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

[Before Hon'ble Shri J.Sudhakar Reddy, AM & Hon'ble Shri S.S. Viswanethra Ravi, JM]

I.T.A No. 248/Kol/2017

Assessment Year : 2012-13

M/s Madura Stones Pvt. Ltd. [PAN: AAECM 6774 G]	-vs-	ITO, Ward-9(1), Kolkata
(Appellant)		(Respondent)

For the Appellant : Shri M. D. Shah, ld. AR

For the Revenue : Shri C.J. Singh, Sr. DR

Date of Hearing : 01.11.2018

Date of Pronouncement : 28.11.2018

ORDER

Per J.Sudhakar Reddy, AM

This is an appeal filed by the assessee for assessment year 2012-13 directed against the order of the Learned Commissioner of Income Tax(Appeals)-3, Kolkata [in short the ld. CIT(A)] passed u/s 143(3) of the Income Tax Act, 1961 [in short the Act].

2. The assessee is a company and is engaged in the business of manufacturing of granites slabs. It filed its return of income electronically on 28.09.2012 and declared total income of Rs. 53,12,552/-. The assessing officer completed assessment u/s 143(3) on 02.03.2015 determining total income at Rs. 2,56,75,060/-, inter alia, making an addition of Rs. 1,80,00,000/- u/s 68 of the Act. The assessing officer held as follows:

"14. In view of the above discussions, I am not convinced that the identity, capacity and genuineness of transactions involving the alleged receipts of share application money totaling to Rs. 1,80,00,000/- from the aforesaid bogus companies is established only on the basis of the fact that those companies have filed return with the registrar of companies and income tax department and that the funds have been transferred through banking channels.

Preponderance of probabilities and all circumstantial and direct evidences show that the scheme of fund transfer through such means was a façade created to portray a veil that attempts to conceal the true nature of such transactions.

I, therefore, add back the entire amount of Rs. 1, 80,00,000/- under section 68 of the I.T. Act, 1961 to the assessee's total income considering the assessee to be the ultimate beneficiary of the said funds through the scheme of bogus fund transfer mentioned in the foregoing paragraphs.

Penalty u/s 271(1)(c) is separately initiated.

[Add: Rs. 1,80,00,000/-]"

3. On appeal, first appellate authority dismissed the appeal on merits by holding as follows:

"5. I have carefully considered the facts of the case, the material on record. During the year there is an alleged receipt of share application money from corporate entities at a premium of Rs. 190/- per share of Rs. 10/- face value. The assessing officer has after an intrusive enquiry found that all the five share applicants have been formed during F.Y. 2011-12 all companies existing only in paper and have no business activity and practically no fixed assets, all companies run form only two addresses, all have shown meager income in their returns, all in their first year of operation claim to have received share application money at a huge premium, the directors are also directors in several other similar companies, the average bank balance is very nominal, the money for the share application money has been received from other paper companies on the same day or immediately before, none of them physically exist at the given addresses. All these are indicative of the fact that what is apparent is certainly not real. The three requirements of identity, creditworthiness of the shareholders and genuineness of the transaction have not been established. The assessing officer in para 9 to 9.4 of assessment order has lucidly explained the methodology as to how through the maze of bogus companies the money has reached the file of the beneficiary company. The question posed by the Hon'ble Calcutta High Court in case of Rajmandir Estates Pvt. Ltd. order dated 13.05.2016 as to who is the person sought to be helped through the device adopted stands answered here. Relying on several case laws which are applicable to the facts of the case, the Assessing officer has made an addition u/s 68 of the Act.

The Highest court of the land has laid down the Human Probability Test to analyze the genuineness of the entry through logical analysis in the case of CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC) and also followed in the case of Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC). Applying the case of human probability and preponderance of probability as laid down by the Apex Court to the surrounding facts and circumstances of the case, the claim being made cannot be sustained before the test of Human Probabilities.

The addition of Rs. 1,80,00,000/- u/s 68 of the Act is confirmed. "

3.1. Aggrieved the assessee is in appeal before us.

4. The ld. Counsel for the assessee Mr. M.D.Shah submitted that the assessee company is engaged in the business of manufacturing of granites slabs and has Earning Per Share (EPS) of Rs. 36. He submitted that the company is not a paper company and has turnover of Rs. 10.54 crores for the assessment year 2012-13 and 9.80 crores for the assessment year 2011-12 etc. He drew attention of the Bench to page 54 of the Paper Book which contained the justification note for charging share premium at the rate of Rs. 190/- per share, on the face value of Rs. 10 per share. He further argued that each of the share applicant company are also not paper companies and that they have substantial net worth and have responded to the notice issued by the Assessing officer and have filed letters confirming the transaction in question. He submitted that they had also filed, copies of acknowledgement of ITR's filed, copies of computation of income, balance sheet and profit and loss account as well as tax audit report. We pointed out from the order of the assessing officer that the basis of addition is that, the directors of the share holder companies have not proved their creditworthiness. He submitted that what is to be looked into is the creditworthiness of the company which has applied for and got allotted shares and that the creditworthiness of the directors is not of any consequence. He pointed out that the directors are known to each other for more than 8-9 years and as they had met on a social occasion long back and in view of their familiarity and association of this transaction had fructified. He took this Bench through each and every document filed by the share allottee companies and argued that the

addition in question is bad in law. He relied on a number of decisions including that the order of " B" Bench of the Tribunal in the case of Splendour Villa I.T.A. No. 1768/Kol/2016 order dated 05.09.2018.

5. The ld. DR on the other hand opposed the contentions of the assessee and submitted that, the assessing officer had given notices u/s 131 of the Act to all the directors and that only one director had appeared before the assessing officer. He relied on the order of assessing officer as well Ld. CIT(A) and submitted that the assessee had failed to prove the identity, creditworthiness and genuineness of the cash credits introduced in its book as share capital and share premium from five private limited companies. Alternatively he prayed that the matter may be restored to the file of the Ld. CIT(A) to the file of the assessing officer, to verify the claims of the assessee regarding justification of share premium and their claim about creditworthiness of the investor companies.

6. After hearing rival submissions and on a careful consideration of the facts and circumstances of the case, a perusal of papers on record and orders of the lower authorities below, as well as case law cited, we hold as follows.

7. The assessee company in this case is a genuine functional company. It is a company having business of manufacturing of granite slabs. It has issued share at a premium. The justification for issue of shares is given at page 54 of the paper book which is extracted for ready reference.

> *Justification regarding issue of shares at large share premium*
>
> *With reference to the above scrutiny case, you have asked to give the justification of large share premium.*
>
> *In relation to that we would like to bring to your notice the company Madura Stones Private Limited is 100% EOU undertaking was incorporated in the year 2006 having a profit of 3908.79. With a vision to become a leading manufacturer in Ceramic ware the*

company has raised adequate funds via equity as well as debts. Gradually with adequacy of investment and manpower the turnover of the company has raised which leads to increase in profit of the company which is shown in table below:

Assesment Year	Turnover/Other Income (Rs)	Profit Before Tax (Rs)	Profit After Tax (Rs)
2007-08	1,15,160.00	5,890.78	3908.78
2008-09	278841.00	36374.43	20111.43
2009-10	28797063.00	-17864621.82	-17189341.82
2010-11	73901544.67	21706240.38	21687080.38
2011-12	98030401.63	22564542.94	21911221.94
2012-13	105397931.57	11747380.71	8874456.71

The above table shows that the company is a fast moving company. The Net Asset value of the company's share was 132.95 in the financial year 2011-12 and moreover the company was planning to invest in the Solar Plant for which it requires heavy investment. Since the NAV of the company's share was Rs. 132.95, issuance of Shares at a premium of Rs. 190 is justified. As the company already having high interest burden so any further increase in the debt will lead to an increase in the risk and ultimately the company will fall in debt trap.

We hope that the above information will serve your purpose."

8. A perusal of the same demonstrates that it is not a case where share premium has been charged at an exorbitant rate which cannot be justified. Hence we have no reason to doubt the justification of the issue of shares by this company at premium of Rs. 190 per share on the facts of this case.

9. All the companies which have applied for and got allotted shares are registered with the Registrar of Companies and have filed confirmation letter as well as other documents with the AO in response to notice u/s 133(6) of the Act to prove their identity creditworthiness. They also confirmed that all the transactions are genuine.

10. Now we consider the creditworthiness of the share applicant companies. There are five share applicant companies.

i) Pragati Synfab Pvt. Ltd. : An amount of Rs. 30,00,000/- was invested by this company as share capital in the assessee company. In reply to the notice u/s 133(6) of the Act, it had submitted to the AO that the source of investment was an amount of Rs. 15,00,000/- each received from Yashika Financial Advisory Pvt. Ltd. and Sanmati Printers Pvt. Ltd. on 29.03.2012 and this amount was invested by it in the assessee company. The balance sheet of this company shows that it had total share holder fund of Rs. 5,96,24,817/- as against the investment of Rs. 30 lakhs in the assessee company. This investor has demonstrated the source of source as well as creditworthiness in this case. No adverse material is brought on record by the revenue to negate this claim.

ii) Sanmati Synfab Pvt. Ltd.: This company had invested an amount of Rs. 35,00,000/- in the assessee company. It was submitted in reply to notice u/s 133(6) that the amount in question was received from three companies i.e. Rs. 10,00,000/- from M/s Ronak Vyapaar Pvt. Ltd., Rs. 15,00,000/- from M/s Sanmati Printers Pvt Ltd. and Rs. 10,00,000/- from M/s Ronak Vyapaar Pvt. Ltd. through banking channels. From the annual report of the Sanmati Synfab Pvt. Ltd, it can be seek that the total share holder funds is more than 5.96 crores as against this investment of Rs. 35 lakhs. In this case also, in our view, the share applicant has demonstrated source of source of funds as well as the creditworthiness of the investor company. No adverse material is brought on record by the revenue to negate this claim.

iii) Preeti Vyapaar Pvt. Ltd.: The assessee had received Rs. 25,00,000/- as share application money from this company. The share applicant states that the amount is received from M/s Preeti Commodities Pvt. Ltd. A perusal of the balance sheet demonstrates that this company has total shareholder's fund of Rs. 5. 96 crores as against this investment of Rs. 35 lakhs. Hence the source of source as well as creditworthiness of the investor is demonstrated. No adverse material is brought on record by the revenue to negate this claim.

iv) Shlok Fashion Pvt. Ltd.: This company has invested an amount of Rs. 40 lakhs in the assessee company. In response to notice u/s 133(6) of the Act, it was explained to the assessing officer that the source of funds were, Rs. 15 lakhs received from Yashika Financial Advisory Pvt. Ltd., Rs. 23 lakhs received from M/s Yashika Corporate Advisory Pvt. Ltd. and Rs. 2 lakhs received from M/s Sanmati Printers Pvt. Ltd. We find that this investor company has shareholder funds of Rs. 5.96 crores as against investment of Rs. 40 lakhs only. Hence in our view, the assessee has demonstrated the creditworthiness of the investor company as well as source of source. No adverse material is brought on record by the revenue to negate this claim.

v) Sanskrita Properties Pvt. Ltd.: This company has invested an amount of Rs. 50 lakhs in the assessee company. In reply to notice u/s 133(6) of the Act, it was explained that the source of funds were receipt from M/s Yashika Financial Advisory Pvt. Ltd. Rs. 20 lakhs and an amount of Rs. 29 lakhs received from Yashika Corporate Advisory Pvt. Ltd. The shareholder funds of this company as per the annual report is 5.96 crores as against an investment of Rs. 50 lakhs. Thus the assessee has demonstrated the source of source as well as the creditworthiness of the transaction. No adverse material is brought on record by the revenue to negate this claim.

11. The assessee company in this case has furnished income tax PAN, R.O.I and other details and registration with R.O.C. copies, copy of audited accounts, confirmation sale of copies etc. of all the share applicant companies before the assessing officer.

12. This is a case of a company which has genuine business of which is in the manufacturing of granite slabs and has huge turnover running into crores of rupees. All the share application companies have filed all necessary documents in support of their

claim that the transactions are genuine. No adverse material is brought on record by the revenue. On the facts of this case, we consider the case on this issue.

13. The Hon'ble " B" Bench of the Tribunal in the case of ITO vs. Splendour Villa Pvt. Ltd. I.T.A. No. 1768/Kol/2016 order dated 05.09.2018 with a similar view and has at para 5.2 onward held as follows:

> *"5.2. 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.*
>
> *5.3. 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 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 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 share application in response to notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.*

5.4. It is not in dispute that the ld AO issued summons to the director of the assessee company who appeared in person before the ld AO on 16.2.2015 and a statement was recorded from Shri Hemand L Harkhani, director of assessee company. He explained the details that were sought for by the ld AO. Merely because he could not produce the directors of the share applicant companies, drawing an adverse inference against the assessee company to treat the receipt of share capital as bogus is unwarranted. 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 discharged, 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 explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. "*

The 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 assessee 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.

5.5. 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:

"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."

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."

5.6. 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 5.6. 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. "

****

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 transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. 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-creditors 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. "

****

" ... 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… "

****

"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 …."

****

"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."

5.7. 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."

5.8. 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 rightly 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 the 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.

5.9. It is not in dispute that all the share applicant companies in the instant case before us are assessed to income tax and assessments framed on some of them by the revenue. 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 share applicant companies would have to be examined by the Assessing Officer of those 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."*

5.10. 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.

5.11. 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 application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from 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.

5.12. 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 to 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 the revenue are dismissed."

5.13. 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 view 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 and 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 remains 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 Court 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 Assessing 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, irrespective 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.

5.14. 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 us, the share subscribing companies are duly assessed to income tax and the ld AR had also placed on record a copy of the assessment order framed in the case of M/s Capricorn Abasan Pvt Ltd (one of the share subscribing company) u/s 143(3) of the Act dated 31.12.2015 for the Asst Year 2013-14 by the Income Tax Officer, Ward -1(1), Kolkata, which are enclosed in pages 221 to 226 of paper book filed before us. 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 . We also find that the ld CITA had categorically stated that the scrutiny assessments were framed on the share subscribing companies for the Asst Year 2012-13 which shows their existence is genuine and transactions carried out by them were the subject matter of examination by the income tax department in scrutiny proceedings. This fact is not controverted by the revenue before us. 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.

5.15. We find that the director of the assessee company Shri Hemant L Harkhani had deposed before the ld AO while recording his statement in the course of assessment proceedings that the assessee company had huge prospects in future in real estate business and accordingly the receipt of share capital with premium was justified. The ld DR had filed written submissions before us reiterating the findings of the ld AO . We find that the reply of the director of the assessee company for justification of premium has been summarily rejected by stating that the said explanation appears to be

incorrect. 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. Why should the director of the assessee company produce the directors 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 assessee 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 the 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 had not followed the due process of law. He called for all the relevant details from the assessee which were duly provided in time. Even the director of the assessee company appeared before the ld AO and a statement was recorded from him in the course of assessment proceedings. Then the onus shifts to the ld AO. The ld AO without making any independent enquiries, if any, from his side, directed the assessee to produce the directors of the share subscribing companies, which remain uncomplied by the assessee company and which eventually led to the ld AO drawing adverse inference about the transaction of receipt of share capital and share premium by the assessee company. This process followed by the ld AO , in our considered opinion, is not in accordance with the due process of law. Even for one share subscribing company where the notice u/s 133(6) of the Act remain uncomplied with, the details were filed by the assessee such as ITR acknowledgement, certificate of incorporation of the said company, audited financial statements, details of bank balances , loans and advances, cash flow statement, share allotment advice, bank statements and certificate for source of source together with confirmation of having made the investment in shares at premium with the assessee company. It is not in dispute that 6 out of 7 share subscribing companies had duly complied with the notices issued u/s 133(6) of the Act which was done behind the back of the assessee and all those parties had duly confirmed the transactions with the assessee by furnishing the requisite details called for by the ld AO. The ld AO actually had taken adverse view in respect of all the share subscribing companies in similar fashion, without bringing any cogent material on record against the assessee, which in our considered opinion, is not tenable as per law. 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.

5.16. 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 of that case 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 Gujarat 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 judgment was dismissed by the Hon'ble Supreme Court.

5.17. 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."

The ld. DR could not controvert this submission of the assessee that the issue in question is squarely covered by the decision of " B" bench of Tribunal in the case of Splendour Villa Pvt. Ltd..

14. In view of the above discussion, we apply the proposition of law laid down in the above case law to the facts of this case, and the addition in question made u/s 68 of the Act is hereby deleted. This appeal of the assessee is allowed.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 28.11.2018

Sd/-	Sd/-
[S.S.Viswanethra Ravi]	[J.Sudhakar Reddy]
Judicial Member	Accountant Member

Dated : 28.11.2018
SB, Sr. PS

Copy of the order forwarded to:
1. M/s Madura Stones Pvt. Ltd., 5, Clive Row, 6th Floor, Room No. 6A, Kolkata-700001,
2. ITO, Ward-9(1), Kolkata, P-7, Chowringhee Square, Kolkata-700069.
3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches