern Exports (P.) Ltd. reported in (2013) 40 taxmann.com 458(Delhi).

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 meager 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 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]

(v) Commissioner of Income Tax vs. Nipun Builders & Developers (P.) Ltd reported [2013] 30 taxmann.com 292(292).

Section 68 of the Income-tax Act, 1961 - Cash Credit - Share application money -Assessment year 2004-05 - In course of assessment, Assessing Officer noticed that assessee claimed to have received certain amount as share capital from different companies - In order to ascertain genuineness of transactions, Assessing Officer issued summons to subscriber companies which were returned unserved with remarks 'no such company' - Inspector sent to addresses for verification confirmed said fact - Moreover, assessee failed to produce principal officers of subscriber companies who could explain sources from which share subscription was made - Whether in aforesaid circumstances, Assessing Officer was justified in adding share subscription money to assessee's taxable income as unexplained deposits - Held, yes [Para 13] [In favour of revenue]

(vi) Commissioner of Income Tax vs. N.R. Portfolio (P.) Ltd. reported in [2014] 42 taxmann.com 339(Delhi).

Section 68 of the Income-tax Act, 1961 - Cash credit [Share money] - Assessment years 2002-03 and 2003-04 - Whether creditworthiness or genuineness of transaction depends on whether two parties are related or known to each, manner or mode by which parties approached each other, whether transaction was entered into through written documentation to protect investment, whether investor professes and was an angel



investor, quantum of money, creditworthiness of recipient, object and purpose for which payment/investment was made, etc. - Held, yes - Whether certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus - Held, yes - Assessee was a private limited company and had received from other companies substantial amount of share application money of Rs. 63.80 lakhs and Rs. 75.60 lakhs in two consecutive years - Other than share application forms, no other agreement between assessee-company and third companies had been placed on record - Persons behind these companies were not produced by assessee - On other hand, assessee-company adopted non-cooperative attitude before Assessing Officer once they came to know about directed enquiry and investigation being made - Whether evasive and transient approach before Assessing Officer was limpid and perspicuous and, therefore, addition made in respect of impugned amount was to be upheld - Held, yes [Paras 30 to 32] [In favour of revenue]

(vii) Commissioner of Income Tax-IV, New Delhi vs. Focus Exports (P.) Ltd. reported in [2014] 51 taxmann.com 46 (Delhi).

Section 68 of the Income-tax Act, 1961 - Cash credits (Share application money) - Assessment year 2002-03 - Whether where Assessing Officer completed best judgment assessment wherein addition was made to assessee's income under section 68 in respect of shares application money, in view of fact that address and PAN were not provided for all parties whereas in case of some of share applicants, there were transactions of deposits and immediate withdrawals of money, impugned addition was to be confirmed - Held, yes [Paras 5, 6 and 14] [In favour of revenue]

(viii) Dhingra Global Credence (P.) Ltd. vs Income Tax Officer reported in [2010] 1 ITR (T) 529(Delhi).

The assessee submitted that it had received an amount of Rs. 74,05,000 (being the total of share capital and share premium) being issue of 74,050 equity shares of Rs. 10 each at a premium of Rs. 90 to nine companies. The names and addresses were provided by the assessee. To find out the identity creditworthiness and genuineness of the amount received, letters were issued under section 133(6) calling for requisite information. Most of the letters were not served and were received back with the postal remark "no such party" and for the reply was not received. Therefore, the assessing Officer made addition.

Held that, basic identity of the respective share applicants itself was not - —identity-e-f-a -person-is-not proved on paper. The record available with the Companies was filed by some persons but the office of the Registrar of Co: took any action to verify the existence of the companies at the so-called address; the existence of the respective share applicants itself was not found to be Assessing Officer could not further enquire as to the source of their investment.



Since the assessee failed to prove even the basic identity as also the credit worthiness, genuineness of the transaction in the form of share premium, the addition was r:_ by the Assessing Officer.

(ix) Commissioner of Income Tax vs MAF Academy (P.) Ltd. reported in [2 [taxmann.com](#) 377 (Delhi).

Section 68 of the Income-tax Act, 1961 - Cash credits [Share trans. Assessment year 2002-03 - Whether where, assessee, a private limited company, sold its shares to unrelated parties at a huge premium and thereupon within short span of tin shares were purchased back even at a loss i.e. less than their face value, revenue ai. rightly concluded that share transactions in question were bogus and, therefore, am received from said transactions was to be added to assessee's taxable income under 68 - Held, yes [Para 35] [In favour of revenue]

(x) Agrwal Coal Corporation (P.) Ltd. vs. Additional Commissioner of Income Tax, reported in 19 [taxmann.com](#) 209 (Indore).

Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2005-06 and 2006-07 - Assessee-company had received share application money from HCL and OTL - Du scrutiny proceedings, Assessing Officer referred to report of Assistant Commissioner, wherein he had confirmed that investigation carried out in some other cases, it was : that HCL and OTL did not exist at given address and seemed to be bogus; that those companies merely existed on papers and were not genuine companies - Assessing Of: accordingly, held that assessee failed to establish identity of those share-applicants **and** hence share application money credited on account of HCL and OTL was to be treated as unexplained under section 68 and, thus, same was added back to taxable income of assessee - Assessee claimed that identity of both these companies had been established as both these companies were registered with Registrar of Companies and their income tax returns were filed and both were having PANs/bank accounts - Assessee also contended that even if it was assumed without admitting that above two companies, viz., HCL and OTL, were to be considered as non-existent companies, in that event also, no addition under section 68 could be made in the hands of assessee-company in view of decision of Supreme Court in CIT v. Lovely Exports (P) Ltd. [Application No. 11993 of 2007, dated 11-1-2008] - Whether since summons/notices issued to those companies were returned back unserved and commission issued with this purpose also found that these companies were non-existent and also assessee had not complied with directions of instant Bench regarding production of any of directors or employees of share applicants before Bench, it was to be held that these share applicants were non-existent and their identity was not proved - Held, yes - Whether none of certificates, claimed to be issued by various authorities, did not establish identity of share applicants as certificates were issued without physically verifying existence of applicants -Held, yes - Whether decision in case of Lovely Exports (P.) Ltd. (supra) would be applicable only after identity of share applicant is established - Held, yes - Whether since identity of share applicants in instant case had not been established,



there was no justification to apply ratio laid by Supreme Court in case of Lovely Exports (P.) Ltd. (supra) - Held, yes - Whether in view of above, it was to be held that initial onus laid down under section 68 had not been discharged by assessee and, thus, addition made was to be upheld -Held, yes [In favour of revenue]

(xi) Aratrac Automotive India(P.) Ltd. Vs Asst. Commissioner of Income Tax reported in [2012] 2 ITR(T) 649 (Delhi).

Held that the existence of a person is not merely on paper. Particularly when the Assessing officer required the assessee to produce the share applicants and particularly when at the stated address the share applicants were not found to exist, it could not be said that the amount received by the assessee was proved to be towards share capital. When the identity of the person itself was not proved, the amount received by the assessee could not be considered to be genuinely received. It was also to be noted that the assessee-company was stated to have issued shares at premium nine times its face value. How the premium was fixed was not forthcoming.

All the facts put together revealed that neither the identity of the d was proved nor justification for share premium had been proved. In such circ. court could not put blinker on the eye and look only at the papers presented before it.

(xii) SubhJakshmi Vanijya (P) Ltd. vs Commissioner of Income-tax-I. reported in [2015J 60 taxmann.com 60 (Kolkata -Trib.)

Section 68 of the Income-tax Act, 1961 - Cash credit (Proviso) - Assessment Year 2008-09 to 2010-11 - Whether amendment to section 68 by insertion of proviso to Finance Act, 2012 which casts onus on closely held company to explain source of share capital is clarificatory and, hence, applicable with retrospective effect - Held, yes [Para 13.aeJ [In favour of revenue]

(xiii) Beutex India (P.) Ltd. vs Commissioner of Income-tax reported in [2012J 18 taxmann.com 9 (Delhi).

Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2005-06 -Assessee allegedly raised share application money from four persons - Assessing Officer issued summons to those persons - Two summons were received back with remarks incomplete address and no such person respectively - Remaining two persons denied investing any amount in assessee-company - In such circumstances, Assessing Officer made addition to assessee's income under section 68 in respect of share application money -Commissioner (Appeals) and Tribunal upheld order of Assessing Officer holding that transactions relating to share application money were bogus as assessee had not produced concerned persons for verification - Whether finding recorded by Tribunal was a finding of fact which did not require any interference - Held, yes [In favour of revenue]

4.12 In the following two cases, it is held that even if share capital is received during the year of inception, it is taxable as appellant's income if



genuineness of transaction and identity and creditworthiness of the alleged share holder is not proved.

(i) Commissioner of Income Tax (Central), Ludhiana vs. Sri Baba Rupadas Spinning Mills (P.) Ltd. reported in [2014] 41 taxmann.com 143 (Punjab & Haryana).

Section 68 of the Income-tax Act, 1961 - Cash credits [Amount received prior to commencement of business] - Assessment year 1994-95 - In course of assessment, Assessing Officer made addition to assessee's income on account of share capital and loan received from different parties - Commissioner (Appeals) and Tribunal held that assessee could not be taxed in respect of impugned amounts as same were received before start of commercial operations - Whether statutory requirement for treating any amount as income of assessee under section 68 is where assessee fails to justify and establish genuineness of entry in books of account - Held, yes - Whether question as to whether amount was introduced prior to commencement of business of company or afterwards is of no significance in as much as aforesaid provision nowhere envisages any such eventuality -Held, yes - Whether in view of aforesaid, impugned order passed by Tribunal was to be set aside Held, yes [In favour of revenue]

(ii) Pennar Aqua Exports (P.) Ltd. vs Asst. Commissioner of Income Tax, Hyderabad reported in [2013] 40 taxmann.com 105(Hyderabad -Trib.)

Section 68, read with section 254, of the Income-tax Act, 1961 - Cash credit [Share capital of Company] - Assessment year 1994-95 - Assessing Officer found huge cash credit in books of account of assessee-company on very first day it commenced its business - He disbelieved share capital introduced by 25 shareholders amounting to Rs. 38.40 lakhs and did not accept investment made by them - Assessee contended that company did not derive any income and had no source of income during relevant previous year and investment was made by shareholders and that Assessing Officer should have accepted their confirmation letter and their capabilities to invest - Tribunal meticulously mentioned arguments of assessee and point raised by him, considered case law relied upon by assessee and thereafter, passed a speaking order for not entertaining claim of assessee - While rejecting claim of assessee, Tribunal distinguished judgment of Supreme Court in case of CIT v. Bharat Engg. & Construction Co. [1972] 83 ITR 187 as cited by assessee - Whether since, Tribunal had considered entire facts and circumstance of case and decided issue, there was no mistake apparent on record falling within scope of section 254(2) and hence, Tribunal's order could not be reviewed on basis of fresh argument advanced by assessee - Held, yes [Paras 18 & 19] [In favour of revenue]

4.13 The appellant has placed strong reliance on the following judgements
(a) CIT vs. Baishnab Charan Mohanty reported in 215 ITR 827 (Ori) (1995
(-b)-CIT-Vs,Lovely Exports(P) Ltd. reported in 216 CTR (SC) 195(2008)



- (c) CIT vs. Orissa Corporation (P) Ltd. reported in 159 ITR 78(SC) (1986),
- (d) lilac Investment (P) Ltd. reported in 287 ITR 135(Del) (2006)
- (e) CIT vs. Stellar Investment Ltd. reported in 251 ITR 163 (SC) (2001),
- (f) CIT vs Diamond products Limited reported in 177 Taxman 331 (2009) (Del)

In the case of CIT vs. Baishnab Charan Mohanty reported in 215 ITR 827 (1995), it has been stated that unless the assessment of creditors is reopened, it could n said that the assessee has not been able to discharge his onus. As discussed above, the – 4 corporate share holders are not traceable. How the assessing officer will carry out the assessment in such cases? Moreover, the individual share holders do not have creditworthiness to lend capital to the appellant company. The appellant has relied upon the decision of Hon'ble Supreme Court of India in the case of CIT vs. Lovely Exports (P) Ltd. reported in 216 CTR (SC) 195(2008). The ratio of this case has been explained in the case of Agarwal Coal Corporation (P.) Ltd. vs. Additional Commissioner of Income Tax reported in 19 taxmann.com 209 (Indore) by Income Tax Appellate Tribunal, Indore(supra). It has been held that the decision in the case of Commissioner of Income Tax vs. Lovely Exports (P) Ltd will be applicable only after the identity of share applicant is established. In the case of the appellant, the identity of the 4 corporate share holders has not been established. The other cases relied upon by the appellant are no longer a good law and they have distinguished in the judgements quoted by me above. Therefore, the decisions relied upon by the appellant are of no assistance to the appellant.

4.14 Considering the above, it is held that the appellant has failed to establish creditworthine s of the individual share holders and has failed to establish genuineness of the transaction and identity and creditworthiness of the alleged corporate share holders. Therefore, the decision of the assessing officer to hold an amount of Rs. 66,08,000/- as undisclosed income of the appellant is upheld and the ground of appeal is dismissed."

12. Before us, Id A.R. reiterated the submissions made before the lower authorities and Id D.R. fully justified the orders of lower authorities.

13. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the assessee claimed to have received share application money during the year under consideration from two Directors of the company and four Privat Limited Companies aggregating to Rs.66,08,000/-. The Assessing



Officer has not accepted the said share application money as genuine on the ground that in spite of notices being issued and several opportunities being allowed, the share-holders did not appear before him for examination. Therefore, he held the share application money as unexplained share capital introduced in the books of account u/s.68 of the Act and added the same to the income of the assessee.

14. On appeal, the CIT(A) confirmed the action of the Assessing Officer on the ground that the assessee failed to establish creditworthiness of the individual shareholders and genuineness of the transaction and identity and creditworthiness of the corporate shareholders.

15. We find that the individual shareholders namely Shri Ajit Keshari from whom Rs.12,58,000/- was received and Sri Aman Agarwal from whom Rs.13,50,000/- was received are Directors of the assessee company and are also assessed to income tax and they have given their PAN Nos. Thus, the identity of two individual shareholders is established. Under the law, the assessee has to establish the identity of the share applicants only. For this, we find support from the decision of Hon'ble Delhi High Court Full Bench in the case of CIT vs. Sophia Finance Ltd., 205 ITR 98 (Del), where, Hon'ble High Court has held that the mere fact that "assessee" company chooses to show the receipt of the money as capital does not preclude the ITO from going into the question whether this is actually so. Where, therefore, the assessee company represents that it has issued shares on the receipt of share application money, then the amount so received would be credited in the books of account of the



company. The ITO would be entitled to enquire, and it would indeed be his duty to enquire, whether the alleged shareholders do in fact exist or not. If the shareholders exist then, possibly, no further enquiry need be made.

16. Further, Hon'ble Supreme Court while dismissing the Special Leave Petition in the case of CIT vs. Lovely Exports Pvt Ltd., Special Leave Petition(Civil) No. 1153 of 2008, reported in (2009) 319 ITR St.5 (S.C) held that "Can the amount of share money be regarded as undisclosed income u/s.68 of the I.T.Act, 1961? -We find that no merit in the Special Leave Petition for the simple reason that if the share application money is received by the assessee-company from the alleged bogus shareholders whose names are given to the A.O., the Department is free to proceed to reopen the individual assessments in accordance with law. Hence, we find no infirmity in the impugned judgement.

17. Further, we are alive to the fact that amendment in Section 68 of the Act has been brought by the Finance Act, 2012 w.e.f. 1.4.2013 by adding a proviso to Section 68, which reads as under:

"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee company shall be deemed to be not satisfactory, unless-

- (a) The person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and



- (b) Such explanation in the opinion of the AO aforesaid has been found to be satisfactory."

18. The assessment year under appeal before us is assessment year 2006-07. The said proviso is not applicable to the case of the assessee in hand. We, therefore, respectfully following Full Bench of the Hon'ble Delhi High Court in the case of Sophia Finance Ltd (supra) and decision of Hon'ble Supreme Court in the case of Lovely Export Pvt Ltd (supra), set aside the orders of lower authorities and delete the addition of share application money of Rs.12,58,000/- received from Ajit Keshari and Rs.13,50,000/- received from Sri Aman Agarwal aggregating to Rs.26,08,000/-. Thus, this part of the ground of appeal is allowed.

19. With regard to share application money of Rs.40,00,000/- received from four Private Limited Companies, we find that the findings of the Assessing Officer is that the Directors of said companies did not appear in response to summons issued u/s.131 of the Act. The Assessing Officer admits at page 3 of the assessment order that the Directors of those companies requested for more time to appear before him in response to summons issued on them. Thus, the identity of the four companies is established as the summons issued to them were received and responded to by the Directors of the companies. Since the Directors of said companies did not appear, the Assessing Officer has treated the share application money received from the said four companies amounting to Rs.40 lakhs as not genuine and made the addition for the same.



20. We find that the CIT(A) states in his order at page 9 that on enquiries by Investigation Wing of Income Tax Department that none of the corporate shareholders are found to exist. The CIT(A) does not mention in his order whether this enquiry made through the Investigation Wing of the Income Tax Department was confronted to the assessee and what was the response of the assessee. It may so happen that the companies may have changed their official address and in that case, they will not be found at their earlier address. The CIT(A) had made absolutely no effort to make enquiries and asked the assessee to give current address of those companies. Further, all the corporate shareholders are assessed to income tax and have PAN Numbers. The CIT(A) could have made enquiries from the respective Assessing Officers and ascertained the current addresses. This has not been done. Further, as noted above, the Assessing Officer categorically accepts in the assessment order that summons issued u/s.131 of the Act was received by four share applicants. Thus, there is contradiction in the findings of the Assessing Officer and the CIT(A). In the above facts and circumstances of the case, in our considered view, it shall be in the interest of justice to set aside the orders of lower authorities and remand the matter back to the file of the Assessing Officer with a direction to make necessary enquiries from four corporate share applicants after allowing reasonable and proper opportunity of hearing to the assessee. The assessee is directed to co-operate with the Assessing Officer in



verifying the four corporate share applicants. With these directions, this part of the ground is allowed for statistical purposes.

21. In the result, appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on 15 /05/2018.

Sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

sd/-

(N.S. Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 15 /05/2018

B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : M/s. Niyati Foods Pvt Ltd.
At/PO: Sarbahal Road, Jharsuguda.
2. The Respondent. ACIT, Circle 1(1),
Bhubaneswar
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack