IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA Nos.1441 & 1442/Bang/2018
Assessment Year: 2009-10 & 2012-13

ACIT Central Circle-1(4) Bengaluru	**Vs.**	M/s. Kansur Developers India Pvt. Ltd. No.2650, Ground Floor 37th B Cross, 28th Main, 9th Block Jayanagar Bangalore 560 009
		PAN NO : AACCK9866F
APPELLANT		**RESPONDENT**

C.O. Nos.103&104/Bang/2018 (Arising out of ITA Nos.1441 & 1442/Bang/2018)
Assessment Years: 2009-10 & 2012-13

M/s. Kansur Developers India Pvt. Ltd. Bangalore 560 009	**Vs.**	ACIT Central Circle-1(4) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri M.V. Seshachala, A.R.
Respondent by	**:**	Shri Dilip, Junior Standing Counsel for Dept.

ITA No.1443/Bang/2018
Assessment Year: 2008-09

ACIT Central Circle-1(4) Bengaluru	**Vs.**	M/s. Snowshine Realtors Pvt. Ltd. No.2650, Ground Floor 37th B Cross, 28th Main 9th Block, Jayanagar Bangalore 560 009
		PAN NO : AAKCS8973R
APPELLANT		**RESPONDENT**

C.O. No.105/Bang/2018 (Arising out of ITA No.1443/Bang/2018)
Assessment Year: 2008-09

M/s. Snowshine Realtors Pvt. Ltd. Bangalore 560 009	**Vs.**	ACIT Central Circle-1(4) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	Shri C. Ramesh, A.R.		
Respondent by	Shri K. Sankar Ganesh, D.R.		
Date of Hearing	21	09	2022
Date of Pronouncement	28	10	2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These appeals by the revenue are directed against orders of CIT(A)-11, Bangalore dated 28.2.2018 for the assessment years 2009-10, 2012-13 & 2008-09 in respect of above two assessees and the Cross objections filed by the assessees against the appeals of the revenue. The grounds raised by the revenue in its appeals are common in nature except figures and hence we reproduce herewith grounds of appeal in ITA No.1441/Bang/2018 for the A.Y. 2009-10 as follows:-

1. *On the facts and circumstances of the case, the Ld CIT(A) erred in deleting 'Addition u/ s 68 amounting to Rs.4,07,88,170/ - without appreciating the fact that except for the identity, the assessee has not been able to establish the creditworthiness of the person advancing loan and also genuineness of the transaction.*

2. *On the facts and circumstances of the case, the Ld CIT(A) erred in holding that the assessee has proved the*

creditworthiness of the person advancing the loan merely relying on the fact that the said person has been held to a large tax defaulter by the US Revenue authorities ignoring the fact that the said fact does not conclusively prove that the said person has any large real income and cannot be a proof of his creditworthiness on stand alone basis.

3. *On the facts and circumstances of the case, the Ld CIT(A) erred in not appreciating that the said investor Shri Samyakant C Veera has invested of about 53.34 million US $ whereas his net income over a period of 6 proceedings years in US was only 3.3 million US$ as revealed from his tax returns filed with US Revenue authorities and hence his creditworthiness has not been proved.*

2. The assessees have raised Cross objections wherein following common grounds are raised which are herein below:-

1. *The order of the learned Commissioner of Income Tax (Appeals) is opposed to the facts of the case and law applicable to it.*

2. *The learned Commissioner of Income Tax (Appeals) erred in upholding the action of the Assessing Officer of invoking the provisions of section 147 of the act for the A.Y.2009-10 dismissing the grounds of appeal of the respondent on the legality of the action of the Assessing Officer in invoking the said provisions.*

3. *The learned Commissioner of Income Tax (Appeals) erred in ignoring that, the Assessing Officer recorded satisfaction on wrong set of facts that, the appellant had not filed the return at all, whereas the appellant in fact had already filed the return of income within the due date and under the circumstances, the reopening was bad in law and deserved to be annulled.*

4. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law that, the provisions of section 147 of the Act cannot be invoked on mere suspicions and relying solely on an alleged report from investigation wing, without any independent evidence, the said provisions could not have been invoked.*

5. *The learned Commissioner of Income Tax (Appeals) erred in not appreciating the position of law that, in the absence of reason to believe and without any evidence to form such reason to believe that, income chargeable to tax has escaped assessment, the Assessing Officer could not have invoked the provisions of section 147 of the act.*

6. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law that, the reason to believe for issue of notice u/s 147 of the Act should be on the basis of tangible material and not on presumptions and on just an opinion which is not supported by evidences the provisions of section 147 of the Act could not have been invoked.*

7. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law laid down by Hon'ble Supreme Court in the case of Indian & Eastern News Paper Society V. CIT (1979) 119 ITR 996 (SC). wherein it is held that, opinion of an audit party cannot be basis for reopening and on the same lines opinion of investigation wing can also be not a basis for reopening U/s.147 of the act.*

8. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law laid down in the following decisions, wherein it is held that. on mere suspicion no reopening is possible U/s.147 of the act, since the satisfaction is based on "reason to believe" and not "reason to suspect"*

   i) CIT V. Jeskaran Bhuvalka (1970) 76 ITR 128 (AP)
   ii) N. Sundareswaram V. CIT (1972) 84 ITR 173 (Ker)
   iii) Smt.Hemlata Agarwal V. CIT (1967) 64 ITR 428 (All)
   iv) ITO V. Lakshmani Mewal Das (1976) 103 ITR 437 (SC)
   v) India Finance & Construction Co., (P) Ltd V. B.N.Panda, DCIT (1993) 200 ITR 710 (Born)

9. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the ratio laid down by Hon'ble High Court of Delhi in the case of Principal Commissioner of Income Tax V. RMG Polyvinyl (I) Ltd (2017) 83 Taxmann.com 348*

(Delhi), wherein it is held that, the information received from Investigation Wing could not be said to be tangible material perse without a further enquiry being undertaken by the Assessing Officer to establish link between "tangible material" and formation of reason to believe that income chargeable to tax had escaped assessment for the purpose of the provisions of section 147 of the act.

10. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law laid down by Gujarath High Court in the case of Gaurav Contracts Co., V. DCIT (2015) 64 Taxmann.com 333 (Guj). wherein it is held that, an opinion of an audit party cannot be basis for reason to believe for the purpose of the provisions of section 147 of the act*

11. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law laid down by Hon'ble High Court of Delhi in the case of Pr.Commissioner of Income Tax — 6, Vs. Meenakshi Overseas Private Limited (2017) 82 Taxmann.com 300 (Delhi), wherein it is held that, reassessment resorted to on the basis of information from investigation wing without independent application of mind to the tangible material is not justified and all the more so in the absence of any such tangible material.*

12. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law laid down by Hon'ble High Court of Bombay in the case of Nu Power Renewables (P) Ltd V.DCIT, Circle-1(2)(a) (2018) 94 Taxmann.com 29 (Bombay), wherein it is held that, relying only upon information received from DDIT and without independently applying mind, re-assessment cannot be resorted to.*

13. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the position of law laid down by Hon'ble High Court of Bombay in the case of Principle Commissioner of Income Tax-5 V. Shodiman Investments (P) Ltd (2018) 93 Taxmann.com 153 (Bombay), wherein it is held that, reopening notice issued by Assessing Officer on the basis of intimation from DDIT, Investigation, is in breach of settled position of law that, a reopening notice has to be issued by the Assessing Officer on his own satisfaction and not on borrowed satisfaction.*

14. *The learned Commissioner of Income Tax (Appeals) erred in not following the ratio laid down by ITAT. Delhi Bench in the case of RMG Polyvinyl (I) Ltd V. DCIT. Circle 15(1), New Delhi (2017) 88 taxmann.com 351 (Delhi-Trib), wherein it is held that, where the Assessing Officer had not applied his mind and mechanically issued notice U/s.148 of the act on the basis of information received from the DIT Investigation, the reassessment is bad in law and deserves to be quashed.*

15. *The learned Commissioner of Income Tax (Appeals) erred in ignoring the ratio laid down by the Hon'ble Delhi Tribunal in the case of Monarch Educational Society V. ITO (Exemption) (2015) 57 Taxmann.com 141 (Delhi) wherein it is held that, simply reproducing details received from Director of Income Tax, Investigation without any verification would not be sufficient reason to believe for the purpose of invoking the provisions of section '147 of the act*

16. *The learned Commissioner of Income Tax (Appeals) erred in not following the ratio laid down by ITAT. Delhi Bench 'A' in the case of Bir Bahadur Singh Sijwali V. ITO Ward-1, Haldwani (2015) 53 Taxmann.com 366 (Delhi Trib).*

17. *The respondent craves permission to ad, delete or alter any of the grounds at the time of hearing.*

2.1 The assessee has raised additional grounds of appeal in cross objections, which are reproduced as under:-

"The Appellant has filed Cross Objection on 06.08.2018 before Hon'ble ITAT. While filing the same, we have 16 grounds of appeal. The last of the grounds is as under: -
"16. The respondent craves permission to add, delete or alter any of the grounds at the time of hearing".

The Appellant is taking the following Additional Grounds of Cross Objections on point of law.

1. *The learned Commissioner of Income Tax (Appeals) erred in upholding the action of the Assessing Officer in invoking the provisions of section 147 of the act for the A.Y.2008-09 ignoring the fact that, the proceedings were initiated on the basis of certain seized material and consequential enquiries and therefore under law the proceedings should have been initiated under the provisions of section 153C of the act.*

2. *The learned Commissioner of Income Tax (Appeals) erred in holding that, the reopening U/s.147 of the act is valid ignoring the position of law that, the provisions to be invoked was the provisions of section 153C of the act and therefore the proceedings U.sl 147 initiated are bad in law and deserve to be annulled."*

2.2 At the time of hearing, the Ld. A.R. has not pressed the legal issue in all the COs filed by the assessee, however, he only supported the deletion of addition made by Ld. CIT(A) on merit.

ITA No.1441/Bang/2018 for the AY 2009-10:-

3. Since issue in all appeals are common, for brevity, we consider the facts and grounds in ITA No.1441/Bang/2018 for adjudication.

Facts of the case are as follows:-

3.1 The issue involved in the appeal is the investment of Rs. 3,94,77,984/- (US Dollars $ 9,39,952) by a non-resident. non-citizen. Sri. Samyak Chandrakanth Veera in shares of the company M/s. Kansur Developers (P) Ltd. The Assessing Officer in the order of assessment dated 31 12.2015 has added the said investment under the provisions of section 68 of the Income-tax Act,1961 ['the Act' for short]. On appeal the Ld. C1T(A) in his order in ITA No. 355/Deputy Commissioner of Income-tax/CC-1(4)/CIT(A)-11/2015-16 dated 10.02.2016 has deleted the addition made. The revenue is now in this appeal before the Tribunal contesting the deletion made by the Ld. CIT(A).

4. The Ld. D.R. submitted that Shri Samyak C. Veera has invested in various companies of an amount of 53,341,067 USD up to assessment year 2012-13 as against the income of 33,122,56 USD. According to him, the judgement relied by the assessee's counsel in the case of M/s. Jaico Realtors Pvt. Ltd. in ITA No.1444/Bang/2018 dated 8.5.2019 cannot be applied to the facts of the present case. Further, he submitted that as per records, assessee has received a sum of 939952 USD (Rs.4,07,88,170/-) from Samyak C. Veera, a share capital and share premium and his return of income from the year 2000 to 2006 is only 3312256 USD and he has no enough sources to invest in the assessee's company and in certain years he has also incurred loss to the tune of 56,628,098 USD. As such, he is not in a position to make an investment of above amount in the assessee's company. According to Ld. D.R., the assessee has not proved the sources of Shri Samyak C. Veera to make such huge investment in assessee's company and he has made following investments for which Shri Samyak C. Veera have no source of income:-

SI. No.	Name of the company	Asst. Year	Share capital amount given in USD
1	M/s.Kansur Developers India (P) Ltd	2007-08	26,00,000
2	M/s. KJS Realtors (P) Ltd	2007-08	16,22,500
3	M/s. Jasuka Developers (P) Ltd	2008-09	5,99,970
4	M/s. KJS Realtors (P) Ltd	2008-09	10,02,475
5	M/s. Jaico Realtors (P) Ltd	2008-09	9,99,970
6	M/s. Snowshine Realtors (P) Ltd	2008[1]09	4,99,975
7	M/s. Kansur Realtors (P) Ltd	2008-09	35,99,910
8	M/s. Kansur Developers India (P) Ltd	2008-09	41,99,915
9	M/s. Zircon Properties (P) Ltd	2009-10 •	5,00,0960
10	M/s. Kansur Developers India (P) Ltd	2009-10	9,39,952
11	M/s. Sukant Developers (P) Ltd	2008-09	10,00,440
12	M/s. Sukant Developers (P) Ltd	2010-11	1,84,62,500
13	M/s. Kansur Developers	2012-13	18,75,000
14	M/s. Zircon Properties (P) Ltd	2010-11	19,37,500
	Total Investment till AY 2008-09		53,10,66,067

As such order of the Ld. CIT(A) has to be reversed.

5. It is the contention of the Ld. A.R. that the identity of the investor is established, the mode of receipt is through banking channels and hence the genuineness of the transaction is also established. Copies of the bank accounts have been furnished and the sources for the investor were available in the bank account. Under the circumstances. no addition could have been made under the provisions of section 68 of the Act by A.O.

5.1 He submitted that incidentally in one of the group companies M/s.Jaico Realtors (P) Ltd there was an investment of 'Rs.4,06,98,779/- ($ 9,99,970) for the A.Y.2008-09 and similar issue was considered by Tribunal in ITA No.1444/Bang/2018 dated 8.5.2019 and deleted addition made by AO u/s 68 of the Act on similar circumstances.

5.2 The Ld. A.R. submitted that the findings of the AO are that, Sri. Samyak Chandrakanth Veera was having net income of $ 33,12,256 only and he has made a total investment of $ 5,33,41,067. It is the finding of the learned AO that the net income as per US returns of Mr.Samyak C Veera is $ 33,12,256 based on the ITAT order in the case of M/s.Jaico Realtors (P) Ltd. The reference is to para 8 of the order in ITA No.1444/Bang/2018 and Co.No.106/Bang/2018, wherein it is mentioned that. the net income of the investor comes to $ 33.12,256 as against remittance by him of only $ 10,00,000. The figure $ 33,12,256 has been culled out from para 6 of the assessment order of M/s.Jaico Relators (P) Ltd, which is reproduced below:-

Year	Income in $	Loss in $	Net Income in $
2000	1,43,96,216		1,43,96,216
2001	1,64,10,419		1,64,10,419
2002	2,91,14,644		2,91,14,644
2003	41,83,594	5,76,00,0	(5,34,16,406)
2004	41,471	16,84,735	(16,43,264)
2005	22,075	3,000	19,075
2006	77,836	16,50,264	(15,68,428)
Net	6,42,46,255	6,09,37,9	33,12,256

5.3 The learned AO has stated that, when Mr. Samyak Veera net income for the years from 2000 to 2006 is only $ 33,12,256, how he could have invested in share capital an amount of $ 5,33,41,067 in various companies.

5.4 In this regard. Ld. A.R. submitted that in respect of the above chart the position of income of Mr. Samyak Veera was based on the Income Tax returns filed by him in US as on date of completion of assessment orders. Subsequently the Internal Revenue Service (IRS) of US has disallowed the claim of losses stating that "based on the fact that the disallowance of $ 57600000 currency option losses would result in substantial under statement of income tax for the year 2003. In support of disallowance of loss claimed of $ 576.00.000 by Mr. Samyak Veera a notice of final partnership administrative adjustments issued by Department of Treasury Internal Revenue Service. USA which is furnished as an annexure to written submission.

5.5 The ld. A.R. submitted that since Ld. D.R. alleged that, the tax returns filed by Mr. Samyak Veera shows that he has no sufficient source to investment in share capital of the appellant company, mere tax returns does not disclose the income of the investor. It only shows the taxable

income of the investor but not the actual funds available with the investor, the ld. AO alleging that investor does not have sufficient source of income, Ld. A.R. furnished final order of IRS for the calendar year 2003, wherein the investor has claimed a loss of US $ 57600000 has been disallowed and brought into tax by the US Tax Authorities. This is not a fresh or additional evidence but only clarifying the facts issue raised by the DR. In view of final findings of the IRS that, the loss included in the chart has to be excluded, Ld. A.R. further furnished Certified Public Accountants M/s. Pandya Kapadia Bhatt & Associates, CPAs letter giving effect to the notice of TMP Notice of Final Partnership Administrative Adjustment, to the Tax Matters Partner, Gamma Trading Partners LLC and consequent effect on Mr. Samyak Veera revised adjusted gross income for Calendar Year 2003 would be US $ 4,183,595. Copy of the letter of Certified Public Accountants (CPA), USA was also enclosed in the written submissions filed by ld. AR.

5.6 On exclusion of loss from the above referred chart of learned AO the assessee's income for the period from 2000 to 2006 is as under:-

Year	Income in $	Loss in $	Net Income in $
2000	1,43,96,216		1,43,96,216
2001	1,64,10,419		1,64,10,419
2002	2,91,14,644		2,91,14,644
003	41,83,594		41,83,594
2004	41,471	16,84,735	(16,43,264)
2005	22,075	3,000	19,075
2006	77,836	16,50,264	(15,68,428)
Net	6,42,46,255	33,37,999	6,09,12,256

5.7 The Ld. A.R. further submitted that the assessee has invested in share capital $ 4,61,82,089, whereas the income determined by the IRS is $ 6,09,12,256 for the period 2000 to 2006 which is much more than the investment made by Mr. Samyak Veera in the various group companies.

5.8 Mr. Samyak Veera was a partner in various partnership firms (LLP) AND LLC, the list of which was furnished along with his US Income Tax Returns to the Assessing Officer and also before the Commissioner of Income Tax (Appeals). Most of the LLCs are 100% owned by Mr. Samyak Veera. At the beginning of 2003 M/s. Gamma Trading Partners LLC, was owned 100% by Mr. Samyak Veera, Pensacola PFI Corp and Lexington Avenue Trust. On 15th April, 2003 membership interests were transferred and additional funds were contributed to Gamma Trading Partners, LLC such that it was owned 100% by Park Avenue Trust, Lexington Avenue Trust and Pensacola PFI Cor. Each (1) Park Avenue Trust (2) Lexington Avenue Trust and (3) Pensacola PFI Corp, were in turn 100% owned by Mr. Samyak Veera. As such, any gains or losses from Gamma Trading Partners flowed through Park Avenue Trust, Lexington Avenue Trust and Pensacola PFI Corp and in turn onto Mr. Samyak Veera personal tax return. In 2003, M/s. Gama Trading Co., has filed an Income Tax return reporting a loss of $ 57,600,000.

5.9 The ld. AR further submitted that investment in share capital made by Mr. Samyak Veera includes items which are not part of present pending appeals before the Tribunal. Hence deserves to be deleted from the Chart. The details are as under:

(i)

Sl. No.	*Name of the company*	*Asst. Year*	*Share capital amount given in USD*
1	*M/s. Kansur Develppers India (P) Ltd*	*2007-08*	*26,00,000*
2	*M/s. KJS Realtors (P) Ltd*	*2007-08*	*16,22, 500*
3	*M/s. Jasuka Developers (P) Ltd*	*2008-09*	*5,99,970*
4	*M/s. KJS Realtors (P) Ltd*	*2008-09*	*10,02,475*

There was no additions made in respect of the above cases on account of investment in share capital by Mr. Samyak Veera and return filed has been accepted.

(ii) SI.No.8, in the chart of learned AO has stated that Mr. Samyak Veera has invested in share capital of M/s. Kansur Developers India (P) Ltd for the A.Y.2008-09, $ 41.99,915. However, as per the assessment order for the A.Y.2008-09 it is only $ 38.49,915 has been added U/s.68 of the act. Hence the difference of $ 3,00,000 is deserves to be deleted from the chart.

(iii) SI.No.11, in the chart of learned AO has stated that Mr. Samyak Veera has invested in share capital of M/s. Sukant Developers (P) Ltd for the A.Y.2008-09 $ 10.00.440. but actual figure is $ 1,00,00,440 The difference of $ 90.00,000 should be added in the chart.

(iv) SI.No.12, in the chart of learned AO has stated that Mr. Samyak Veera has invested in share capital of M/s Sukant Developers (P) Ltd for the A.Y 2010-11 $ 1,84,62,500. However. this amount was invested by Mr.

Samyak Veera out of the balance in NRE account maintained in India amounting to Rs.73,85,00,000/-.

(v) SI.No. 13, in the chart of learned AO has stated that Mr. Samyak Veera has invested in share capital of M/s. Kansur Developers (India) Pvt Ltd for the A.Y.2012-13 $ 18.75.000. However, this amount has invested by Mr. Samyak Veera out of the balance in NRE account maintained in India amounting to Rs.5,50,00,000/-.

(vi) Sl.No.14, in the chart of learned AO has stated that Mr. Samyak Veera has invested in share capital of M/s. Zircon Properties (P) Ltd for the A.Y.2010-11 $ 19.37,500. However, this amount has invested by Mr. Samyak Veera out of the balance in NRE account maintained in India amounting to Rs.7.75,00 000/-.

(vii) If the above referred errors are corrected in the chart the total amounts work out to $ 4,61.82.089. As such the allegation of the learned AO that, Mr. Samyak Veera has invested $ 53,34,1067, is not correct.

5.10 The Ld. A.R. further submitted that the Income Tax return does show only the taxable income i.e., excluding exempted income, income from partnership firms, drawing from firms and borrowings. capital balances. Insurance funds etc. which are also sources of income and available for investment. Mr. Samyak Veera was a partner in various partnership firms (LLP) and LLC. the list of which was furnished along with his US Income Tax Returns to the Assessing Officer and also before the Commissioner of Income Tax (Appeals). Most of the LLCs are 100% owned by

Mr. Samyak Veera. At the beginning of 2003 M/s. Gama Trading Partners LLC, was owned 100% by Mr. Samyak Veera, Pensacola PFI Corp and Lexington Avenue Trust. On April 15, 2003, membership interests were transferred and additional funds were contributed to Gamma Trading Partners, LLC such that it was owned 100% by Park Avenue Trust, Lexington Avenue Trust and Pensacola PFI Corp. Each of these entities i.e., (1) Park Avenue Trust (2) Lexington Avenue Trust and (3) Pensacola PFI Corp, were in turn 100% owned by Mr. Samyak Veera. As such, any gains or losses from Gamma Trading Partners flowed through Park Avenue Trust, Lexington Avenue Trust and Pensacola PFI Corp and in turn onto Mr. Samyak Veera personal tax return. In 2003, M/s. Gama Trading Co., has filed an Income Tax return reporting a loss of $ 57,600,000. This claim of loss has been rejected by the IRS and disallowed stating as under: -

> *"It is determined that the $ 57,600,000 of losses claimed on Form 1065, Schedule K. line 7, and reflected on Form 6761, Line 1 and statement 11 are disallowed because:*
>
> 1. *You have failed to substantiate that the transactions occurred, that they occurred in the manner claimed, or that the transactions and the claimed losses were bona fide or the result of a bona fide transaction.*
> 2. *You have failed to substantiate the existence of transactions entitling you to the loss deductions.*
> 3. *You have failed to establish that the claimed losses were deductible under I.R.C $ 165 of any other provision of the Internal Revenue Code.*
> 4. *It is determined that the transactions for which the losses were claimed were shams, lacking economic reality."*

5.11 In view of the above findings by the IRS the loss disallowed in the hands of M/s. Gamma Trading LLC flowed through Park Avenue Trust. Lexington Avenue Trust and Pensacola PFI Corp and in turn onto Mr. Samyak Veera personal tax return. In this regard, copy of IRS notice of final partnership administrative adjustment for 2003, dated 10-2-2019 and 09-04-2019 in the case of M/s. Pensacola PFI Corp and M/s. Gamma Trading Partners LLC is attached, wherein it clearly says that losses disallowed in the hands of the firms is to be adjusted in the individual return of the partners. Considering the findings of IRS the loss claimed by Mr. Samyak Veera for the year 2003 is to be adjusted in his personal tax returns which results a positive income of $ 41,86,594 instead of loss claimed of $ 53,416,406.

5.12 The Ld. A.R. drew our attention to the letter issued by for the assessee enclosed Certified Public Accountants M/s. Pandya Kapadia Bhatt & Associates, CPAs letter giving effect to the notice of TMP Notice of Final Partnership Administrative Adjustment, to the Tax Matters Partner, Gamma Trading Partners LLC and consequent effect on Mr. Samyak Veera revised adjusted gross income for Calendar Year 2003 would be US $ 4,183,595. Copy of the letter of Certified Public Accountants (CPA), USA. He therefore submitted that, the objection of the AO that, only $ 33.12,256 was available to Mr. Samyak C. Veera is not correct. Mr. Samyak C. Veera had sources far exceeding the investments made and hence there was no case of addition.

FURTHER SUBMISSIONS ON THE FINDINGS OF THE ASSESSING OFFICER IN THE ASSESSMENT ORDER IN REGARD TO CREDIT WORTHINESS OF SRI.SAMYAK C VEERA.

5.13 Further, the Ld. A.R. submitted that the Assessing Officer sought for statement of affairs during the course of assessment proceedings and only for the reason that, such statement of affairs was not furnished. concluded that the remitter Sri. Samyak C. Veera does not have the sources for investment.

5.14 On this issue the Ld. A.R. submitted the following before us:-

1) At the outset, under law the source for the source is not required to be proved in regard to the creditworthiness of the investor. Ld. A.R. relied on the following decisions wherein it is held that, the source for the source and origin for the origin need not be proved by the investor.

   i) Tolaram Daga V. CIT (1966) 59 ITR 632 (Assam)
   ii) CIT V. Daulat Ram Rawatmull (1973) 87 ITR 349 (SC)
   iii) Sarogi Credit Corporation V. CIT (1976) 103 ITR 344 (Pat)

   5.19 (i) In the present case the appellant has not only proved the source but also the source of the source. The investor Mr. Samyak C. Veera has accepted the investment. It is open for the department to initiate

enquiries in his case. The revenue cannot insist upon the assessee to prove the source of the source.

(ii) It is clarified by Mr. Samyak C. Veera that as per US Law, individuals are not required to create or submit personal balance sheet as part of their personal income tax reporting obligations. The IRS form are reporting individual income tax in Form 1040, US Individual income tax return. Form 1040 requires taxpayers to report the following general categories of items, as applicable to the particular taxpayer, filing status, exemptions, income deductions that reduce adjusted gross income (AGI), the AGI itself, other itemized deductions, a computation of the taxable income a computation of the tax and the alternative minimum tax (AMT). tax credits, and the amount of tax due. In sum, there is no requirement to submit a personal balance sheet with the Form 1040. and there are no lines on the Form 1040 for reporting assets and liabilities. As there is no requirement to create or submit a personal balance sheet under US tax law, no such balance sheet is submitted to IRS. This fact is evident from the Affidavit filed by Ms. MEGHAN L. BRACKNEY, representative of M/s. Kostelanetz & Fink, LLP, 7 World Trade Center, 34th Floor, New York, New York 10007, one of the premier law firms in United States, who are attorneys for Mr. Samyak Veera before the Tribunal on 09.11.2020. Under the circumstances, the respondent cannot insist on such statement of affairs from the investor. Seeking for the same from the assessee is virtually directing the assessee to do the impossible. Ld. A.R. submitted that, it

is a decided position of law that, under law one cannot compel a person to do the impossible. He relied on the following decisions, wherein it is held that, under law once cannot compel a man to do an act which he cannot possibly perform.

(i) Cochin State Power & Light Corporation Ltd V. State of Kerala (AIR 1965 SC 1688. 1691)
(ii) Vinod Krishna Kaul V. Union of India (JT 1995 (9) SC 205, 208)
(iii) Attiq-Ur-Rehman V. Municipal Corporation of Delhi (JT 1996(2) SC 670, 678)
(iv) Manohar Joshi V. Nitin Bhaurao Patil (1996) 1 SCC 169, 179
(v) Life Insurance Corporation of India V. CIT (1996) 219 ITR 410, 418 (SC)

(iii) All the investments made by Mr. Samyak C. Veera are through NRE account. The relevant Bank accounts have been furnished. There were sufficient balances in the bank accounts. In many of the cases the sources for remittances to these bank accounts have also been established. Mr. Samyak C. Veera has confirmed the transactions. Under the circumstances, the following conditions which are requirement of proving the transactions are satisfied.

(a) The identity of the investor is established, since the said investor has confirmed the investment.
(b) The genuineness of the transaction is established for the reason that, all the transactions are through banking channels and FIRC have been furnished.
(c) Evidences in regard to the sources of the investor have been furnished. The revenue is only

misinterpreting the fact of notional claim of loss which perhaps was allowable under US laws as actual loss and denying to accept the source. This position is factually incorrect and the US authorities have also denied allowance of such loss.

5.15 In the light of the above position of law as confirmed in the various decisions listed out hereunder the Ld. A.R. submitted that the sources for investment are proved, the genuineness of the transaction established and the onus cast on the assessee is established.

5.16 In this regard, he relied on the ratios laid down in the following decisions, which are more fully explained in the earlier submissions:-

(i) *Commissioner of Income Tax and Another V. Arunananda Textiles (P) Ltd (2011) 333 ITR 116 (Kar)*

(ii) *CIT V. Lovely Exports (P) Ltd (2009) 319 ITR (St.) 5 (SC)*

(iii) *CIT V. Ask Brokers Ltd (2011) 333 ITR 111 (Kar)*

(iv) *CIT V. Steller Investments Ltd (2001) 251 ITR 263 (SC)*

(v) *ITO V. Ankush Finstock Ltd (2012) 21 Taxmann.com 119 (Ahmd)*

(vi) *CIT V. Anurag Agarwal (2015) 54 Taxmann.com 75 (Allahabad)*

(vii) *CIT V. Gangeshwari Metal (P) Ltd (2013) 30 Taxmann.com 328 (Delhi)*

(viii) *CIT V. Jaydee Securities & Finance Ltd (2013) 32 Taxmann.com 91 (Allahabad)*

(ix) *CIT V. Nav Bharat Duplex Ltd (2013) 35 Taxmann.com 289/217 Taxman 17 (All)*

(x) *CIT V. Bhaval Synthetics (2013) 35 Taxmann.com 83 (Raj)*

(xi) *CIT V. Miq Steels (P) Ltd (2013) 36 Taxmann.com 422/217 Taxman 209 (AII)/CIT V. Kamna Medical Centre (P) Ltd (2013) 35 Taxmann.com 470/217 Taxman 16 (All)*

(xii) *CIT V. Peoples General Hospital Ltd (2013) 35 Taxmann.com 444 (MP)*

(xiii) *CIT V. Al Anam Agro Foods (P) Ltd (2013) 38 Taxmann.com 375 (All)*

(xiv) *CIT V. Divine Leasing & Finance Ltd (2008) 299 ITR 268 (Delhi)*

(xv) *Jaya Securities Ltd V. CIT (2008) 166 Taxman 7 (All)*

(xvi) *Cochin State Power & Light Corporation Ltd V. State of Kerala (AIR 1965 SC 1688, 1691)*

(xvii) *Vinod Krishna Kaul V. Union of India (JT 1995 (9) SC 205. 208)*

(xviii) *Attiq-ur-Rehman V. Municipal Corporation of Delhi (JT 1996 (2) SC 670. 678)*

(xix) *Manohar Joshi V Nitin Bhaurao Patil (1996) 1 SC 169. 179*

(xx) *Life Insurance Corporation of India V. CIT (1996) 219 ITR 410, 418 (SC)*

(xxi) *Sreelekha Banerjee V. CIT (1963) 49 ITR 112. 120 (SO)*

(xxii) *D.Yasodamma, Gudur V. CIT (1968) 70 ITR 515, 517 (AP)*

(xxiii) *Anil Kumar Singh V. CIT (1972) 84 ITR 307 (Cal)*

(xxiv) *Abu Bucker Sait V. CIT (1970) 76 ITR 362 (Mad)*

(xxv) *Bhagavan Prasad Mishra V. CIT (1959) 35 ITR 97 (Orissa)*

(xxvi) *Tolaram Daga V. CIT (1966) 59 ITR 632 (Assam)*

(xxvii) *CIT V. Daulat Ram Rawatmull (1973) 87 ITR 349 (SC)*
Sarogi Credit Corporation V. CIT (1976) 103 ITR 344 (Pat)
. (xxix) Commissioner of Income Tax V. Shiv Dhooti Pearls & Investments Ltd (2015) 64 Taxmann.com 329 (Delhi)

(xxx) *Nemichand Kothari V. CIT (2003) 264 ITR 254 (GUJ)*

(xxxi) *Modi Creations (P) Ltd V. ITO (2013) 354 ITR 282 (Delhi)*

(xxxii) *Kale Khan Mohd. Hanif V. CIT (1963) 50 ITR 1 (SC)*

(xxxiii) *CIT V. United Commercial and Industrial Co (P) Ltd (1991) 187 ITR 596 (Cal)*

(xxxiv) *CIT V. Precision Finance (P) Ltd (1994) 208 ITR 465 (Cal)*

(xxxv) *CIT V. Lachman Dass Oswal (1980) 126 ITR 446 (P & H)*

(xxxvi) *Jiyajirao Cotton Mills Ltd V. CIT & EPT (1958) 34 ITR 888 (SC)*

(xxxvii) *CIT V. Sakarlal Balabhai (1968) 69 ITR 186 (Guj) affirmed by Han'ble Supreme Court in CIT V. Sakarlal Balabhai (1972) 86 ITR 2 (SC)*

(xxxviii) *Mc.Dowell & Co., Ltd V. CTO (1985) 154 ITR 148 (SC)*

(xxxix) *DCIT, Circle-16(1), Hyderabad V. Madhusudan Rao (2015) 57 Taxmann.com 262 (Hyd-Trib)*

(xl) *Gulshan Verma V. DCIT. Yamunanagar (2015) 61 Taxmann.com 178 (Chandigarh-Trib)*

(xli) *Sahara India Financial Corporation Ltd V. DCIT, Central Circle-6, New Delhi (2014) 41 Taxmann.com 251 (Delhi-Trib)*

(xlii) *CIT V. (i) Oasis Hospitalities (P) Ltd, (ii) UP Bone Mills India Ltd, (iii) Vijay Powers Generators Ltd*

(xliii) *CIT V. Dolphin Canpack Ltd (2006) 283 ITR 190 (Delhi)*

(xliv) *CIT and Another V. ASK Brothers Ltd (2011) 333 ITR 111 (Kar)*

(xlv) *CIT V. Value Capital Services (P) Ltd (2008) 307 ITR 334 (Delhi)*

5.17 The Ld. A.R. finally submitted that in this case the assessee company has proved the identity of the investor with confirmation letters from the investor. Further the genuineness of the transaction is established as assessee company has furnished that all transactions are though banking channel, FIRC's and communication with Reserve Bank of India as per the RBI Guidelines under the FEMA. The department is harping on the investors source of investment in share capital who was a Non-Resident and Non-Citizen of India. The company has established the source of investment in share capital has come from Mr. Samyak Veera. This is not disputed by the Assessing Officer. The only issue on which the Assessing Officer is harping is that personal Balance Sheet and fund flow of Mr. Samyak Veera is not provided. It is not the responsibility of the company to call for such details from the investor in share capital. The transaction of investment is in the form of Foreign Currency, which has been received through in banking channels. The receipt of Foreign currency by the Indian Company is subjected to verification by the Reserve Bank of India as per the FEMA / FDI guidelines. As such expecting the company to prove beyond the source of

source of Mr. Samyak Veera is not responsibility of the company. Under these circumstances the addition U/s.68 of the Act deserves to be deleted.

5.18 The Ld. A.R. prayed to consider these facts and various ratios laid down by the Hon'ble Supreme Court and various High Courts in number of cases and requested to dismiss the appeals filed by the revenue.

6. We have heard the rival submissions and perused the materials available on record. In the present case, Shri Samyak C. Veera has invested to the tune of Rs.53341067 USD in various companies from assessment year 2007-08, 2010-11 & 2012-13. Shri Samyak C. Veera is residing abroad during the relevant time. The Ld. CIT(A) has observed that remittance towards share capital were issued from the banking channels from outside the country. The copies of bank accounts proved the identity of remitter and also the source of the remittance. The onus cast on the assessee has been discharged and the transactions are genuine. Being so, there was no reason to believe that the income chargeable to tax has escaped assessment. The fact that the remitter being a proclaimed tax offender in USA does not prove that he does not have any sources. On the contrary, it is the case of the authorities in USA that the remitter has substantial income but no tax paid. This information cannot form a basis to believe to prove that the remitter has enough sources. Before us, assessee furnished its written submissions along with following documents:-

1. Copy of Standard Chartered Bank account No.88-7-008167-0 of Shri Samyak C. Veera showing the deposit and withdrawal from that account. (PB 59-61)

2. Copies of FIRC in support of remittance (PB 62-63)

3. Confirmation dated 1.7.2008 from VP Bank confirming the KYC of Shri Samyak C. Veera (PB 64)

4. Copies of US IT Returns of Shri Samyak C. Veera for the AYs 2000-01 to 2006-07 (PB 65-107)

6.1 Thus, according to the Ld. A.R., these financial statements along with bank accounts of Shri Samyak C. Veera explain the capacity of the remitter, the person who remit the amount to the assessee.

6.2 On the other hand, Ld. D.R. submitted that merely producing the bank accounts does not discharge onus of the creditors if the capacity or creditworthiness of the creditor is not proved. He submitted that the assessee company has not filed any evidence regarding the sources of Shri Samyak C. Veera. The Ld. D.R. also submitted that when the department started enquiry specifically to satisfy the sources of income of Shri Samyak C. Veera, it has came to the knowledge of the department that he has incurred huge loss of 56 Million US Dollars whereas his net income over period of 6 preceding years was only 3.3 Million US dollars and he is not in a position to invest such a huge amount in these companies. According to him, the enquiry by AO shows that the entries shown by the assessee are not genuine and the same represent credit entry which is to be treated as income of assessee. But in our opinion, the satisfaction of AO must not be illusory or imaginary but must have been derived from the relevant facts and evidence and on the basis of proper enquiry of all material before him. In our opinion, the assessee is required to offer explanation about the nature and sources thereof and the explanation so offered should be satisfactory in the opinion of the AO. In the present case, there is no doubt regarding the identity of the party from whom assessee

received money. This has been proved by the assessee by furnishing necessary evidence in support of the identity of the parties. He is an NRI and he is having a bank account with Standard Chartered Bank and the money has been moved from this account to the assessee's bank account. The income generation by Shri Samyak C. Veera has been deposited into Standard Chartered Bank account. However, the AO was of the opinion that the sources available to him is not sufficient to cover the remittance made by him to the assessee. In other words, according to AO, the generation of income in the hands of Shri Samyak C. Veera was also to be established. The AO wants to prove the Sources of Source, in our opinion, it is not at all required u/s 68 of the Act as the provisions of explanation of Sources of Sources are not applicable in the case of NRI. It is further noted that the entire share application money was transferred through banking channel. In the hands of the assessee the money stood transferred from the bank account of Shri Samyak C. Veera in Standard Chartered Private Bank, Singapore to Indian Bank. It is evidenced from page 62 from the following certificate issued by the Indian Bank, which reproduced hereunder:-

(62)

इंडियन बैंक
Indian Bank

Serial No. TF/FIRC: 030165

Branch: OVERSEAS BRANCH:2, ST. MARKS' ROAD, BANGALORE

Ref No.RDPA/1569/2008 Date:2 September, 2008

CERTIFICATE OF FOREIGN INWARD REMITTANCE

ORIGINAL

We certify that we have received the following remittance and proceeds thereof were paid to M/s.KANSUR DEVELOPERS INDIA PVT LTD., No.297, 1st Floor, 7th Main, BTM Second Stage, BANGALORE 560 076 on 11.AUGUST.2008 by credit to their Current A/c.No. 602606 USD 1,49,967.00

Name and Place of Residence of the Remitter: MR.SAMYAK CHANDRAKANT VEERA, 202, HORIZONS VILLAS, FRIGATE BAY, ST. KITTS.

Name and address of remitting Bank: STANDARD CHARTERED BANK/SINGAPORE.

TT No. 207388339 dated 25.JULY.2008

Foreign Currency Amount: USD 1,49,967.00 (US Dollars One Lakh Forty Nine Thousand Nine Hundred Sixty Seven Only)

Rupee equivalent: Rs. 62,95,802.00 (Rupees Sixty Two lakhs Ninety Five thousand Eight hundred Two Only)

Rate applied : 41.9850

Purpose of remittance as stated by beneficiary : INVESTMENT.

We also certify that the payment thereof has not been received in non-convertible rupees or under any special trade or payments agreement.

We confirm that we have obtained reimbursement in an approved manner.

for INDIAN BANK
Chief Manager
MANAGER
Bangalore-1.
(Name and Designation)

(Address): S. Vasudevan V-179

Head Office: 31, Rajaji Salai, Chennai 600 001.

This confirmation letter was also produced by the assessee before the authorities.

6.3 Thus, to summarize, assessee furnished all the supporting documents to prove the genuineness of the amount received by the

assessee in the form of share capital and share premium. Further, as per CBDT Circular No.5 dated 20.2.1969, which reads as follows:-

> ***"Money brought into India by non-resident for investment or other purposes is not liable to Indian Income-tax. Therefore, there is no question of a remittance into the country being subjected to Income-tax in India (Para 2). If the money has been brought into India through banking channels or in the form of assets like plant and machinery or stock-in-trade, for which the necessary import permits had been obtained, no question at all are asked by the ITOs as to the origin of the money or assets brought in (Para 3)."***

6.4 It is pertinent to mention that in ITAT Delhi Bench order dated 12th April 2013 in the case of Russian Technology Centre (P) Ltd. vs DCIT, Circle – 13, New Delhi (ITA No.4932, 4933, 5390 & 5391/Del/2011) wherein the bench observed as under:-

> *''13.....In our considered opinion the conflict between the provisions is only with reference to the onus and not to the issue of taxability of income. The onus is shifted under ss. 68 or 69 only with reference to the income which is otherwise taxable in the hands of non-resident under section 5(2). Therefore, the issue whether the income of non-resident is taxable or not is still to be decided with reference to the provisions of section 5(2) and the provisions of section 68 or 69 cannot enlarge the scope of section 5(2). What is not taxable under section 5(2) cannot be taxed under the provisions of section 68 or 69. Under sections 5(2), the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. Reference can be made to the judgement of Supreme Court in the case of Kehsav Mills Ltd. (supra). If such income is shown in the books of account then it cannot be taxed in India merely because the assessee is unable to prove the source of such entry. For example, there may be appearing an entry of cash credit in the name of a person of USA by way of loan received through cheque and deposited in the bank account maintained at any city in USA. Such money, being received outside India, cannot be taxed under section 5(2) unless it is proved that such money is relatable to the income accrued or arising in India. Therefore, the same cannot be taxed under secton 68 merely on the ground that assessee fails to prove the genuineness and source of such cash credit. Therefore, we are of the considered view that the provisions*

of section 68 or 69 would be applicable in the case of nonresident only with reference to those amounts whose origin of source can be located in India. Therefore, the provisions of section 68 or or 69, in our opinion, have limited application in the case of nonresident."

6.5 The Hon'ble Delhi High Court vide judgement dated 15-12-2016 on the similar issue in the case of CIT vs Russian Technology Centre (P) Ltd. (ITA No.547, 549, 555/2013) wherein the Hon'ble High Court affirmed the judgement of the Tribunal by holding as under:-

9. "It then concluded that

xxxx xxxx xxxx xxxx

"15. Next ground for AY 2005-06 pertains to addition of Rs.5 lacs bing unsecured loans received by the assessee from M/s. Claridges SEZ Pvt. Ltd., as assessing officer held that creditworthiness of M./s. CSEZ was not established as the assessee had not produced the bank statements.

xxxx xxxx xxxx xxxx

17. We have heard rival contentions and perused the relevant material on record. We find merit in the arguments of Id. Counsel that CSEZ also being searched on the same date and the seized record being with the department, department could have verified the same from its record. The interest of justice will be served if the issue is remitted back to the file of assessing officer to verify from the seized record about the bank statement of CSEZ and decide the issue after giving the assessee fair and reasonable opportunity of being heard. The assessee may be allowed to submit necessary evidence in this behalf. This ground of the assessee is allowed for statistical purposes.

xxxx xxxx xxxx xxxx

22. We have heard rival contentions. From the orders of both the lower authorities, the names of the persons whose interest payment has been disallowed, has not been given. Besides, we have deleted additions made u/s 68 in respect of above parties. In the absence of the details about disallowance of interest, it will not be possible for us to adjudicate this ground. Therefore, we set aside the issue of interest of Rs.7,54,797/- back to the file of assessing officer to decide the same afresh, considering our conclusion on applicability of sec. 68, commencement of business in 2007- 08, after giving the assessee reasonable opportunity of being heard. In view of above, this ground is allowed for statistical purposes."

10. The learned counsel for the assessee relied upon the judgment of this Court in Commissioner of Income Tax Vs. Divine Leasing & Finance Ltd.

2008 (299) ITR 268 (Del.) to contend that the assessee had furnished all relevant documents which should have been considered to prove the creditworthiness of the creditor/subscriber and the genuineness of the transactions.

11. In Divine Leasing & Filance Ltd.'s case (supra), this Court had held as under:-

> *"13. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue. the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of sections 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessee: if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company.*
>
> *xxxx xxxx xxxx xxxx*
>
> *16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the Income Tax act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely: whether it has been transmitted through banking or other indisputable channels: (3) the creditworthiness or financial strength of the creditor/subscriber: (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable explanation by the assessee. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices: (6) the onus would not. stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the*

assessee. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation"

12. The preceding enumeration of the circumstances of the case show that the assessee had furnished all relevant data before the AO and the CIT(A), which, however, were not inquired into by the AO. Instead he obdurately adhered to his first impression and/or initial understanding that the entire transaction was neither creditworthy nor genuine. The assessee relied upon the documents to prove that the monies had been received through banking channels from its principal and other related companies; it had submitted the FIPB Approval dated 10.12.2005 authorizing the assessee company to raise capital upto '600 crores, copy of certificates of incorporation of share holders, copy of bank statement, copy of Form 2 filed before ROC, copies of Certificates of (i) Incorporation of RTCHL, (ii) Incumbency of RTCHL, (iii) Good Standing of RTCHL, (iv) Director Certificate of RTCHL as well as the Balance Sheet of RTCHL for the years 2004-05 and the confirmation given by the remitters towards remittance of share capital etc. This was all that the assessee could have furnished in the circumstances. It could not be expected to prove the negative that the monies received by it were suspicious or not genuine infusion of capital etc. The assessee had discharged its burden of proof in terms of the settled dicta in Divine Leasing (supra). It is only logical to expect that if the AO was not convinced about the genuineness of the said documents, he would have inquired into their veracity from the bank(s) to ascertain the truth of the assessee's claims. Having not done so, he was not justified in disregarding the assessee's contentions that the infusion of monies into its accounts was legitimate. Consequently, the AO was not justified in making additions of the various sums under Section 68 of the Act.

13. In view of the above, this Court is of the view that the conclusion of the Tribunal in deleting the additions made cannot be faulted. Accordingly, the questions of law are answered against the Revenue and in favour of the assessee. The order of the Tribunal is, therefore, affirmed."

6.6 The Madhya Pradesh High Court in the case of CIT vs M/s. Peoples General Hospital (MAIT No. 27/2008 dated 27 June 2013) wherein the Hon'ble Court dismissed the appeals of the Revenue as to the matter of proving the identity and creditworthiness of the person providing share application money. The relevant observation of the Hon'ble Court is as under:-

''16. The aforesaid judgement has been followed by all the judgements relied on by the appellants relates to the period prior to the judgement of Lovely Exports. As the Apex Court has specifically held that if the identity of the person providing share application money is established then the burden was not on the assessee to prove the creditworthiness of the said person. The position of the present case is identical. It is not the case of any of the parties that M/s. Alliance Industries Limited, Sharjah is a bogus company or a non-existent company and the amount which was subscribed by the said company by way of share subscription was in fact the money of the respondent assessee. In the present case, the assessee had established the identity of investor who had provided the share subscription and it was established that the transaction was genuine though as per contention of the respondent the creditworthiness of the creditor was also established. In the present case, in the light of the judgement of Lovely Exports (P) Ld., we have to see only in respect of the establishment of the identity of the investor. The Delhi High Court also in Divine Leasing & Finance Ltd. (supra) considering the similar question held that the assessee company having received subscription to the public/ rights through banking channels and furnished complete details of the shareholders, no addition could be made under section 68 in the absence of any positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that part of the share capital represented company's own income from undisclosed sources. The similar view has been taken by the High Courts.

17. As the Apex Court has considered the law in Lovely Exports (Supra) and in view of the law laid down by the Apex Court, we find that the substantial questions framed in these appeals do not arise for our consideration. Accordingly, all these appeals are dismissed with order as to costs.

6.7 Lastly the ITAT Hyderabad Bench in the case of DCIT, Circle – 6, Hyderabad vs Shri Madhusudan Rao (ITA No.1482/Hyd/2014 dated 18-03-2015) in which the Bench dismissed the appeal of the Revenue by holding as under:-

"10. We have considered the rival contentions, perused the documents placed on record and the orders of the authorities. First of all we are unable to understand how Assessing Officer can consider inward remittance of moneys into NRI A/c of a non-resident Indian as income of assessee as unexplained. Assessee in the course of assessment proceedings furnished enough evidences in support of inward

remittance of funds including a certificate from M/s. Vitrual International Ltd., about the source of funds being loan. If Assessing Officer has any doubt about the said company in Mauritius, he cannot reject the genuineness of the said company without making necessary enquiries either through the internal mechanism of foreign tax division of CBDT or by any other means. Just because the certificate furnished does not have any seal, the same cannot be rejected outright. However, the matter did not end there. Assessing Officer took pains to verify from the internet and also from the website of the SEBI and came to the conclusion that the said company is one of the group companies of assessee listed as persons constituting group under Monopolies and Restrictive Trade Practices Act, 1969 and further noticed from the red herring prospectus of M/s. Lanco Infratech Limited, wherein this company was shown as single shareholder company of assessee as on 29-07-2006. This means the existence of the company is accepted by the authorities, not only by SEBI and other statutory authorities but even by the Assessing Officer, as can be seen from the enquiries conducted. We are unable to understand how the Revenue could raise ground on existence of the above company in Ground No.7 about the identity of the company when Assessing Officer himself acknowledged the same in the assessment order.

11. Coming to the creditworthiness of the amount, assessee's explanation is that the amounts were transferred from his own bank account in Mauritius to the NRI account in India. Therefore, the immediate source of funds is his own account from Mauritius which is not disputed. If funds are received into Mauritius account, then that becomes source of the source which cannot be examined by Assessing Officer, unless there is any incriminating evidence. Except presumptions and allegations, virtually there is no evidence against assessee that these funds received into his bank account in Mauritius are his own incomes from India or 'round trip' funds of assessee as alleged. Therefore, all the grounds raised on this issue, particularly Ground No.10 & 11 does not require any consideration on the facts of the case.

12. Coming to the issue of creditworthiness of the above said company, there is no dispute with reference to the funds. It has its own funds and Ld. CIT(A) took pains to examine and hold that it is creditworthy. Nothing was brought on record to counter the findings of Ld. CIT(A), except contending that the order of the CIT(A) is not correct. Therefore, the ground regarding creditworthiness of the company particularly from Ground No.6 to 10 also does not require any consideration.

13. One of the issues to be considered is whether the admission of additional evidence by assessee at the directions of CIT(A) required to be sent to Assessing Officer under Rule 46A(1). It is not assessee who furnished the additional evidence. Therefore, it cannot be strictly considered as additional evidence under Rule 46A. CIT has co-terminus powers as that of Assessing Officer as far as appeals before him are concerned. In fact, he even had enhancement powers, if Assessing Officer has missed out bringing into tax any amounts. He also has powers of enquiry and investigation. Therefore, the CIT(A) if exercises his powers as an Assessing Officer, there is no need to give an opportunity to the Assessing Officer who passed the assessment order under Rule 46A. The action of the CIT(A) is completely justified and is in line with the judicial pronouncements in DCIT Circle-16(1), Hyderabad Vs. NE Technologies India (P) Ltd., [47 Taxmann.com, 405 (Hyderabad-Trib)] and ITO Vs. Industrial Road Ways [112 ITD 293 (Mumbai-Trib)]. In the case of ITO Vs. Industrial Road Ways (supra), the co-ordinate bench has held as under:

> *"Having regard to the provisions of Part A of Chapter XX relating to the appeals before the first appellate authority, a distinction has to be made between the evidence and material voluntarily furnished by an assessee in support of his appeal and the evidence/material requisitioned from an assessee by the first appellate authority with a view to have proper disposal of proceedings before him. While the provisions of rule 46A apply to the former, the same have no application to the latter. {Para 4]*
>
> *Provision of rule 46A enjoins upon the first appellate authority not to admit any fresh evidence unless he records in writing his reasons for its admission. Further, rule 46A enjoins upon him to provide the Assessing Officer with a reasonable opportunity to examine the fresh evidence or to cross examine the witness produced by the assessee or to produce any evidence or document or any witness ill rebuttal of the additional evidence produced by the assessee. {Para 5}*
>
> *The provisions of section 250(4), cm the other hand, empower the first appellate authority to make such further enquiry as he thinks fit or to direct the Assessing Officer to make further enquiry and report the result of the same. There are many judgments to the effect that in view of the provisions of section 250(4), the first appellate authority is duty bound to make an enquiry even if such an enquiry was not made by the Assessing Officer if the facts and circumstances of the case warrant such an enquiry to be made. It, therefore, follows that the matters to be considered by the first appellate authority need not be*

confined to what was considered by the Assessing Officer while making the order appealed against. {Para 6]

There are of course several judgments whcre it has clearly been laid down that the assessee on his own cannot produce any additional evidence not furnished before the Assessing Officer without meeting the various conditions provided under rule 46A for which satisfaction is to be recorded by the appellate authority in writing and with which the appellate authority is further required to confront the Assessing Officer and allow him a reasonable opportunity to have his say in the matter. [Para 9]

From the various authorities of courts, the legal position is that the first appellate authority has wide powers over the order of assessment appealed against before him. In the course of exercise of such power the first appellate authority can direct the assessee to produce any evidence, information or material that was not produced before or was not considered by the Assessing Officer.

The purpose of rule 46A is to place fetters on the rights of an appellant to produce additional evidence before the first appellate authority and not on the rights of the first appellate authority to call for production of any fresh evidence or information. This aspect of the provisions of rule 46A is clear from the provisions of sub-rule (4) of rule 46A itself that nothing contained in rule 46A shall affect the power of the first appellate authority to direct the production of any document or to examine any witness to enable him to dispose of the appeal or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer).[(Para 13]

In the instant case, the entire additional evidence had come on the record of the Commissioner (Appeals) because he had decided to examine the facts of the case in depth and then adjudicate upon the matter on the basis of evidence and material, thus, gathered. The Commissioner (Appeals) was empowered to do so under the provisions of section 250(4). The result of enquiry conducted by him could either go to further cement the case made out by the Assessing Officer or to help out the assessee against the findings of the Assessing Officer. The mere fact that the results of the enquiries thus conducted supported the case of the assessee and not that of the revenue, it has no bearing on the jurisdiction and powers of the Commissioner (Appeals). The Commissioner (Appeals) could have confronted the Assessing Officer with the evidence thus

received and the material thus gathered and allowed the Assessing Officer to have his say in the matter and perhaps had he done so the dispute in question would not have arisen. But there is no requirement, in law, that the Commissioner (Appeals) should invariably consult or confront the Assessing Officer every time an additional evidence that was not before the Assessing Officer comes on the record of the Commissioner (Appeals). Where the additional evidence is obtained by the first appellate authority on its own motion, there is no requirement, in law, to consult/confront the Assessing Officer with such additional evidence. There may be cases where additional evidence is admitted by the first appellate authority on a request or application made by the assessee. In such cases sub-rule (2) of rule 46A requires the first appellate authority to allow the Assessing Officer a further opportunity to rebut the fresh evidence filed by the assessee. Even that requirement cannot be said to be a rule of universal application. If the additional evidence furnished by the assessee before the first appellate authority is in the nature of a clinching evidence leaving no further room for any doubt or controversy, in such a case no useful purpose would be served by performing the ritual of forwarding the evidence/material to the Assessing Officer to obtain his report. In such exceptional circumstances the requirement of sub-rule (3) may be dispensed with. [Para 14]

Therefore, there was no infirmity in the impugned order of the Commissioner (Appeals) who had taken pains to comprehensively examine the issue before him and arrive at a correct finding of fact and he should be congratulated for having done so. Therefore, his order was to be upheld and the appeals were to be dismissed. [Para 15].

14. In this case CIT(A) requisitioned the evidence to examine the contentions. Therefore, the grounds raised from Ground No.3 to 6 on the issue of additional evidence are infructuous and does not require any consideration.

15.Therefore, on the facts of the case, it is to be admitted that assessee having his own funds abroad has remitted the amount to India and this inward remittance cannot be considered as unaccounted income of assessee for the year under consideration.

16.Revenue has raised various grounds on the legal principles. We are of the opinion that these are all misplaced or wrongly applied to the facts of the case. First of all, assessee being a non-resident invoking the provisions of Section 68 & 69 has its own limitations. Even though, the credits are to

be examined u/s.68 and 69, 69A or 69C prima facie these sections are not applicable in the case of assessee for the following reasons.

Section	***Explanation for non applicability of Section***
68: Unexplained Cash Credit	*The assessee has merely transferred his own money from his account in Barclays Bank, Mauritius to NRI A/c held in Axis Bank and Indusind bank. As he transferred the amount from his own bank a/c. Therefore, the question of unexplained credit will not come.*
69: Unexplained Investment	*The amount of Rs.78,04,58,374/- does not represent any investment, it is the assessee own money transferred from outside India a/c to Indian NRI A/c. Therefore, Unexplained Investment does not attracts.*
69A: Unexplained Money	*The amount of Rs.78,04,58,374/- is the credit appearing in the capital account of the assessee. The money transferred from his own foreign bank a/c to his own NRI A/c in India. This will not attract unexplained money.*
69C: Unexplained Expenditure	*This section will not attract as no expenditure is involved.*

17. Reference to the Board circular by Assessing Officer is also not correct as the same was extracted and was discussed in detail by the Ld.CIT(A). One cannot quote out the context to take a different meaning of the general circular issued by the Board. Ld.CIT(A) having examined that the principles laid down by the Board circular are clearly applicable to the facts of the case, we do not see any merit in Ground No.15 raised by Revenue unless it is established that assessee has earned income in India or received in India. Provisions of Section 5 does not permit taxation of amounts remitted to India from sources outside India which are not incomes under the provisions of the Act. This issue was discussed elaborately by the co-ordinate bench in the case of DCIT Vs. Finlay Corporation Ltd., [86 ITD 626], Delhi, wherein it was held as under:

> *"The issue whether the income of non-resident is taxable or not is still to be decided with reference to the provisions of section 5(2) and, the provisions of Section 68 or 69 cannot enlarge the scope of section 5(2). What is not taxable under section 5(2) cannot be taxed under the provisions of section 68 or section 69. Under section 5(2) the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. Reference can be made to the judgment of Supreme Court in the case of*

Keshav Mills Ltd. V. CIT (1953) 23 ITR 230 (Supreme Court of India) if such income is shown in the books of account then it cannot be taxed in India merely because the assessee is unable to prove the source of such entry. For example, there may be appearing an entry of cash credit in the name of a person of USA by way of loan received through cheque and deposited in the bank account maintained at any city in USA. Such money being received outside India cannot be taxed under section 5(2) unless it is proved that such money is relatable to the income accrued or arising in India. Therefore, the same cannot be taxed under section 68 merely on the ground that the assessee fails to prove the genuineness and source of such cash credit. Therefore, we are of the considered view that the provisions of Section 68 or 69 would be applicable in the case of non-resident only with reference to those amounts whose origin of source can be located in India. Therefore, the provisions of section 68 or 69, in our opinion, have limited application in the case of nonresident."

18. Likewise, in the case of Smt. Susila Ramasamy V. ACIT, Central Circle – II(2), Chennai [008 ITR (Trib) 18 (Chennai)], Chennai Bench has held as under:

"A non-resident person having money in foreign country could not be called upon to pay income tax on that money in India. The reason is obvious because in respect of that money it will not be possible for the AO to say it was either received by him in India, or it was deemed to be received by him in India, or it accrued to him in India, or it arose to him in India, or it is deemed to accrue to him in India, or it is deemed to arise to him in India. [para 14.1]. if a non resident person, having money in a foreign country, brings that money to India, through a banking channel, he cannot be called upon to pay income tax on that money in India, firstly, for the reasons stated above and secondly, because the remittance of money into India through banking channel will make, the onus on the assessee under section 69, discharged. [Para 14.2]. Once an amount is received as income, any remittance or transmission of that amount to another place does not result in receipt once again at other place, within the meaning of section 5. Therefore, if certain income, profits or gains was received by the assessee outside India it does not become chargeable to income tax in India by reason of that money having been brought into India. This is because what is chargeable is the first receipt of the money and not a subsequent dealing by the assessee with the said money. In that event the money is brought by the assessee as his own money which he had already received and had control over

it and it does not take the character of income, profits and gains after being brought into India. [Para 14.3]. There could of course be a situation where a non-resident has money in India, transmits it to a foreign country then brings it back to India through a banking channel. If this circular motion of the money is conclusively proved with evidence then the non resident will surely do the, explaining under section 69, despite the money having been brought into India through banking channel. But merely on suspicions or doubts, conjectures or surmises, no inference can be drawn against the assessee. It is trite law that there can be no presumption in favor of any illegality of a transaction. In fact the presumption is the other way about. [Para 14.4]. In the cases of remittances through banking channel the nature and source of the funds get explained and the onus on the assessee under section 69 gets discharged, and consequently such remittances cannot be taxed under section 5(2) (b). Therefore, the argument of the revenue that, in the present case, the impugned money was taxable under section 5(2)(b) read with section 69, on the facts, as no merit and cannot be accepted. [para 14.6]. But, the position will be entirely different if the money has been brought into India otherwise than through banking channel, because in that case the onus on the assessee under section 69 will not stand discharged. In such a case the provisions of section 5(2)(b) read with section 69 will surely be attracted. [Para 14. 7]. In the present case, the AO while relying on the CBDT circular, has committed an error of reproducing in his order from Para 4 of the circular, which does not apply to the remittances through banking channels. He should have applied the Para 2 and first part of Para 3 of the circular. In the circumstances, therefore, his order has no merit and cannot be sustained.[Para 15.4]. The assessee, who is a non resident brought money into India through banking channel and the manner in which this money was utilized in India is described in the Annexure. It has been observed that because of the mode of banking channel, admittedly, used for the remittance in this case, the onus on the assessee under section 69 stood discharged, and therefore it was not taxable in India under section 5(2)(b). The CBDT circular squarely supports the case of the assessee. The fact that the transactions and events narrated in the Annexure look curious and suspicious makes no difference to the conclusions that have been drawn in this case, as per law. [Para 16.2]"

''19. In view of the legal principles as stated above, provisions of section 5(2) are also not applicable as the amount received is

from assessee's own account outside India and no income has accrued or arisen in India. These funds were also received through banking channel with necessary statutory approvals. Therefore, assessee has proved the source of receipts and discharged the onus. It is the Revenue which failed in proving that this amount is unexplained income of assessee. In view of these facts of the case, we are of the opinion that various case laws relied on by the Revenue does not apply and they are clearly distinguishable. In view of this, we have no hesitation in upholding the order of the CIT(A) and rejecting the Revenue's grounds."

6.8 Thus, in our opinion, money has been credited into India through banking channel and the assessee as per Circular No.5 dated 20.2.1969 the money brought into India by non-resident for investment or other purpose is not liable to Indian Income Tax in the hands of the present assessee. Further, the Coordinate bench in the case of M/s. Jaico Realtors Pvt. Ltd. cited (supra) has held as under:-

5. *" We have considered the rival submissions. First of all, we reproduce para no. 6 from the assessment order because we find that in this para, the AO has noted the loss and income declared by the remitter during Calendar year 2000 to 2006. This para reads as under.*

6. During the course of assessment, the assessee was asked to prove the genuineness of the transaction along with the relevant documentary evidences. The assessee has informed that the assessee company has received investments towards share capital and share premium from Sri Samyak C Veera, who is a non-resident and the funds are received in foreign exchange through banking channels. The assesses has furnished copies of the FIRC, foreign bank statement of theremitting share holder and copies of income tax returns for period ended31.12.2000, 31.12.2001, 31.3.2002 and the Closing Agreement on Final Determination Covering Specific Matters for these years in Form 906, issued on31.10.2011 by the Department of Treasury, Internal Revenue Service, USA. The assessee has furnished the income details of Sri Samyak C Veera as per US Tax returns, as here below:

Year	*Income as per US Tax returns in $*
2000	*14,396,216*
2001	*16,410,419*
2002	*29,114,644*

2003	*Income as reported - (-)53,416,406 (Gross income 4,183,594 - Losses 57,600,000)*
2004	*Income as reported - (-) 1,643,264 (Gross income 41,471- Losses 1,684,735)*
2005	*Income as reported - 19,075 (Gross income 22,075 - Losses 3,000)*
2006	*Income as reported - (-) 1,568,428 (Gross income 77,836 – Losses 1,650,264)*

6. *From the figures noted by the AO in this para of assessment order, it is seen that the total income reported during this period i.e. in four calendar years i.e. 2000,2001,2002 and 2005 is to the extent of $ 5,99,40,354 and the loss reported by the remitter in the years 2003,2004 and 2006 was to the extent of $ 5,66,28,098 and even after adjusting the losses in the subsequent years, the net income of the remitter is seen to be $ 33,12,256 whereas the remittance by him to the present assessee in the present year is only $1,000,006.53. Hence it is seen that the net income after adjusting losses incurred by the remitter in the calendar years 2003,2004 and 2006 also, the net income was many times more than the amount of remittance received by the assessee from this remitter. Regarding the applicability of the judgment of Hon'ble Apex Court rendered in the case of Pr. CIT Vs. NRA Iron & Steel Pvt. Ltd. (supra), we find that in that case, the shares in question were issued at a very high premium at Rs. 190/- per share, even though the face value of the share was Rs. 10/- per share whereas in the present case, the premium received is only Rs. 50/- per share as against the face value of shares at Rs. 100/- per share. Hence the amount of such premium is 50% of the face value in question in the present case whereas the amount of premium in that case was 19 times of the face value of shares. It is also seen that in that case, it is noted by Hon'ble Apex Court in para 9 of the judgment that the AO made an independent and detailed enquiry, including survey of the so called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions and the field reports revealed that the share-holders were either non-existent or lacked credit-worthiness. In the present case, this is not the case of the AO that the remitter is non-existent and the only objection of the AO is this that in view of losses incurred by that remitter in the years 2003, 2004 and 2006, the credit-worthiness of the remitter is in doubt. But we have seen that even after reducing the amount of losses incurred by the remitter in these three years i.e. 2003, 2004 and 2006, the remitters was having net income of $ 33,12,256 during the period from 01.01.2000 to 31.12.2006 and the assessee has received remittance of only $ 10 Lakhs approx. Under these facts, in our considered opinion, this judgment of Hon'ble Apex Court rendered in the case of Pr. CIT Vs. NRA Iron & Steel Pvt. Ltd. (supra) is not applicable in the present case.*

7. *Now we reproduce para 5.4 from the order of CIT(A) which is available on page nos. 35 to 39 of the order of CIT(A). This para reads as under.*

> *"5.4 I have considered the grounds of appeal and also the submissions filed by the appellant. I have also considered the ratios laid down in the various decisions and relied upon by the appellant. The grounds of the appellant are disposed off as under: -*
>
> *GROUNDS 2, 3 & 4*
> *The only issue involved in these grounds of appeal is the addition of Rs.4,06,98,779/-brought to tax by invoking the provisions of section 68 of the act. As brought out in the facts the amount represents share capital introduced by Sri. Samyak Chandrakanth Veera a nonresident, non-citizen in the appellant company.*
>
> *The submissions of the appellant have been considered. All the documents furnished during the course of hearing by the AR of the appellant and also his oral arguments have been considered.*
>
> *The funds remitted by Mr. Samyak Chandrakant Veera towards the share capital is as under:*

Originating country	*Date Of remittance*	*Amount in US$*	*Relevant F. Y.*	*Remitter details*	*Source of Bank account*
USA	*06.06.2007*	*9,99,970*	*2007-08*	*Samayakant Veera*	*JP Morgan, Chase Bank*
Total		*9,99,970*			

> *It is a decided position of law that, in respect of cash credits brought into the books, the onus ison the assessee to prove the following.*
>
> *1. Identity of the creditor*
> *2. Genuineness of the transaction*
> *3. Credit worthiness of the creditor*
>
> *After examining the documents produced by the appellant during the course of assessment of which the copies were produced before the undersigned and considering the submissions of the appellant's representative, the findings on the above three issues are as under: -*
>
> *1. Identity of the creditor*
> *In support of the identity of the creditor, the Income Tax returns of the*

creditor which was filed in United States of America has been produced, wherein USA Social Security no. and the citizen ship of the person has been disclosed. Further, the investigation wing of the department also verified the fact.

The Assessing Officer has not given any findings against the identity of the creditor and has accepted the identity of the creditor.

As far as the identity of the creditor is concerned there is no dispute.

2. Genuineness of the transaction
The transactions are through banking channels. Copy of the foreign bank account through which the amounts have been remitted to the bank account of the appellant company has been furnished. The appellant has also furnished the Foreign Inward Remittance Certificates issued by recipient bank in support of the transaction. The FIRCs certificates clearly indicates, name of the remitter, the fund transferred from which country, from which bank and recipient bank as detailed below.

Name of the remitter	*Date Of remittance*	*Amount in US$*	*Indian Rs.*	*Receiving bank*	*Remitting bank*
Sri Samayakanth Veera	*06.06.2007*	*999970*	*4,06,98,779/-*	*Indian Bank*	*JP Morgan Chase Bank, NA, New York NY*

The appellant company has also intimated the Reserve Bank of India of the transaction.

These documents have been examined by me.

The Assessing Officer also does not dispute the genuineness of the transaction.

Under the circumstances, as far as the genuineness of the transaction is concerned there is no dispute.

3. Credit worthiness of the creditor
The only issue to be examined in the appeal is the credit worthiness of the shareholder.

The findings of the Assessing Officer in the assessment are only on this issue. The Assessing Officer states that, the sources of the creditor are not proved with supporting evidences. The Assessing Officer also states that, the appellant has not produced the statement of affairs and also the cash flow statement of the investor. Itis on these grounds that,

the Assessing Officer has concluded that, the creditworthiness of the creditor is not established and therefore the sources are not explained.

It is vehemently argued by the appellant's representative that, it is not the appellant's responsibility to produce the statement of affairs and also the cash flow statement of the investor. It is argued on behalf of the appellant that, copies of income tax returns of the investor Sri. Samyak Chandrakanth Veera was filed during the course of hearing. As per these returns the investor has huge income but claimed certain deductions which is eligible under the law of that country (USA). Such claim has been disallowed by the Inter Revenue Service of USA and assessed huge income which resulted in a huge tax demand. The fact that, substantial income is assessed is established. The fact of its taxability being under dispute also confirms that, the investor had enough of sources.

This fact is evident from form no.4549-A "Income Tax Discrepancy Adjustments" for the year ended 31.12.2000, 31.03.2001 & 31.03.2002, dated 06.09.2011 detailed asunder: -

Year ending	*Income determined in US$*	*Rate of conversion to INR*	*Income in Indian Rupees*
31.12.2000	*141,86,897*	*46.75*	*66,32,37,435*
31.03.2001	*164,10,419*	*48.18*	*79,06,53,987*
31.03.2002	*291,14,644*	*48.03*	*139,83,76,351*
Total	*59,11,960*		*285,22,67,773*

The Closing agreement of final determination covering specific matters in form 906 of department of treasury - internal revenue service, dated 31.10.2011 duly signed by Commissioner of Internal Revenue Service & Annexure to such closing agreement also discloses various entities in which Mr. Samyak Chandrakant Veera has invested and income earned has been placed on records. As Mr. Samyaka Chandrakant Veera has not paid tax demanded as per investigation wing of the department and same has been informed to the Assessing Officer that, he is a tax defaulter in USA

It was argued by the AR that, the huge income earned by Mr. Samyak C Veera during those years was available with Mr. Samyak C Veera for investments till the disputes are closed in 2011

The Assessing Officer states that, the investment is in 2007-2008, whereas the evidences are for the years 2000, 2001 & 2002 and therefore without a cash flow it cannot be accepted that the investor had enough of sources.

The Assessing Officer has insisted on the cash flow and has concluded that, there were no sources to the investor for the A.Y.2008-09. The arguments of the appellant's representative is that, the Assessing Officer has not made any further enquiries to find out the sources of the investor for the said year. It is pointed out by the AR of the appellant that, the foreign bank account copy of the investor was produced from which account the funds are remitted to the banks in India. Since the evidences in the form of bank accounts are furnished the Assessing Officer should not have rejected the appellant's contention in a summary way without making enquiries on his own. The appellant had produced the bank accounts of the investor Mr. Samyak C Veera in support of the investment made. The entries were available in the said bank accounts. All the bank accounts are foreign bank accounts and the transactions are in the nature of interbank transfers. Instead the assessing Officer has directed the appellant to produce the cash flow of the investor, which is not in the realm and control of the investor, and thereafter giving a finding that, such cash flow was not furnished has concluded that the investor is not credit worthy.

> *I, find force in the argument of the appellant's representative that, the appellant cannot be called upon to produce the cash flow statement of the investor. Since, the copy of the bank account has been produced it was for the Assessing Officer to make enquiries before arriving at conclusions.*

In the light of the above facts, considering the impeccable evidences such as US Tax Returns, copies of bank account of the investor, intimation to RBI and also copy of FIRC, which have been perused and examined by me, I hold that, the appellant has proved the identity of the investor, the genuineness of the transaction and also prima facie the credit worthiness of the investor.

There is no basis for the Assessing Officer to conclude that, the credit worthiness of the investor is not established. The appellant has prima facie established the credit worthiness of the investor and therefore in the absence of any other evidence brought in by the Assessing Officer to prove the contrary, it has to be concluded that, the credit worthiness of the investor is also established.

In view of the above facts and submissions, I hold that prima facie the identity of the investor is established, the genuineness of the transaction proved and also the credit worthiness of the creditor established.

Under the circumstances, above, since the basic requirements for the provisions of section 68 of the act, were satisfied, there was no case for the Assessing Officer to invoke the provisions of section 68 of the act and consider the share capital of Rs.4,06,98,779/- as income of the appellant.

GROUNDS - 5 & 6

The grounds relate to the extent of proof that the appellant can be called upon to produce and the extent of onus cast on the appellant.

The appellant's representative argues that, the following documents have been produced in support of the transactions.

v) Copies of FIRCs issued by the receiving bank.
vi) Copies of the foreign bank accounts in support of the moneys transferred.
vii) Copy of the letter filed by the company for having received foreign inward remittances with RBI.
viii)Copies of the Income Tax Returns filed in US by Mr.Samyak Chandrakanth Veera.
ix) Confirmation letter from Mr. Samyak Chandrakanth Veera."

8. As per above discussion, we find that the only objection of the AO is this that the credit-worthiness of the investor is in doubt and this observation of the AO is on this basis alone that the investor has incurred huge losses in calendar years 2003, 2004 and 2006. But we have seen that even after reducing the losses incurred in these three years from the income earned by the investor in 2000, 2001, 2002 and 2005, net income of the investor comes to $ 33,12,256 as against remittance by him of only about $ 10 Lakhs. Hence in our considered opinion, the addition made by the AO is not justified simply on this basis that since the investor has incurred losses and the assessee has not furnished cash flow statement, there is no creditworthiness of the investor. In our considered opinion, this objection of the AO is not valid for making addition of this huge amount particularly when the investor has remitted money from abroad through proper banking channel and even after adjusting or reducing the losses incurred by investor in three years i.e. 2003, 2004 and 2006 also, the remaining income of four years i.e. 2000, 2001, 2002 and 2005 is more than three times of the remittance received by the present assessee from the investor abroad. Considering these facts, we find no reason to interfere in the order of CIT(A) on this issue.

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

6.9 In the present case, as discussed in earlier paras, the issue is with regard to onus on the assessee to prove the sources of sources of credit. The onus is shifted under Sections 68 or 69 of the Act only with reference to the income, which is otherwise taxable in the hands

of non-resident u/s 5(2) of the Act. Therefore, the taxability of the income is to be decided with reference to section 5(2) of the Act and provisions of sections 68 or 69 of the Act cannot enlarge the scope of section 5(2) of the Act. What is not taxable u/s 5(2) of the Act cannot be taxed under sections 68 or 69 of the Act. Under section 5(2) of the Act, the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought to India by way of remittance. If such income is shown in the books of accounts of the assessee as in the present case, if the assessee is unable to prove the source of such credit, cannot be taxed u/s 5(2) of the Act, unless it is proved that such money is relatable to the income accrued or arising in India. In the present case, it is not the case of department that such money has been accrued or arising in India. The only contention of the Ld. AO/DR is that the assessee has not proved the sources of sources of credit. Therefore, in our opinion, the said impugned amount in all these cases cannot be taxed u/s 68 of the Act merely on the ground that assessees herein failed to prove the sources of sources of such credit. The Ld. AO/DR wanted to enlarge the scope of section 5(2) of the Act, which cannot be permitted. Further, the receipt of the above amount through banking channels remitted from foreign bank to bank in India. The receipt is supported by FIRC Certificates issued by the receiving bank. Sri Samyak Chandrakanth Veera is a non-resident and assessed to tax in United States of America. Confirmation dated 1.7.2008 from VP Bank confirming the KYC of Samyak Chandrakanth Veera. Copies of US Income Tax Returns of Mr. Samyak Chandrakanth Veera. The receipt above is through banking channels and the same was intimated to Reserve Bank of India by the Company. Copy of the bank account supporting the

remittance was furnished during the course of assessment proceedings.

6.10 In the case of Snowshine Realtors (P) Ltd. the assessee company has proved the identity, creditworthiness and genuineness of transactions by filing the following documents:-

i) Copies of the foreign bank accounts in support of remittances and also copy of the bank account in India wherein the monies were received, were also furnished.

ii) Copies of Income Tax Returns filed in USA by Mr. Samyak Chandrakanth Veera also furnished.

iii) Confirmation from Samyak Chandrakanth Veera furnished.

iv) FIRCs issued by the receiving bank and filed before the RBI.

6.11 In our opinion, identity of person, the genuineness of the transaction is established as assessee company has furnished that all transactions are though banking channel, FIRC's and communication with Reserve Bank of India as per the RBI Guidelines under the FEMA. The department is harping on the investors source of investment in share capital who was a Non-Resident and Non-Citizen of India. The company has established the source of investment in share capital has come from Mr. Samyak Veera. This is not disputed by the Assessing Officer. The only issue on which the Assessing Officer is harping is that personal Balance Sheet and fund flow of Mr. Samyak Veera is not provided. It is not the responsibility of the company to call for such details from the investor in share capital. The transaction of investment is in the form of Foreign Currency, which has been received through in banking channels. The receipt of

foreign currency by the Indian Company is subjected to verification by the Reserve Bank of India as per the FEMA / FDI guidelines. As such expecting the company to prove beyond the source of source of Mr. Samyak Veera is not responsibility of the company. Under these circumstances the addition U/s.68 of the Act deserves to be deleted.

6.12 Furthermore, the section 68 is not applicable to remittance made in India by non-resident as seen from the proviso to section 68 which has been inserted w.e.f. assessment year 2013-14 by Finance Act, 2012. According to the said proviso, if an assessee company, in which public are not substantially interested, receives money by way of share capital or share premium or any such amount by whatsoever name called, then the source of funds of resident shareholder has to be established by the assessee in order to get out of the kin of the deeming provision u/s 68 of the Act. Hence, the proviso speaks of the source being established only when the shareholder is a resident of India. There is no such requirement, if the shareholder is a non-resident, therefore, the creditworthiness of the shareholders, if he is non-resident, does not have to be established by the assessee in respect of remittance received by him or it. Being so, in the present cases, only identity and creditworthiness of investor and genuineness of the transactions for explaining the credit in the books of account of the assessee is sufficient, and the onus does not extend to explain the source of funds in the hands of the investor. Thus, the proviso to section 68 of the Act is applicable to residents only, who are required to substantiate “source of source of funds”. This additional

burden cast upon by the proviso was not applicable to non-resident investors. Accordingly, we confirm the deletion of addition made by the Ld. CIT(A). Hence, all the appeals filed by the revenue are dismissed.

6.13 Since we have dismissed all the appeals of the revenue on merit, the COs filed by the assessee on legal issue is dismissed as not pressed.

7. In the result, the revenue appeals in ITA Nos.1441 & 1442/Bang/2018 & 1443/Bang/2018 are dismissed. The COs filed by the two assessees in CO Nos.103 & 104/Bang/2018 and CO No.105/Bang/2018 are dismissed as not pressed.

Order pronounced in the open court on 28th Oct, 2022.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(Chandra Poojari)**
Vice President	**Accountant Member**

Bangalore,
Dated 28th Oct, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore