IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", NEW DELHI

BEFORE SH.BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. L.P.SAHU, ACCOUNTANT MEMBER

ITA No.3342/Del/2013
[Assessment Year: 2009-10]

The Income Tax Officer, Ward-7(3), Room No.306, C.R.Building, New Delhi.	vs.	XO Infotech Ltd., (Now known as M/s. Saral Mining Ltd.), 304, Saffron Building, Panchvati to Ambawadi Road, Ambawadi Ellisbeidge,Ahmedabad-380006.PAN-AAAXX0059K
(Appellant)		(Respondent)

By Revenue :	Shri Vijay Varma, CIT-D.R.
By Assessee :	Shri S.R. Wadhwa, Advocate

Date of Hearing :	07.06.2018
Date of Pronouncement :	09.07.2018

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by the Revenue has been directed against the order of Ld.CIT(A)-XXI, New Delhi dated 15.03.2013 for AY 2009-10, challenging the deletion of addition of Rs.16.95 crores u/s 68 of the of the Income Tax Act, 1961 (in short "Act").

2. Briefly, the facts of the case are that the assessee company filed return of its income on 29.09.2009 declaring income of Rs.69,860/-. The AO issued a notice u/s 143(2) of the Act to the assessee but no compliance has been made. Further, notices were issued which were also not complied with. Later on, Ld. Counsel for the assessee appeared before the AO. The AO issued notice u/s 133(6) to various Mutual Funds in which the assessee had invested to obtain details of investment and the bank details of the assessee. On obtaining bank details and after getting approval of Ld.CIT, letter for provisional attachment was sent to HDFC Bank, Ahmedabad but the same returned unserved. The assessee submitted Annual Report and other details before the AO. The AO noticed that the assessee is a listed company which during the previous year increased its share capital by Rs.16.95 crores. This increase was not through public issue but by way of investment in equity share directly through fully convertible warrants. The assessee filed copy of the Audited Account and ITR. The assessee made sale and purchase only from two

parties. The assessee is selling as well as purchasing from the same parties and the same items i.e. Maize Grain. AO noted that the assessee is merely showing bogus sale and purchase. The assessee submitted that it is a listed company and all the issues of the shares are done as per SEBI Guidelines. The AO noted that approval of SEBI allows issue of such fully convertible warrants but it does not certify the genuineness, creditworthiness or identity of the applicants as required u/s 68 of the Act. The AO noted the names of various entities who invested in assessee company in assessment order with their details and after going though the documents submitted by the assessee regarding their creditworthiness and genuineness of the transaction noted following facts from the analysis of the various balance sheets and P&L Account, the crux of the same was drawn as under:-

a) "None of the entities had their own creditworthiness/capacity to make the requisite investment .

b) Copies of returns, bank statements, audited accounts have not been filed in all cases.

c) The funds invested in the assessee company are received in the bank accounts of investors on the same day or within a couple of days when such funds are forwarded to the assessee.

d) The bank accounts don't show credit balance or any CC limit to show the credit strength of the company.

e) Most of the investing companies do not have any assets for business.

f) The profit & loss accounts of the companies reflects bare minimum or no business activities.

g) Most of the entities are audited by same persons & have similar standing, raises suspicion on basic existence of such entities. These entities may be mere paper companies.

h) Why would such companies forward money to the assessee for its investment in Mutual Funds for the *assessee, when such activities could have been done by such investors themselves?*

i) *Why are such investors sacrificing their own profits for the sake of assessee; on such investments when they are not related enterprises & on account of being companies, do not have mutual love & affection?"*

3. The AO noted that the assessee has failed to prove creditworthiness of the investor companies and genuineness of the transactions u/s 68 of the Act, therefore, addition of Rs.16.95 crores was made to the returned income. This addition was challenged before Ld. CIT(A).

4. The assessee filed written submissions before Ld.CIT(A which is forwarded to the AO for filing the Remand Report. The Remand Report is reproduced in the appellate order as under:-

1. "In this Para the assessee has stated that formal notice u/s. 143(2) was issued by the then AO just for sake of formality showing that the return for the year is under scrutiny.

The above contention of the assessee is not correct as the language of the notice u/s. 143(2) of IT Act itself speaks that:-

"There are certain points in connection with the return of income submitted by you for the A. Y. 2009-10 on which I would like some further information. You are hereby required to attend my office on 29th September, 2010 at 2.45 P.M either in person or by a representative duly authorized in writing in this behalf or produce or cause there to be produced at the said time any documents, accounts and any other evidence on which you may reply in support of the return filed by you."

From the above notice it is very clear that the assessee from the day of receiving notice knows that he is required to file documents basis on which the return of *income has been filed. The assessee cannot say that this is a formal notice only.*

This case was fixed for hearing on 29.9.2010.

However, on the same day nobody attended nor any application for adjournment has been filed. Again on 17-1-2011 detailed questionnaire along with notice u/s. 143(2) of IT Act was issued to the assessee. The case was fixed for 28-1-2011. However. on 28.1.2011 nobody attended the proceedings nor any reply or adjournment has been filed by the assessee. Again the case was fixed on 28.2.2011 for 7.3.2011. Again on 7.3.2011 none attended. On 12.8.2011 the case was again refixed for 24.8.2011 by notices issued under section 142(1) of IT Act with detailed questionnaire and 143(3) of IT Act. Again on 24.8.2011 nobody attended the proceedings nor any reply has been filed. On 26.8.2011 the case was again refixed for issuing notice u/s. 143(2) of IT Act dated 26.8.2011 for 2.9.2011.

Again on 2.9.2011 nobody attended the proceedings nor has any reply been filed. From the above facts it is *very clear that the assessee was deliberately avoiding the proceedings. He was not attending the office even no application for adjournment has been filed by him. He was making the mockery of the various notices issued to him under the provisions of IT Act by not attending the proceedings initiated u/s. 143(2) of the IT Act. Keeping in view the above mentioned facts in the mind that the assessee is deliberately avoiding the proceedings and intentionally is not filing the reply to avoid any further inquiry/query in the case, therefore the AO made a proposal for provisional attachment u/s. 281-B of IT Act on 3-10-2011. In his letter he has stated that there would be all possibilities that this case will be completed ex-parte resulting in huge demand as the assessee shown huge investments to the tune of Rs.20.82 crores in Mutual Funds. Approval for which has also been granted by CIT The AO vide his letter ete dt 31.102011 made provisional attachment by writing letter to the Manager, HDFC Bank. Glujarat.*

As per note sheet entry dated 31. 10.2011. Shri Ashish Jain. CA attended the proceedings and filed Power of Attorney only. He was requested to file P & LA/c, B/Sheet, computation of R.I. and he was also requested to justify the delay in attending the proceedings. The case was adjourned to 3.11.2011. As per record a letter dated 3.11.2011 has been filed in which it is stated that due to shifting of office the company has changed his registered office and also the name of the company has been changed from XO Infotech Limited to Saral Mining Limited w.e.f 17.8.2011. However, no details have been filed by the assessee.

AO again issued a detailed questionnaire to the assessee on 14.11.2011 for compliance on 21.11.2011. On 21.11.2011 nobody attended, however, on 23.11.2011 Shri Ashish Jain, CA submitted part details and he was requested to file more details. The case was adjourned to 5.12.2011. On 5.12.2011 he did not file all the details, again he was asked to file balance details. On 19.1.2011 *he was again asked to file balance details. On 26.12.2011 Shri Ashish Jain again attended but did no file all the details as asked earlier vide various notices issued or query raised by note sheet entry, therefore, again he was asked to file balance details. The case was adjourned to 28.12.2011.*

From the above facts, it is very clear the assessee and his Authorized representative deliberately avoiding the proceeding by non-filing complete details. On 29-12-2011 Shri Ashish Jain, CA attended and filed part details. The AO has made assessment order u/s. 143 (3) of IT Act on 30-12-2011 being time barring assessment. Therefore, the assessing officer being time barring assessment had left with no option but to t60 pass the assessment order on 30.12.2011. In assessment order, in absence of any explanation given by the assessee the AO has made an addition of Rs.16.95 crores as the assessee has failed to prove the creditworthiness of the investors.

2. In second ground of appeal the assessee has challenged the jurisdiction for issue of notice u/s. 143(2)/142(1) of IT Act.

In this regard it is submitted that the First notice u/s. 143(2) of IT Act was issued by the ACIT Circle 18(1), New Delhi as the jurisdiction over the PAN was lying with him and also has the jurisdiction over previous assessment years. As the assessee has filed his return of income for assessment year 2009-10 declaring income of Rs.69,860/- as per the declared income the jurisdiction over the case lies with ITO, therefore, the case was transferred to ITO, Ward 18(4), having the jurisdiction over the company as per alphabet. Further, during the whale proceedings the assessee has never challenged the jurisdiction.

3. In this paragraph the assessee has stated that from August 2011 to. 31-10-2011, practically nothing was heard from the AO.

It is very surprising that the assessee has not commented about the period from the issue of notice on

24.9.2010, 17.1.2011 and 28.2.2011 because he has deliberately not attended the proceedings. Further, an 12.8.2011 the case was again refixed for 24.8.2011, 26.8.2011 far 2.9.2011, in bath dates no. body attended nor any reply has been filed by the assessee against the statutory notice issued u/s. 143(2)/142(1) along with detailed questionnaire.. Therefore, the contention of the assessee is not correct as the case was fixed between the period August 2011 to. Oct., 2011.

4. The assessee's contention is bath correct because during the whale proceeding the assessee has failed to. file complete details as per questionnaire issued an 17-01-2011 to. 29-12-2011 till the date of passing assessment order (almost one year).

5. From the above facts, it is apparent that the notices were being served on the assessee regularly and he was deliberately avoiding the proceedings by mis-leading the facts.

6. As regards the admission of additional evidence, the same is not admissible under Rule 46A of IT Rules, 1962 as none of the following circumstances wherein additional evidence can be permitted under Rule 46A apply to the case of the appellant.

i) The AO did not refuse to admit said evidence as the same were not at all produced by the assessee during the assessment proceedings.

ii) The Assessee was not prevented by any sufficient cause from producing evidence called upon by the AO

iii) The assessment order was passed after giving sufficient opportunity to the assessee to produce the evidences."

5. The Remand Report was provided to the assessee. The assessee filed the re-joinder which is reproduced in the appellate order which reads as under:-

"2. At the outset, the appellant feels highly obliged for affording us an opportunity to submit our counter submission in rebuttal of the AO's report under reference.

3. Vide opera 1, the AO has denied that the notice u/s. 143(2) of the Act was formal one. Conversely, he has reproduced the format of the notice and has supplied emphasis on the wordings "to be produced at the said time any documents, accounts and any other evidence on which you may rely in support of the return filed by you." This itself goes to establish that it was neither a specific notice u/s. 142(1) nor a questionnaire therewith. The assessing officer's proposition is against the letters and spirit of instruction No. 1367 dated 18.11.1980 which reads as under:-

> *"Hearing fixed by the Income Tax officers for completion of the assessments:*
>
> *1. It has been time and again brought to the notice of the board that the Income Tax Officers are issuing notices u/s. 143(2) indiscriminately and*

mechanically without acquainting themselves in advance as to what is their requirement. This has been a source of harassment to the taxpayers and also delaying the completion of assessment proceedings, more particularly so in Salary Circles.

2. In the Action Plan for 1980-81 also the Chairman has desired that before fixing up the cases the files should be studied and requirements specified for the purposes of scrutiny. In cases which would normally fall under the Summary Assessment Scheme only a deficiency letter may be issued as required by Board's Instruction No 1072 dated 1.1.1977 or under section 139(9) of the Income Tax Act, 1961.

3. Where the cases is to be fixed for hearing, it will be advisable to either issue notice under section 142(1) which requires production of certain documents or books or notice under section 143(2) specifying the point on which the clarification is *needed, issue of notices under section 143(2) which requires the assessee to produce evidence in support of the return should not be done mechanically and the Income Tax Officer should be well aware of the points on which he desires the assessee to produce evidenced issue of such notice.*

4. The Commissioners and the Inspecting Assistant Commissioners should make it a point to see during the course of surprise or regular inspections as to whether the notices have been issued mechanically or not. In case some officers are in the habit of issuing notices mechanically, they may be suitably pulled up.

5. The Board desire that the contents of the above instructions may be brought to the notice of all the officers working in your charge.

Instruction: No./367. dated 18-11-1980 (Source: 114th Report of P.A.C (1981-82) (Seventh Lok Sabha) (pp 14- 15) "

Thus this in itself demolishes the absurb reasoning assigned by the AO rendering the notice as the one issued mechanically and indiscriminately which did not specified any of his requirement.

In the latter part in this para the AO has simply extracted selective portion from the impugned assessment order but has tacitly avoided offering any comments on the fact that the jurisdiction over the case was ested with the AO only in the middle of August, 2011. Needless to state that the AO has passed final order u/s. 143(3) and not u/s. 144 of the Act. Therefore, the AO's comments in the latter limbs of this para are misleading and exhibits non-application of kind. As submitted in the appellant's letter dated 3.7.2012, the first and foremost questionnaire was issued only on 14.11.2011 and the appellant on each and every hearing attended and submitted replies vide letters dated 23.11.2011, 28/11/2011, 5/12/2011, 17/12/2011 &

28/12/2011. The present AO having failed to offer any comments on these compliances, his report is untrue and reveals unfair attitude with a prejudiced mind.

6. Vide para 2, the AO summarily dealt with the jurisdiction issue saying that the case was transferred to ITO, Wd. 18(4) having jurisdiction over company cases. What the appellant want to bring on record is that the then AO didn't possess even a return of income and it is the appellant who has supplied hard copy of re3turn of income along with requisite audit reports and Annexures/Schedules etc. on 30/10/2011 as incorporated in para 3 of the assessment order. Therefore, in the fitness of things, the then AO didn't have any jurisdiction to issue statutory notice u/s. 143(2) of the Act prior to that date.

7. Vide para 3 the AO has rejected the contention of the appellant that nothing was heard from the *department between August, 2011 to 30/10/2011. As mentioned in para 3 of the appellant's letter dated 3/7/2012, the appellant's representative, su-motto met the then AO on 30/10/2011 to enquire about the fate of pending assessment, as stated in para 2 of the impugned order itself. After collecting the return of income and other documents Authorized Representative, the first and foremost questionnaire was issued only on 14/11/2011. As is also verifiable from the records, the appellant has attended on each and every hearing and submitted written replies vide letters dated 23/11/2011, 28/11/2011,5/12/2011, 17/12/2011 & 28/12/2011.*

8. Vide para 4, the AO has commented in cryptic manner without addressing the issue raised by the appellant in proper prospective. As submitted by the appellant in para 4 of the letter dated 3/7/2012 the appellant is not allowed adequate time nor any show *cause notice has been issued! served before making huge addition running in to Rs.15.95 Crores vis-a-vis returned income of Rs.69,860/-. It is incorrect to state that first questionnaire issued on 17/1/2011 remained uncomplied with. On the contrary, the first and foremost questionnaire was issued only on 14/11/2011 and the appellant has attended on each and every hearing and submitted replies vide letters dated 23-11-2011, 28-11-2011, 5-12-2011, 17-12-2011 & 28-12-2011. The present AO has not offered any comments on such compliances and has simply rejected appellant's contention in a quite casual manner.*

9. Vide para 5 the AO has stated that the notices were being served on the appellant and they remained uncomplied with. In this context, it is submitted that the remark of the AO is quite vague and he has not offered any comments on the additional evidences produced by the appellant.

10. Vide para 6, the AO has objected to admission of additional evidence saying the same is not admissible under Rule 46A of the IT Rules, 1962, without pin-pointedly mentioning as to how the appellant is not entitled to produce the same. In this context it is submitted that as stated in appellant's letter dated 3-7-2012, the then AO made an order appealed against, without giving sufficient opportunity to the appellant to adduce evidence relevant to the grounds raised in the appeal on hand.

It is further submitted that the AO has furnished his comments on the appellant's letter dated 3-7-2012 but he has opted not to examine the documents produced by the appellant nor he has produced any evidence to the contrary. The AO has not made any attempt to cross verify the facts on record by making any reference to the evidence produced by the appellant though all the parties are *assessed to tax. In fact copies of their Bank Statements*

evidencing the identity and source of payment are placed on record and it remains undisputed as issued by the respective banks. Even a cursory look at these Bank Statements goes to eveal that there was no introduction of cash deposit in any of such bank accounts.

11. The submission of the A 0 vide the last para of his report is of general nature for the sake of defence.

12. In view of the above, it may kindly be appreciated that the appellant was prevented by sufficient cause from producing the evidence before the AO which is relevant to the grounds raised in appeal and the appellant is entitled to its right to defend its case within the parameters of provisions of Rule 46A. This should be found in accordance with the Rule of Natural Justice. Your honour is, therefore, earnestly requested to kindly consider the evidence *produced by the appellant on merits and decide the same sympathetically in the interest of justice.*

13. The appellant therefore crave liberty to submit a consolidated chart in respect of all the nineteen parties reflecting the names of such parties and the details of evidences submitted all along including the additional evidences such as acknowledgment of income tax return filed, balance sheet, bank statements etc. with reference to the paper book page numbers filed so as to judge the issues at a glance. The same may therefore be read as a whole alongwith submission dated 1/6/2012 as submissions filed with regard to our appeal and may kindly be treated and considered as our attendance for the hearing and the appeal may also be decided in the light of it.

For the act of your honour's kindness the appellant, as is duty bound, shall every pray.

Thanking you,"

6. Ld.CIT(A) considering the material on record admitted the additional evidences and deleted the entire additions. His findings in para 4 to 6.4 of the order is reproduced as under:-

4. Decision on admission of additional evidence:-

I have gone through the finding of AO in the Remand Report and appellant's rejoinder. In this regard vide letter dated 3.7.2012 appellant has submitted that in between the period from August, 2011 to 31-10-2011 no intimation was received from AO. Furthermore, as various written eplies were submitted vide letters dated 23.11.2011, 28.11.2011, 5.12.2011, 17.12.2011 and 28.12.2011 and order u/s. 143(3) of the IT Act w3as passed as on 30.12.2011, wherein, in para 2 and 23 it has been mentioned that appellant has purposefully delayed the attendance in the assessment proceedings. I have considered the submission in this regard and I found that additional evidences submitted by the appellant are very much essential to adjudicate the matter as these are the evidences which should have been taken on the record by *the AO to decide the issue. I have considered the objection of the AO and in my considered opinion additional evidences are being admitted under Rule 46A(1)(c) of IT Rules. In this regard vide letter dated 3.7.2012 appellant has submitted all the circumstances under which he was prevented by sufficient cause to produce the evidence which were necessary for deciding the issue. The evidences pertain to additions made by AO by making adverse observation against the appellant which have been properly supported by the appellant during the course of the appellate proceedings. In this regard reliance is placed on the judgment of Hon'ble Delhi High Court in the case of CIT vs. Virgin Securities and Credits P. Ltd., reported at 332 ITR 396 (Delhi), wherein, Hon'ble Delhi High Court has held as under.-*

"Held-dismissing the appeal, (i) that before admitting the additional evidence the Commissioner (Appeals) had obtained a remand report from the assessing officer. The additional evidence was crucial to the disposal of the

appeal and had a direct bearing on the quantum of the claim made by the assessee. Rule 46A of the Income-tax Rules, 1962, permits the Commissioner (Appeals) to admit additional evidence if he finds that the same is crucial for disposal of the appeal. "

4.1 In view of the above discussion, in my considered opinion, case is fit to admit additional evidence under Rule 46A(1)(c) treating that appellant was prevented by a sufficient cause during the course of the assessment proceedings.

5. After admitting the additional evidences, ground-wise issues are decided hereunder.-

Determination:

6. Grounds No.1, 2 and 3 are taken together as these are interlinked. In this regard during the course of appellate proceedings ld. AR of the appellant has filed a letter dated 20-8-2012, wherein, in the relevant paragraph various credit balances in the bank have been explained by submitting a chart as under:

S. No. Name of the party	***Credit balance in Bank when fund invested with the appellant***	***Paper Book Page No. of its bank statement***
1.Siddhi Vinayak Tradelink Pvt. Ltd.	*500067-92*	*195*
-do-	*2010457-65*	*196*
2.Sonhika Granites Pvt. Ltd.	*209849-75*	*144*
-do-	*5000037-00*	*536*
3.Girish Metals Pvt. Ltd.	*5000038-00*	*339*
-do-	*2011921-32*	*340*
4. Exodan Trading Co. Ltd	*2500187-00*	*510*
-do-	*1020828-36*	*511*
5. Shanti Tradelink Pvt. Ltd. *-do-*	*5000044-00* *2010619-75*	*214* *215*
6. Shalibhadra Steels Pvt. Ltd.	*5000044-00*	*446*
12 -do-	*2010372-62*	*447*
7. Shankheshwar Metals Pvt. Ltd.	*5000076-00*	*234*
-do-	*2010425-29*	*235*
8. Amraworld Agrico Ltd.	*1282087-15*	*537*
-do-	*3137906-15*	*538*
-do-	*8137906-15*	*539*
-do-	*3137906-15*	*540*
9. Amardeep Industries Ltd.	*1270698-07*	*541*
-do-	*3178827-50*	*542*
-do-	*8178827-53*	*543*
-do-	*3178827-53*	*544*
10. Myraj Consultancy Limited	*507072-85*	*453*
-do-	*1256756-84*	*454-455*
-do-	*4247790-84*	*454-455*
-do-	*997790-84*	*454-455*
11. Plantimun Corporation Limited (Mahavir Impex Limited)	*8075624-12*	*566 to 568*
-do-	*5000281-85*	*569-570*
12. Dhanlaxmi Lease Finance Ltd.	*3604707-00*	*357*
-do-	*369955-00*	*358*
-do-	*40000556-44*	*359*
13. Simplex trading & agencies Ltd	*8125000-00*	*175*
-do-	*3135497-00*	*176*
14. Robinson Worldwide Trade Ltd	*3127396-06*	*297*
-do-	*10031949-78*	*575*
-do-	*3126949-78*	*576*
-do-	*1250000*	*576A*

15. Vashi Construction Pvt. Ltd.	3321899-74	577-579, 580, 581
-do-	5398289-74	580-581
-do-	3125289-74	580-581
16. Rudra Securities & Capital Ltd.	5010029-38	258
-do-	312500-15	582
-do-	10002500-09	582A
-do-	3127250-00	582A
17. Induram Develops Pvt. Ltd.	3278609-02	319-320
-do-	1280785-85	583
-do-	3134826-00	584
-do-	5109029-02	585
-do-	3278609-02	586
18. Suchak Trading Co. Ltd.	201052-39	123
-do-	5010048-39	124
19. Corporate Strategic Allianz Pvt Ltd.	3300344-03	379
-do-	1350116-49	587
-do-	5339173-75	588
-do-	3356623-75	589

6.1 All the bank statements are available at various pages of Paper Book, which were perused by me and were sent to AO during the remand proceedings. Furthermore, Id. AR of the appellant has also submitted that AO has drawn inference on suspicion, conjectures and surmises and has brushed aside all the written and oral submissions made during the course of assessment proceedings and addition of Rs.l6.95 crores has been made without cross verification of the facts and without doing any independent inquiry and not serving any show cause notice before making huge addition which is in utter disregard to the settled principles of law and in violation of principles of natural justice. It has been further *submitted that appellant has received fund from entities which have their identity and creditworthiness and details with regard to payments, like cheque number, date, ledger account with explanation for credit entries, bank statement, PAN No, I.T.R., copy of balance sheet, all details were produced so as to prove identity, genuineness and creditworthiness. It has also been submitted that all the companies who have invested are Public Limited Companies. In this regard appellant has relied on various case laws as under.-*

1. *ACIT v. Venkateshwar Ispat (P) Ltd [2009] 319 ITR 393 (Chhattisgarh)*
2. *CITv. Samir Bio-Tech (P) Ltd. [20I0] 325 ITR 294 (Delhi)*
3. *AGM Protection Devices Ltdv. Dy. CIT [2010] 191 Taxman*
4. *CITv. Fibers Ltd [20I0] 187 Taxman 53 (Delhi)*
5. *CITv. Winstral Petrochemicals (P) Ltd. [2010] 233 CTR (Delhi)*
6. *CITv. Dwarkadhish Investment (P) Ltd [2010] 194 Taxman 43 (Delhi)*
7. *CIT V. Gangour Investment Ltd [2011] 335 ITR 0359 (Delhi)*
8. *CITv. Electro Polychem Ltd [2007] 294 ITR 0661 (Madras)*
9. *Orient Trading Co. Ltdv. CIT (1963) 049 ITR 723 (Bombay)*
10. *A-One Housing Complex Ltd v. Income Tax Officer [2008] 299 ITR (AT) 327 (Delhi)*
11. *Aravali Trading Co. v. ITO [2009] CTR 622 [Rajasthan}*

I have gone through the case laws relied upon by the Id. AR of the appellant in this regard.

6.2. Besides that ld. AR of the appellant has also relied on Paper Book submitted vide letter dated 1.6.2012, wherein, each and every entry has been discussed in detail by making full submission in this regard and it has been mentioned that vide various letters dated 23.11.2011, 28.11.2011,5.12.2011,17.12.2011 and 28.12.2012 replies were submitted to AO. Copy of all the replies have been made available in the Paper Book and I have perused the same. In the letter submission before AO, address, PAN No, details of amount, bank details and cheque details and copy of balance sheet have been furnished and I have gone through the same and it is found that appellant has submitted full details before AO on different dates. It has also been found that AO has issued notice as on 14.11.2011 and after that appellant has submitted five replies on various dates, but no independent inquiry has .been conducted u/s. 133(6) of the Act so as to disapprove the claim of the appellant. in this regard vide letter dated 2.11.2012 Id. AR of the appellant has relied on the judgment of Hon'ble Supreme Court in the case of CIT-II, New Delhi vs. Khamdhenu Steel & Alloys Limited, wherein, Hon 'ble Supreme Court has affirmed the decision of Hon'ble Delhi High

Court in the above mentioned case, reported at 248 CTR 33. The reply of the appellant is reproduced hereunder:-

> *"In addition to what is being submitted early the appellant most respectfully craves liberty to place on record copies judgments of the order passed by Honorable Supreme Court of India rendered in the case of CIT-II, New Delhi versus Khamdhenu Steel & Alloys Limited in petition for special leave to Appeal in CC 15640/2012 arising from the judgment and order dated 23.12.2011 in ITA No. 927/2009 of the High Court of Delhi at New Delhi (As reported in*
> *248 CTR 33). The appellate strongly relies on the judgment of jurisdictional High Court of New Delhi as affirmed by the Honorable Supreme Court of India being binding on the subordinate authorities. The facts of appellant's case are on much better and sound footing then that of the relied case. The same is discussed hereunder:-*
>
> *The appellant has inter-alia amongst others submitted the following documentary evidences as supplied by the subscribers to the appellant company for subscribing to the share capital as satisfactory explanation to prove the share application money subscribed by the respective shareholders*

in its public issue as the appellant is a listed public limited company:

1. *Permanent Account No.*
2. *Acknowledgement of income tax return being proof as existing assesses*
3. *Balance sheet and Annual account.*
4. *Confirmation in the form of copy of ledger account and contra account.*
5. *Share application forms.*
6. *Bank statements.*

6.3 I have gone through the submission and has found that respective shareholders have given full details and appellant is a listed Public Limited Company and PAN No., acknowledgement of ITR, balance sheet, annual account, confirmation and contra account and share application form and balance sheet and bank statements have been furnished. While analyzing the issue I came across latest judgment of Hon'ble Delhi High Court in the case of CIT vs. Gangeshwari Metal Pvt. Ltd. dated 21.1.2013, 'ITA No. 597/2012, wherein, in relevant paragraph Hon'ble Delhi High Court has held as under:-

> *"As can be seen from the above extract, two types of cases have been indicated. One in which the assessing officer carries out the exercise which is required in law and the other*

in which the assessing officer sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the assessing officer, after noting the facts, merely rejected the same. "

6.4 In this regard Hon'ble Delhi High Court has further observed as under:-

"There was a clear lack of inquiry on the part of the assessing officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under section 68 of the Act. "

The above mentioned judgment of Hon'ble Delhi High Court is squarely applicable on the facts of the case as AO has not carried out any exercise. All details were made available to AO during the course of assessment proceedings as well as during the course of remand proceedings, AO has not bothered to conduct any inquiry in this regard. So, there was a clear lack of inquiry on the part of the AO, though, all the details were furnished before AO during the course of assessment proceedings as is evident from reply filed by the appellant on five dates as mentioned above. So, appellant's reliance on the judgment of Hon'ble Supreme Court in the case of

Khamdhenu Steel & Alloys Limited is appreciated. Furthermore, judgment of Hon'ble Delhi High Court in the case of Gangeshwari Metal Pvt. Ltd., as discussed, clearly applies on the facts of the case. So, in my considered opinion addition made by AO amounting to Rs.16,95,00,00/- deserves to be deleted. Grounds No.1, 2 and 3 of the appeal are allowed."

7. We have heard the learned Representatives of both the parties and perused the material on record.

8. The Ld. D.R. relied upon the order of the A.O. He has submitted that there were no compliance to the statutory notices at assessment stage. Notice under section 133(6) were issued which were partly complied by the assessee. Copy of the same is filed at pages 74 and 75 of the paper book. The sale and purchase are made with the two parties only. The Ld. CIT(A) admitted the additional evidence without any reasons. The creditworthiness of all the creditors/investors are doubtful. The A.O. made the addition under section 68 of the I.T. Act because its conditions are not satisfied. In case, A.O. has not made further enquiry of the documents furnished by

the assessee, the Ld. CIT(A) could have made inquiry at appellate stage having co-terminus powers to that of the A.O. In support of this contention, he has relied upon the decision of the Hon'ble jurisdictional Delhi High Court in the case of Jen Sampark Advertising & Marketing Ltd., 375 ITR 373. Bank statement of the investors are on the same pattern and only one investor transferred the funds in the investor companies which is source of payment of share application money. Therefore, the findings of the Ld. CIT(A) may be reversed. He has relied upon decision of the Hon'ble jurisdictional Delhi High Court in the case of Nova Promoters & Finlease Pvt. Ltd., 342 ITR 169 and Pr. CIT vs. Bikram Singh (2017) 399 ITR 362 (Del.)

9. On the other hand, Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that except notice under section 143(2), no other notice have been received by assessee. In the first notice dated 14.11.2011 (PB-64) even address of

the assessee is not mentioned. PB-65 is reply of the assessee. The assessee is a public limited company and its share are quoted and listed by Bombay Stock Exchange of which PB-76 to 79 are approval of Bombay Stock Exchange Limited for issuing shares which were passed before issue of shares. Out of 19 investor companies, 17 investor companies are similarly Public Limited Companies. Therefore, no doubt should have been raised by the authorities below. The assessee received the amount earlier also from the same companies and all the documentary evidences were filed before A.O. as well as before Ld. CIT(A). There is no challenge to the admission of the additional evidences in the present appeal before the Tribunal. Opportunity was given to the A.O. to examine and rebut the evidence produced on record. But A.O. did not verify and examine the facts and the documents on record either at the assessment stage or at the appellate stage (remand proceedings). It is well settled law that no source of the source is to be proved by the assessee. he has filed chart of all the investor companies supported by confirmation, ledger account, PAN, acknowledgment of ITR, balance-sheet, annual accounts, share application form and bank statements of all the investor companies. He has submitted that since assessee company is a listed company, therefore, permission of SEBI for allotment of additional shares were also obtained. Copies of the same are filed in the paper book. Learned Counsel for the Assessee submitted that it was explained before the authorities below that assessee-company is a listed company and all the issuance of shares are done as per SEBI guidelines and during the year, assessee company has increased its paid-up equity share capital from Rs.217.284 millions to Rs.386.784 millions, adding the value of Rs.169.50 millions and also specified manner of issue of warrants. The details of shareholders whose share warrants are converted in the equity shares and against paid-up value were brought to the notice of the authorities below. All the details were furnished before the authorities below. However, A.O. has not made any investigation on the same. Learned Counsel for the Assessee submitted that assessment record was summoned in this case which have not been produced by the Department to verify the facts on the record. He has relied upon the following the decisions.

9.1. Judgment of the Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Value Capital Services (P) Ltd., (2008) 307 ITR 334 (Del.) in which it was held as under :

> *"CIT(A) having accepted the existence of the share applicants and the Revenue having not shown that the applicants did not have the means to make the investment and that such investment actually emanated from the coffers of the assessee company, addition was rightly deleted by the Tribunal; no substantial question of law arises."*

9.2. Judgment of the Hon'ble Punjab & Haryana High Court in the case of CIT vs. G.P. International Ltd., (2010) 325 ITR 25 (P & H) in which it was held as under :

> *"AO having not doubted the identity of the persons from whom the assessee company has shown receipt*

> *of share application money, impugned transactions cannot be treated as non-genuine merely because some of the applicants did not respond to the notice issued by the AO under s. 133(6) and, therefore, addition was not sustainable."*

9.3. Judgment of Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Victor Electrodes Ltd., (2010) 329 ITR 271 in which it was held as under :

> *"When the assessee had filed copies of resolution passed by the board of directors of applicant companies, besides their bank statements and IT returns which were not found to be non- genuine, without making further inquiry from the internal record of the Department or from the concerned banks, the addition could not be made on the ground that the directors or representatives of the applicant companies were not produced."*

9.4. Judgment of Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Orbital Communication (P) Ltd., (2010) 327 ITR 560 in which it was held as under :

> *"In view of the decision of the Supreme Court in the case of CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195, the Tribunal was justified in upholding the order of the CIT(A) deleting addition made on account of share application money when substantial evidence was produced by the assessee to establish the identity of share applicant."*

9.5. Judgment of Hon'ble jurisdictional Delhi High Court in the case of CIT & Ors. Vs. Five Vision Promoters Pvt. Ltd., & Ors. (2016) 380 ITR 289 (Del.) in which it was held as under :

> *"Provisions of s 68 can be invoked only where assessee offers no explanation at all or explanation offered is unsatisfactory; and addition thereunder can be made only on that condition."*

9.6. Judgment of Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Shiv Dhooti Pearls & Investment Ltd., (2016) 237 Taxman 104 (Del.) in which it was held as under :

> *"In terms of section 68, assessee is liable to disclose only source(s) from where he has himself received credit and it is not burden of assessee to show source(s) of his creditor nor is it burden of assessee to prove creditworthiness of source(s) of sub-creditors."*

9.7. Judgment of Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Gangeshwari Metal (P.) Ltd., (2013) 30 taxmann.com 328 (Del.) in which it was held as under :

> *"Where assessee in support of transaction of receipt of share application money brought on record various documents such as names and addresses of share applicants, etc., no addition could be made in respect of same under section 68."*

And submitted that in the case of CIT vs. Gangeshwari Metal (P.) Ltd., the Hon'ble jurisdictional Delhi High Court considered its decision in the case of Nova Promoters Finlease Pvt. Ltd., (supra), relied upon by the Ld. D.R. He has, therefore, submitted that order of the Ld. CIT(A) may be confirmed and appeal of the Revenue may be dismissed.

10. We have considered the rival submissions, It may be noted here that before the appeal was finally heard, the Ld. D.R. was directed to produce the assessment record for perusal of the Bench. Even last opportunity was given to the Ld. D.R. to produce the assessment record. However, assessment record has not been produced for the inspection of the Bench. The assessee in this case has categorically submitted before Ld. CIT(A) that various replies were filed before A.O. at assessment stage along with the documents, on which, no inquiry have been conducted by the A.O. and no further query have been raised from the assessee. The Ld. CIT(A), after verification of the facts accepted the contention of

assessee. Since, it is a Departmental Appeal, therefore, in order to verify the fact whether assessee filed documents and replies at assessment stage, record was summoned through Ld. D.R. However, assessment record has not been produced for inspection of the Bench. We, therefore, draw adverse inference against the Revenue and hold that all the documents were filed before A.O. even at assessment stage. It is not in dispute that assessee is a Listed Public Company and its shares are listed at Bombay Stock Exchange Limited. Learned Counsel for the Assessee also submitted before Ld. CIT(A) as well as before us that out of 19 investor companies, 17 are Public Limited Companies. This fact is not disputed by the Revenue through any evidence or material on record. It is not in dispute that assessee produced sufficient documentary evidence before the authorities below to prove identity, creditworthiness of the investors and genuineness of the transaction in the matter with regard to payments like cheque no. date, confirmation copy of the ledger account with explanation for credit entries, bank statement, PAN, ITR and copy of the balance sheet of all the investor companies before A.O. The A.O. instead of making any inquiry on the documents filed before him, ignored the same and made the addition against the assessee without application of mind. When the assessee filed all the documents before the Ld. CIT(A) and requested for admission of the additional evidences, same were again referred to the A.O. for examination/verification and comments. The A.O. however, did not verify and examine the additional evidences and merely objected to the admission of the same. The Ld. CIT(A) on perusal of the same, correctly noted that these documents are relevant and essential for disposal of the matter. The Ld. CIT(A) vide impugned order admitted the additional evidences under Rule 46A of the I.T. Rules. However, the Revenue Department did not challenge those finding of fact recorded by the Ld. CIT(A) for admitting additional evidences at appellate stage. No grounds of appeal have been raised by the Revenue. No material is produced before us to contradict the findings of fact recorded by the Ld. CIT(A). In the absence of any challenge to the admission of additional evidences which were already part of the record of the A.O, the contention of the Ld. D.R. is rejected that additional evidences should not be admitted by the Ld. CIT(A). In this case, it is an admitted fact that assessee produced the documentary evidences before the authorities below to prove the identity of the investors, their creditworthiness and genuineness of the transaction in the matter. The shares of the assessee are listed with the Bombay Stock Exchange and permission of the SEBI for allotment of the additional shares have been obtained in this case. Copies of the approval are filed in the paper book. Further, the bank statements of the investors shows they are having sufficient funds with them to make investment in the assessee company and all the transactions are recorded in their books of account and the audited accounts and balance sheet. The A.O. instead of making inquiry on the documentary evidence at assessment stage as well as at appellate stage by the Ld. CIT(A), merely rejected the claim of assessee, without any just reasons. The A.O. did not make any independent inquiry on the documents furnished by the assessee and no further inquiry have been conducted under section 133(6) of the I.T. Act. No cash was found to have been deposited in the bank account of the investor companies. The Ld. D.R. referred to some pages of the bank statements of the investor companies filed in the paper book to show that on the date of investment in assessee-company, identical amount through transfer entry have been transferred to their accounts. However, such arguments has no relevance to the mater in issue because it is not a case of the Department that the transfer entry in the account of investor companies have been transferred through the source of the assessee company. The investors might have taken capital from their own source through transfer entry, therefore, there is nothing wrong in the explanation of assessee in this regard. Further, if A.O. suspected anything wrong have been committed by the investor companies, the matter should have been investigated thoroughly by referring to their concerned A.O. to investigate the source held by them. Further, no such attempt have also been made in this case. It is well settled law that no source of the source shall have to be proved by the assessee. It is, therefore, clear that A.O. did not make any inquiry on the documentary evidences filed by the assessee. The A.O. merely rejected the explanation of assessee because none of the investors have their creditworthiness and copies of the bank statement and audited accounts are not filed and that they did not have any assets for business. However, the finding of fact recorded by the Ld. CIT(A) clearly prove that the investor companies have their creditworthiness to make investment in assessee company and the copies of the bank statement and audited accounts have been filed on record. Therefore, finding of fact recorded by the Ld. CIT(A) have not been rebutted by the authorities below. The details furnished by the assessee also shows that prior to assessment year under appeal, 11 investor companies have also made investment in assessee company in earlier years which would strengthen the case of the assessee that it has received the amount from genuine parties having creditworthiness. There is no material on record to disprove the explanation of assessee.

The Ld. CIT(A) was, therefore, justified in holding that assessee proved creditworthiness of the investors and genuineness of the transaction in the matter. We, rely upon the following decisions.

10.1. Decision of Hon'ble jurisdictional High Court in the case of CIT vs. Kamdhenu Steel and Alloys Ltd., & Ors. 361 ITR 220 (Del.) in which it was held as under :

> *"Once adequate evidence/material is given, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has "created" evidence, the Revenue is supposed to make thorough probe before it could nail the assessee and fasten the assessee with such a liability under s.68; AO failed to carry his suspicion to logical conclusion by further investigation and therefore addition under s.68 was not sustainable."*

10.2. Decision of Hon'ble jurisdictional High Court in the case of CIT vs. Vrindavan Farms Pvt. Ltd., etc. ITA.No.71 of 2015 dated 12th August, 2015 (Del.), in which it was held as under :

> "*The sole basis for the Revenue to doubt their creditworthiness was the low income as reflected in their return of income. It was observed by the ITAT that the AO had not undertaken any investigation of the veracity of the documents submitted by the assessee, the departmental appeal was dismissed by the Hon'ble High Court.*

10.3. Decision of jurisdictional High Court in the case of CIT vs. Laxman Industrial Resources Pvt. Ltd., ITA.No.169 of 2017 dated 14th March, 2017, in which it was held as under :

> *"The CIT(A) took note of the material filed by the assessee and provided opportunity to the AO in Remand proceedings. The AO merely objected to the material furnished but did not undertake any verification. The CIT(A) deleted the addition by relying upon the decision of*

the Hon'ble Apex Court in the case of Lovely Exports Pvt.Ltd. (supra) and judgement of Delhi High Court in the case of CIT vs Divine Leasing & Finance Ltd. [2008] 299 ITR 268. The ITAT confirmed the opinion of the Ld.CIT(A). Hon'ble High Court in view of the above findings noted that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. The assessee provided details of share applicants i.e. copy of the PAN, Assessment particulars, mode of amount invested through banking channel, copy of resolution and copies of the balance sheet. The AO failed to conduct any scrutiny of the document, the departmental appeal was accordingly dismissed.

10.4. Decision of the Hon'ble Supreme Court in the case of Earth Metal Electric Pvt. Ltd., vs. CIT dated 30th July, 2010 in SLP.No.21073 of 1999, in which it was held as under :

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

10.5. Decision of Hon'ble jurisdictional High Court in the case of Divine Leasing & Finance Ltd., 299 ITR 268, in which it was held as under :

"No adverse inference should be drawn if shareholders failed to respond to the notice by A.O.

10.6. Decision of Hon'ble M.P. High Court in the case of CIT vs. Peoples General Hospital Ltd., (2013) 356 ITR 65, in which it was held as under :

"Dismissing the appeals, that if the assessee had received subscriptions to the public or rights issue through banking channels and furnished complete details of the shareholders, no addition could be made under section 68 of the Income-tax Act, 1961, in the absence of any positive material or evidence to indicate that the shareholders were

benamidars or fictitious persons or that any part of the share capital represented the company's own income from undisclosed sources. It was nobody's case that the non-resident Indian company was a bogus or non-existent company or that the amount subscribed by the company by way of share subscription was in fact the money of the assessee. The assessee had established the identity of the investor who had provided the share subscription and that the transaction was genuine. Though the assessee's contention was that the creditworthiness of the creditor was also established, in this case, the establishment of the identity of the investor alone was to be seen. Thus, the addition was rightly deleted. CIT v. Lovely Exports P. Ltd. [2009] 319ITR (St.) 5 (SC) applied."

10.7. Decision of Hon'ble jurisdictional High Court in the case of CIT vs. (i) Dwarakadhish Investment P. Ltd., (ITA.No. 911 of 2010) and (ii) Dwarkadhish Capital P. Ltd., (ITA.No.913

of 2010) (2011) 330 ITR 298 (Del.) (HC), in which it was held as under :

> *"In any matter, the onus of proof is not a static one. Though in section 68 of the Income Tax Act, 1961, the initial burden of proof lies on the assesses yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income-tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "source of source". The assessee-company was engaged in the*

business of financing and trading of shares. For the assessment year 2001-02 on scrutiny of accounts, the Assessing Officer found an addition of Rs.71,75,000 in the share capital of the assessee. The Assessing Officer sought an explanation of the assessee about this addition in the share capital. The assessee offered a detailed explanation. However, according to the Assessing Officer, the assessee failed to explain the addition of share application money from five of its subscribers. Accordingly, the Assessing Officer made an addition of Rs.35,50,000/- with the aid of section 68 of the Act, 1961 on account of unexplained cash credits appearing in the books of the assessee. However, in appeal, the Commissioner of Income-tax (Appeals) deleted the addition on the ground that the assessee had proved the existence of the shareholders and the genuineness of the transaction. The Income-tax Appellate Tribunal confirmed the order of the Commissioner of Income-tax (Appeals) as it was also of the opinion that the assessee had been able to *prove the identity of the share applicants and the share application money had been received by way of account payee cheques. On appeal to the High Court: Held, dismissing the appeals, that the deletion of addition was justified."*

10.8. Decision of Hon'ble jurisdictional High Court in the case of CIT vs. Winstral Petrochemicals P. Ltd., 330 ITR 603, in which it was held as under :

"Dismissing the appeal, that it had not been disputed that the share application money was received by the assessee-company by way of account payee cheques, through normal banking channels. Admittedly, copies of application for allotment of shares were also provided to the Assessing Officer. Since the applicant companies were duly incorporated, were issued PAN cards and had bank accounts from which money was transferred to the assessee by way of account payee cheques, they could not be said to be non-existent, even if they, after submitting

the share applications had changed their addresses or had stopped functioning. Therefore, the Commissioner (Appeals) and the Tribunal were justified in holding that the genuineness of the transactions had been duly established by the assessee."

10.9. The Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Gangeshwari Metal (P.) Ltd., (supra), considering its decision in the case of Nova Promoters Finlease Pvt. Ltd., (supra), relied upon by the Ld. D.R. has decided the issue in favour of the assessee.

11. Considering the facts of the case in the light of material on record, it is clear that assessee produced sufficient documentary evidences before A.O. at the assessment as well as appellate proceedings to prove the ingredients of Section 68 of the I.T. Act. The A.O. however, did not make any further inquiry on the documents filed by the assessee. Thus, the A.O. failed to conduct scrutiny of the documents at assessment stage and merely suspected the

transaction between investor companies and the assessee on irrelevant reasons which were disproved in the findings of the Ld. CIT(A). Therefore, the totality of the facts and circumstances of the case, clearly prove that the assessee discharged its initial onus to prove the identity of the investor companies, their creditworthiness and genuineness of the transaction in the matter. No material is produced before us to rebut the finding of fact recorded by the Ld. CIT(A). We, therefore, did not find any justification to interfere with the order of the Ld. CIT(A) in deleting the addition. There is no merit in the Departmental Appeal and the same is dismissed.

12. In the result, Appeal of the Department is dismissed.

Order pronounced in the open court.

Sd/-	Sd/-
(L.P.SAHU)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated 09th July, 2018
Amit Kumar & VBP/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals) concerned
5. DR: ITAT 'D' Bench, Delhi
6. Guard file

//By Order//

ASSISTANT REGISTRAR
ITAT : NEW DELHI