

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ई, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री एन. के. प्रधान, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri N.K. Pradhan, Accountant Member**

**ITA NO.5589/Mum/2017
Assessment Year: 2012-13**

ACIT-30(3), R. No.510, 5 th Floor, Pratayakshkar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai-400051	<u>बनाम/</u> Vs.	Shreedham Builders, 105/106, 1 st Floor, Vijay Indl. Estate, Malad (W), Mumbai-400064
(राजस्व /Revenue)		(निर्धारिती /Assessee)
P.A. No. ABDFS0133N		

राजस्व की ओर से / Revenue by	Shri V Justin-DR
निर्धारिती की ओर से / Assessee by	Shri Neelkanth Khandelwal

सुनवाई की तारीख / Date of Hearing :	04/06/2018
आदेश की तारीख /Date of Order:	22/06/2018

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 01/06/2017 of the Ld. First Appellate Authority, Mumbai, deleting the addition made under section 68 of the Income Tax Act, 1961 (hereinafter the Act), without appreciating the statement of Shri Ajay Maheshwari, who retracted the same after 23 days.

2. During hearing, Shri V. Justin, Ld. DR, defended the addition made by the Ld. Assessing Officer by contending that Shri Ajay Maheshwari, partner of the assessee firm was recorded on this basis of which addition was rightly made by the Ld. Assessing Officer. On the other hand, Shri Neelkanth Khandelwal, ld. counsel for the assessee, strongly defended the impugned order by submitting that the statement on the basis of addition was made was retracted by Shri Ajay Maheshwari at the earliest and there was no material placed on record by the Revenue justifying the addition. It was explained that interest has been paid by the assessee on the loans, which was also disallowed by the Assessing Officer. It

was also pleaded that the Ld. Commissioner of Income Tax (Appeal) granted relief after considering the factual matrix and on the interest portion, no appeal has been filed by the Revenue. The ld. counsel further explained that the assessee was doing only one project i.e. Shreedam Splendor and the statement of Shri Arun Jatily is having no relevant as it talks about the case of sister concern. It was further pleaded that the loans taken by the assessee were repaid along with interest and no cash was found during the survey. It was empathetically argued that the loans were even repaid before the survey and all the parties appeared before the Assessing Officer during remand proceedings, when the Ld. Assessing Officer recorded the statement and nothing was found against the assessee, therefore, the Ld. Commissioner of Income Tax (Appeal) rightly deleted the addition. It was explained that even Shri Pravin Jain himself appeared before the Assessing Officer for which our attention was invited to page 38 of the paper book. Ld. counsel further contended that the Ld. Assessing Officer carried out the enquiries and no adverse remark was made. The crux of the argument is

that all the parties not only appeared before the Assessing Officer but also filed all possible documents evidencing that the alleged loans are not bogus. It was empathetically contended that no cash was deposited in the bank account of these parties and all the parties are active on ROC website, therefore, these are no bogus entities. In reply, the Ld. DR invited our attention to page 7 and 28 of the assessment order. The crux of argument by Ld. DR is in support of the addition. Reliance was placed upon the case of *Sumati Dayal vs CIT* (214 ITR 801)(Supreme Court), *CIT vs Shri Durga Prasad More* (82 ITR 540)(Supreme Court) and another decision in the case of *ACIT vs Nakoda Fashions Pvt. Ltd.* (2018) 92 taxman.com 46(Ahmadabad Trib.)

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is a partnership firm, engaged in the business of construction of residential/commercial projects, declared total income of Rs.3,30,801/- in its return filed on 29/09/2012, which was processed under section 143(1) of the Income Tax Act, 1961 (hereinafter the Act). The case of

the assessee was selected for scrutiny, therefore, notice under section 143(2) was served upon the assessee. Thereafter, notices under section 143(2) and 142(1) of the Act were also issued along with questionnaire and served upon the assessee. The assessee was developing a project known as 'Shreedham Splendour, Link Road, Oshiwara, Mumbai. Shri Satyanarayan Maheshwari. The ld. counsel, before the Ld. Commissioner of Income Tax (Appeal) as well as before this Tribunal explained that the remaining projects were developed/constructed by sister concern and the only project developed/constructed by the assessee is Shreedham Splendour, which commenced from the year 2008.

2.2. A survey action 133A of the Act was carried out at the business premises of the assessee on 17/10/2014 of the assessee. As per the Revenue, the survey was carried out upon the assessee on the basis of information claimed to be received from the DGIT Investigation that the assessee had obtained accommodation entries in the form of unsecured loans from the entities controlled by Shri Pravin Kumar Jain, who was alleged to be engaged in providing accommodation

bills. The statement of Shri Ajay Maheshwari, one of the partners of M/s Shreedham Builders (sister concern) was recorded on oath under section 131 of the Act on 17/10/2014, wherein, he made a disclosure of Rs.15.40 crores (Rs.4.70 crores for Assessment Year 2012-13 and Rs.10.70 crores for Assessment Year 2013-14). On account of bogus unsecured loans by further claiming that all these transactions were carried out through one broker namely Shri Jitu Bhai. The statement of Shri Anil Jateli, broker was also recorded. Considering the statement, the Ld. Assessing Officer made addition under section 68 of the Act. Further, the Ld. Assessing Officer also made addition on account of interest payment and disallowed under section 37 of the Act.

2.3. On appeal before the Ld. Commissioner of Income Tax (Appeal), the factual matrix was considered and the additions so made were deleted. The Revenue is in appeal before this Tribunal with respect to the additions made under section 68 of the Act.

2.4. If the observation made in the assessment order, leading to addition made to the total income, conclusion

drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, before adverting further, it is our bounded duty to examine section 68 of the Act, which is reproduced hereunder for ready reference and analysis:-

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

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

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

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.”

2.5. As per section 68 of the Act, onus is upon the assessee to discharge the burden so cast upon. First burden is upon the assessee to satisfactorily explain the credit entry contained in his books of accounts. The burden has to be discharged with positive material (*Oceanic Products Exporting Company vs CIT 241 ITR 497 (Kerala.)*). The legislature had laid down that in the absence of satisfactory explanation, the unexplained cash credit may be charged u/s 68 of the Act. Our view is fortified by the ratio laid down in Hon'ble Apex Court in *P. Mohankala (2007)(291 ITR 278)(SC)*. A close reading of section 68 and 69 of the Act makes it clear that in the case of section 68, there should be credit entry in the books of account whereas in the case of 69 there may not be an entry in such books of account. The law is well settled, the onus of proving the source of a sum, found to be received/transacted by the assessee, is on him and where it is not satisfactorily explained, it is open to the Revenue to hold that it is income of the assessee and no further burden lies on the Revenue to show that income is from any other particular source. Where the assessee failed to prove

satisfactorily the source and nature of such credit, the Revenue is free to make the addition. The principle laid down in Ganpati Mudaliar (1964) 53 ITR 623/A. Govinda Rajulu Mudaliar (34 ITR 807)(SC) and also CIT vs Durga Prasad More (72 ITR 807)(SC) are the landmark decisions. The ratio laid down therein are that if the explanation of the assessee is unsatisfactory, the amount can be treated as income of the assessee. The ratio laid down in Daulat Ram Rawatmal 87 ITR 349 (SC) further supports the case of the assessee. In the case of a cash entry, it is necessary for the assessee to prove not only the identity of the creditor but also the capacity of the creditor and genuineness of the transactions. The onus lies on the assessee, under the facts available on record. A harmonious construction of section 106 of the evidence Act and section 68 of the Income Tax Act will be that apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of the creditors. In CIT vs Korlay Trading Company Ltd. 232 ITR 820 (Cal.), it was held that mere mention of file number of creditor will not

suffice and each entry has to be explained separately by the assessee (CIT vs R.S. Rathaore) 212 ITR 390 (Raj.). The Hon'ble Guwahati High Court in Nemi Chandra Kothari vs CIT (264 ITR 254)(Gau) held that transaction by cheques may not be always sacrosanct. In the present appeal, the assessee duly fulfilled the conditions enshrined u/s 68 of the Act and produced necessary evidence for its claim.

2.6. The ratio laid down in ACIT vs Rajeev Tandon 294 ITR (AT) 219 (Del.), which was confirmed by Hon'ble High Court , in 294 ITR 488, supports the case of the Revenue. Identical ratio was laid down in CIT vs Anil Kumar 392 ITR 552 (Del.), wherein it was held that mere identification of the donor and movement of gift through banking channel is not sufficient to prove the genuineness of gift.

2.7. Now, we shall analyze certain cases wherein either the parties are same or the facts are identical. One of such case is from the Mumbai Bench of the Tribunal like ACIT vs Shri Ramesh Ramswarupdas Jindal (ITA NO.3091 to 3096/Mum/2017), order dated 15/11/2017, wherein, one of us (Accountant Member) is signatory to the order and the

Tribunal considering various decisions dismissed the appeals of the Revenue. The relevant portion from the order is reproduced hereunder:-

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1. All these appeals are filed by the Revenue against the common order of the Learned Commissioner of Income Tax (Appeals)-36, Mumbai dated 23.02.2017 arising out of the Assessment orders passed u/s. 143(3) r.w.s. 147 of the Act for the Assessment Years 2008-09 to 2011-12 and Assessment Order passed u/s.143(3) for the Assessment Years 2012-13 & 2013-14.

2. The common grounds of appeal in all these Revenue appeals relates to deletion of addition made by the Assessing Officer towards unexplained unsecured loans.

ITA.NO.3091/MUM/2017 FOR ASSESSMENT YEAR 2008-09

3. First we take up the appeal for the Assessment Year 2008-09. Briefly stated the facts are that, the assessment for the Assessment Year 2008-09 was reopened based on the search proceedings carried out in the case of Pravin Kumar Jain Group wherein Shri Pravin Kumar Jain is said to have deposed before the authorities that he is indulged in providing accommodation entries in the nature of the bogus bills/sales bills and unsecured loans. As per the information the assessee is one of the beneficiaries of such accommodation entries. In the course of Assessment Proceedings assessee was required to explain unsecured loans and prove genuineness of transactions, identity and creditworthiness of the unsecured loans, records and supporting documentary evidences. In response to the same, assessee furnished loan confirmations, bank statements, I.T. Return acknowledgements of the lender companies and also submitted that money has been borrowed through regular banking channels and it was repaid in subsequent years with interest. TDS was made on such interest. It was also further submitted that Shri Pravin Kumar Jain was retracted the statement which he has said to have been given and therefore it was contended that transactions are genuine and they cannot be treated as unexplained unsecured loans. However, Assessing Officer rejected the submissions of the assessee holding that Shri Pravin Kumar Jain Group only engaged in providing accommodation entries of various nature and no genuine business was being carried out and the assessee obtained only accommodation entries from them and relying on the statement of Shri Pravin Kumar Jain recorded u/s. 132(4) of the Act, the Assessing Officer concluded that assessee has obtained only accommodation entries from various parties referred to

in the Assessment Order and added the amount shown as unsecured loans from these parties as unexplained unsecured loans and accordingly brought to tax. Assessing Officer also brought to tax the interest paid on such unexplained unsecured loans.

4. On appeal by the assessee the Ld.CIT(A) deleted the additions observing that the Assessing Officer has merely doubted the loans taken by the assessee from various parties and the Assessing Officer has gone only on the statement of Shri Pravin Kumar Jain recorded in search proceedings ignoring the fact that Shri Pravin Kumar Jain later retracted such statements. The statements recorded were not supplied to the assessee and no opportunity for cross examination was given violating the principle of natural justice and since the statements could not be utilized against the assessee without giving full and proper opportunity of cross examination. He relied on the decision of the Hon'ble Supreme Court in the case of *Kishanchand Chellaram v. CIT* [125 ITR 713]. He also observed that assessee submitted the confirmations from the parties, filed audit reports of the parties along with the copy of ITR and bank statements and therefore since the assessee has discharged its primary onus, the onus had shifted to the Assessing Officer and the Assessing Officer has not made any inquiries from the alleged lenders by summoning them. Further observing that the assessee has transacted through proper banking channels, interest was also paid by deducting TDS, the Ld.CIT(A) concluded that the Assessing Officer made addition disregarding the evidence on record and without discharging his onus and without establishing anything contrary to the submissions of the assessee and without verifying the bank account, existences of entities who have extended loans to the assessee and without making any fruitful investigation he directed the Assessing Officer to delete the addition made towards unsecured loans.

5. The Ld. DR strongly supported the orders of the Assessing Officer. Further taking us through the Assessment Order, Ld. DR submits that Shri Pravin Kumar Jain has categorically said in his statement that he is providing only accommodation entries and no genuine business was carried on and as per the information assessee is one of the beneficiary to such transactions and therefore the Assessing Officer rightly concluded that assessee has obtained only accommodation entries in the name of unsecured loans and the entities were not carrying out any business.

6. On the other hand, Learned Counsel for the assessee strongly supported the orders of the Ld.CIT(A). He further submitted that the Assessing Officer has relied on the information received from DGIT(Inv), Mumbai regarding the details of accommodation entries provided in the nature of bogus purchases/ sale bills and unsecured

loans by Shri Pravin Kumar Jain Group. Further the Assessing Officer has stated in the order that DGIT(Inv) has carried out search and seizure action on Pravin Kumar Jain group. The report mentions Shri Pravin Kumar Jain is one of the entry providers, operating in Mumbai, indulged in providing accommodation entries in the nature of bogus purchases/sale bills and unsecured loans. The name of the assessee is in the list of the alleged beneficiaries to the said transactions. The list of parties from whom the assessee has availed accommodation/fictitious bills as alleged by the Assessing Officer is as follows:

<u>Party</u>	<u>Nature of transaction</u>	<u>Amount in Rs.</u>
M/s Mohit International	Loan	10,00,000/-
M/s. Natasha enterprises	Loan	10,00,000/-

7. He submits that during the re-assessment proceedings the Assessing Officer asked to prove the genuineness of the transactions, identity and credit worthiness of the above companies. In respect of the same the assessee submitted Loan confirmation of unsecured loans along with their ITR-V and the affidavits from the said parties. It was submitted that the assessee has borrowed the money through proper banking channels. The bank statements highlighting the receipt of money were submitted before the Assessing Officer. It was further submitted that the assessee has subsequently repaid the loans. Further, with reference to the letter from DGIT(Inv) Mumbai, the assessee submitted that the said statement allegedly given by Shri Praveen Kumar Jain, has not confirmed yet by the Assessing Officer. Thus the alleged statement cannot be relied upon. Further it was submitted that the said Praveen Kumar Jain, has retracted his statement of giving accommodation loans, as evident from the copy of the affidavit, was submitted before the Assessing Officer. Therefore, Learned Counsel for the assessee submits that the assessee has submitted the loan confirmations, bank statements showing the receipts and ITR-V of the lenders, the assessee has discharged his primary onus by submitting all the documents establishing the genuineness of the transactions, identity of lender and its creditworthiness. It is submitted that all the transactions are carried out through proper banking channels, the assessee has provided substantial evidence of the loans received from parties, subsequent repayment of loans proves the genuineness of the loans. It is submitted that the Assessing Officer has not rebutted any of the evidences submitted by the assessee. Further the address as available with the assessee was provided to the Assessing Officer. It is submitted that

the alleged statement given by said Shri Pravin Kumar Jain is retracted by himself subsequently. It is submitted that the alleged statement given by Shri Pravin Kumar Jain is not yet confirmed in his assessments and thus it cannot be considered as evidence. Therefore, it is submitted that the Assessing Officer has made additions merely relying on the report and no evidence was placed on record to make the additions.

8. Learned Counsel for the assessee further referring to Page Nos.24 to 28 of the Paper Book submits that an identical issue came up before this Coordinate Bench in the case of DCIT vs. Bairagra Builders P. Ltd reported in [2017] 51 CCHand submits that the Hon'ble Bench held that the plain reading of the Assessment Order demonstrates that the Assessing Officer merely went by the investigation done by the office of DGIT(Inv), Mumbai.No enquiries or investigation was carried out in the case of parties who lent the money, no evidence to controvert the claims of the assessee was brought on record by the Assessing Officer, even the submissions of Shri Pravin Kumar Jain was not supplied, nothing is on record about the result for investigations done by DGIT (Investigation), Mumbai, papers filed by the assessee do demonstrated identity creditworthiness and genuineness of the transactions, therefore the addition is made merely on surmises and conjectures. The Learned Counsel for the assessee submits that the decision of the Coordinate Bench squarely apply to the facts of the assessee's case. He also placed reliance on the following decisions for various propositions as under: -

<u>Case reference citation</u>	<u>Proposition</u>
Kishanchand Chellaram v. CIT[125 ITR 0713 (SC)]	Burden of proof was on the Department to prove that the amount belonged to assessee. The amount cannot be assessed as undisclosed income of assessee in the absence of positive material brought by Revenue to prove that the amount in fact belonged to assessee as the burden lay on the Revenue.
DCIT v. Rohini Builders, [256 ITR 0360 (Guj)]	Tribunal having deleted the addition under S.68 accepting the genuineness of loans which were received and repaid by assessee by accountpayee cheques, assessee having established the identity of the creditors by giving their complete addresses, GIT Numbers/PAN as well as confirmations along with the copies of their assessment orders wherever readily available. No substantial question of law arises.

<u>Case reference citation</u>	<u>Proposition</u>
H.R. Mehta v. ACIT [289 ITR 0561 (Bom)]	The least that the Revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. Assessee was bound to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15 th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statements and disclose material, these were denied to him.
CIT v. Ashwani Gupta [322 ITR 0396 (DEL)]	Once there is a violation of the principles of natural justice in as much as seized material is not provided to an assessee nor cross-examination of the person on granted, then, such deficiencies would amount to a denial of opportunity and therefore, Tribunal was right in confirming the CIT(A)'s order in deleting additions made by the AO as he had neither provided copies of the seized material to the assessee nor had he allowed the assessee to cross-examine concerned party
CIT v. K. Bhuvanendran & Ors. [303 ITR 0235 (Mad)]	Revenue having brought no material on record to establish that consideration shown in the sale deed was understated and no material having been found during search to show that assessee paid a sum over and above the stated consideration, no addition could have been made on the basis of retracted statement of assessee recorded during speech.
CIT v. Sahibganj Electric Cables (P) Ltd. [115 ITR 0408 (Cal)]	Where the amounts of loan were received by cheque and repayment was also made by cheque through assessee's bankers; and confirmation of creditors along with their income-tax file numbers were furnished the assessee discharged its initial burden and ITO was not justified, in the absence of any further investigation, to reject the evidence and

<u>Case reference citation</u>	<u>Proposition</u>
	make addition.

9. We have heard the rival submissions, perused the orders of the authorities below, the case laws relied on and the material furnished before us. The only issue involved in this appeal relates to the deletion of addition of ₹.20 lakhs made by the Assessing Officer towards unexplained unsecured loans and interest thereon amounting to ₹.2,35,246/. Search and seizure action u/s. 132 of the Act has been conducted in the case of Shri Pravin Kumar Jain and statements were recorded from him and he is said to have been deposed that he is providing only accommodation entries through various concerns. On the basis of this information received from DGIT (investigation), Mumbai the Assessing Officer noted that assessee was one of the beneficiaries of accommodation entries given by Shri Pravin Kumar Jain. Assessee was required to explain the unsecured loans obtained in the name of M/s Mohit International and M/s. Natasha enterprises of ₹.10 lakhs each and prove the genuineness of the transactions. Assessee furnished information in respect of the above transactions i.e. copy of Loan confirmation and Affidavit establishing identity of the lender, copy of ledger giving detail towards loan taken during the year and subsequent repayments and Copy of ITR – V filed establishing Creditworthiness of the Lender. However, Assessing Officer did not accept the evidences furnished by the assessee and also the retraction statement of Shri Pravin Kumar Jain, ignoring all the evidences Assessing Officer concluded that the assessee has not explained the transactions as genuine and therefore he has added the unsecured loans as unexplained income of the assessee. Correspondingly he has also disallowed the interest thereon. Before the Ld.CIT(A) assessee furnished all the information regarding the unsecured loans as mentioned above. The Ld.CIT(A) considering the submissions and the findings furnished by the assessee deleted the additions observing as under: -

“6.2 HELD: - I have carefully perused the Assessment Order, written arguments of the appellant, counter arguments of the ld. AR and have considered the evidences on record and assessment record called for during the appellate proceedings. I find that the Ld. Assessing Officer has merely doubted the loans taken by the appellant from (1) Mohit International amount to ₹.10,00,000/- and (2) Natsha Enterprises amounting to Rs.10,00,000/- aggregating at Rs.20,00,000/- . I find force in the argument of the Ld. AR. It is very important to mention here that the appellant has discharged his onus and the Ld. Assessing officer has not proved otherwise than doubting the loans. Apparently, Ld. Assessing officer has not substantiated his presumption, his doubt with any verifiable documents. He has merely described the statement of Shri. Pravin Kumar Jain and as communicated by the investigation wing. Thus, it is very evident that the Ld. Assessing officer has not made any independent enquiry in

order to establish the in-genuineness of loans if any, with contrary evidence. The statements referred to and relied upon by the assessing officer have never been disclosed to the appellant opportunity for cross examination was also not given, hence such statement could not be utilized against the appellant without giving full and proper opportunity of cross examination as has been held vide Mahesh Gulabral Joshi Vs. CIT(A) (2005) 95 ITD 300 Mumbai ITAT and Hon'ble Supreme Court decision in the case of Kishanchand Chellaram Vs. CIT (125 ITR 713 (SC)).

6.3. *Further during the course of assessment proceedings, the appellant has produced copy of a comprehensive Affidavit of Shri. Pravin Kumar Jain dated 25.04.2014 retracting, the statements made before the Investigation Wing. Assessing officer has not given opportunity to the appellant for cross examination of Shri Pravin Kumar Jain. Going by the discussion contained above, it is obvious that the inference drawn by the Assessing officer against the appellant is not sustainable for the simple reason that the principles of natural justice have not been followed. First and foremost, the appellant has not been given any access to the material (reports, intimations, statement etc.) used against it. Secondly, by withholding the said material the assessing officer has denied to the appellant an opportunity to refute the evidence by cross examining the witnesses, statements, if any made by whom, incriminated the appellant. On both counts, the impugned assessment order fails squarely.*

6.4. *It has to be said that the appellant had done everything in its power to prove the three ingredients required to prove the satisfactory nature of the loan transactions. He has submitted confirmation from the parties, filed Audit Reports of the parties alongwith copy of their ITR, and bank statements. In these circumstances, the onus had shifted to the assessing officer. If the assessing officer was still not satisfied, he had the option of making enquiries from the alleged lenders by summoning them. However as seen from the assessment order, he did not do any such thing. Further, if the assessing officer was satisfied with what had been given to him by the appellant, he was duty bound to specify what more material he wanted from the appellant to furnish. The assessing officer never asked for any further material. This leads to the inescapable conclusion that the Assessing Officer could not think of any further material to ask for and proceeded to reject the appellant's claims, relying upon the information/ material, which he never even brought to the notice of the appellant for any rebuttal. The unequivocal conclusion is that all the three ingredients having been satisfied.*

6.5. *The AO did not consider the evidences provided by the appellant as satisfactory. According to him, submissions and statements given by Sh. Pravin Kumar Jain confirmed that they had*

issued only bogus bills/accommodation entries to the interested parties. However, he did not bring out the relevant extract from the statement where they have admitted that they have given accommodation entries to the appellant. Moreover, he had just referred to the statement of Shri Pravin Kumar Jain Group without giving specific details as to who is the person who is giving the statement and what exactly did he admit. Instead of stating that the party did not exist, he should have summoned the party and recorded the statement. As the AO, has not brought anything in record to show that the evidences filed by the appellant are false, the loan received and repaid by the appellant cannot be treated as bogus. The addition cannot be made merely on the basis of suspicion, surmises and conjectures. There has to be some concrete evidence whether direct or circumstantial. In this case, no such evidence is present. On the contrary, the appellant is showing from the record that he has received loan through account payee cheques from above TWO PARTIES. He has shown that the loans have been repaid through account payee cheque and as long as he was holding the loan, he has paid the interest after deducting TDS. With regard to the disallowance of interest on loans taken from afore-mentioned parties, the appellant submitted that the AO has also ignored the fact that the said interest expenses were incurred wholly, exclusively & necessarily for business of the Appellant. The interest paid on loans was subject to TDS. During the present proceedings, the appellant also submitted the details of the TDS made on the loans wherever it is applicable and the details of amount of TDS paid into the Government account. In the appellant case the addition made towards the said loans is deleted after discussing the issue in detail in the above paragraphs.

6.6. Thus, above discussion and various explanations leads to the conclusions that the Ld. Assessing officer has made addition of ₹.20,00,000/- and interest given to the parties, disregarding the evidence on record and without discharging his onus and without establishing anything to the contrary to the submissions of the appellant and without verifying the bank account, existence of entities who have extended loans to the appellant and without making fruitful investigation. Therefore, the Assessing officer is directed to delete the addition made of Rs.20,00,000/- on account of unexplained unsecured loans and ₹.2,35,246/- made on account interest on the same. The grounds of appeal are allowed.

10. On a plain reading of the Assessment Order, we find that the Assessing Officer has gone only by the statement recorded from Shri Pravin Kumar Jain who said to have been deposed that he is only providing accommodation entries and no real business is carried on by the entities. The Assessing Officer has not made any efforts to make independent enquiries with the lender companies. We also observe from the Assessment Order that the Assessing Officer has not provided

the statements of Shri Pravin Kumar Jain to the assessee for its rebuttal. Nothing is placed on record to suggest that the information furnished by the assessee in the form of copy of affidavit, establishing identity of the lender, copy of the ledger giving details of loans confirmation taken and also repayment in subsequent years, copy of bank statement highlighting the natures of loan taken and repayment in subsequent years to establish the genuineness of the transactions copy of ITR –V filed establishing creditworthiness of the lender are non-genuine. It was also noted by the Ld.CIT(A) that the assessee has provided the identity creditworthiness as well as the genuineness of the transactions. The Ld.CIT(A) also elaborately considered the submissions and the averments made by the Assessing Officer in the Assessment Order and the evidence furnished by the assessee and concluded that the assessee has discharged its primary onus on providing complete details in respect of the loan transactions and the Assessing Officer failed to carry out any fruitful investigation. Therefore, no addition can be made towards unexplained unsecured loans, this finding in our view is completely justified in view of the facts and circumstances of the assessee's case.

11. An identical issue came up in the case of DCIT vs. Bairagra Builders P. Ltd reported in [2017] 51 CCH 0107 in ITA.No. 4691 and 4692/Mum/2015 dated 14.09.2017 wherein the Coordinate Bench held as under:

“6. We have heard the rival submissions along with the orders of the tax authorities below. We noted that during the impugned assessment year, the assessee had taken unsecured loans from the following two parties:

<u>Sr. No</u>	<u>Name of the Party and Address</u>	<u>PAN</u>	<u>Loan taken(Rs.)</u>	<u>Rate of Interest</u>
1.	Javda India Impex Limited CS-1, Silver Anklet, Yari Road, Versova, Mumbai 400 061	AAACA7065L	20,00,000	9%
2.	Lexus Infotech Ltd. 626, Panchratna, OperaHouse, Mumbai 400 002	AAACL4646G	20,00,000	9%

When the Assessing Officer asked the assessee to prove the genuineness of these loans, the assessee submitted the following documents:

a. Copy of acknowledgment of income tax return filed for A.Y. 2007-08.

- b. Copy of PAN of the parties
- c. Copy of bank statement of the parties from where the cheque is issued.
- d. List of directors of the parties
- e. Copy of annual report of the parties for financial year 2006-07.
- f. Copy of loan confirmation from the parties.

The Assessing Officer treated these loans to be non-genuine and made addition u/s 68 of the I.T Act on the basis of the statement of Shri Nilesh Parmar, one of the associate of Shri Praveen Kumar Jam, Director of Mohit International and one of the dummy Director of some of the companies of Shri Praveen Kumar Jam. Although said statement has been immediately retracted by him by filing an affidavit with the CBDT, the CIT(A) has deleted the said addition as in his opinion the assessee has duly discharged his onus as laid down on it u/s. 68 of the I.T.Act. It was also noted by the CIT(A) that the assessee has proved the identity, credit worthiness as well as genuineness of the transactions and, therefore, no addition u/s. 68 can be made.

7. The learned AR before us relied on the order of the CIT(A) and has also pointed out that the loan received by the assessee has been returned to the respective parties through cheques and in none of the case the respective party has deposited any cash. He relied on the following Tribunal decisions:

- *Arceli Realty Ltd vs. ITO [ITA No.6492/Mum/2016 dated 21.04.2017 (Mumbai)]*
- *M/s Komal Agrotech Pvt. Ltd. vs. ITO [ITA No.437/Hyd/2016 dated 25.11.2016 (Hyderabad)]*
- *Sudhanshu Suresh Pandhare vs. ITO [ITA No.5185/Mum/2012 dated 05.10.2016 (Mumbai)]*
- *Dilsa Distributors Combines vs. ITO [ITA No.5849/Mum/2011 dated 06.09.2013 (Mumbai)]*
- *Aim Properties & Investments Pvt. Ltd vs. ITO [ITA No.7426/Mum/2012 dated 04.12.2013 (Mumbai)]*

He further placed reliance on the following judgments:

Nemi Chand Kothari vs. CIT [2004] 136 Taxman 213 (Gau)
Vijay Kumar Talwar vs. CIT [2011]330 ITR 1 (SC)

8. *The learned DR, on the other hand, relied on the decisions of the Hon'ble Delhi High Court in the case of Principal CIT vs. Bikram Singh ITA.No. 55/2017 & CIT vs. Jansampark Advertising & Marketing Pvt. Ltd. in ITA.No.525/2014.*

9. *We have gone through the orders relied upon by the learned DR. We noted that the decision of the Delhi High Court in the case of Bikram Singh, the assessee could not discharge the onus as laid down by section 68 of the Act. Similarly, in the case of CIT vs. Jansampark Advertising & Marketing Pvt. Ltd. (supra), the additions have been made u/s. 68 in respect of the share capital received by the assessee from various companies and during the course of investigation, it was found that the share capital has been received from three entry operators, who are allegedly in the business of providing accommodation entries. Notices issued u/s. 131 to these parties were returned undelivered by the postal authorities with the remark "left"/ "no such person". Under these circumstances, the Hon'ble High Court took a view that the assessee failed to discharge the burden to prove the credit worthiness as well as the genuineness of the transactions.*

10. *But in the impugned case, we noted that the assessee has submitted all the evidences including the confirmation of the creditors. This is not a case where the creditors have not given confirmations rather they have duly confirmed to giving loan to the assessee, the loans were received and returned through banking channels. The assessee has also submitted copies of bank accounts. The lender has not deposited cash into bank account. The assessee has duly discharged the onus with regard to identity of the lender, credit worthiness of the party and all supporting evidences as required u/s. 68 of the I.T.Act. Therefore, in our opinion the decisions relied upon by the DR does not assist the Revenue to the facts of the present case.*

11. *We have also gone through the decisions relied upon by the learned AR. We noted that this Tribunal in similar circumstances in the case of Komal Agrotech Pvt. Ltd. vs. ITO in ITA No. 437/Hyd/2016 vide its order dated 25.11.2016 has held as under:*

A plain reading of the assessment order demonstrates that the AO merely went by the Investigation done by the office of D G. I T (Investigation), Mumbai. No

enquiries or investigation was carried out. No evidence to controvert the claims of the Assessee was brought on the record by the AO. Even the statement of Shri Praveen Kumar was supplied. Nothing is on record about the result If investigations done by DGIT (Inv), Mumbai. The papers filed by the assessee do demonstrate the identity, creditworthiness and genuineness of the transaction. The addition is made merely on surmises and conjectures.

In view of the above, we hold that the addition made under section 68 of the Act is bad in law.

We noted that in the said case also loan had been received from Javda India Impex Ltd.

12. *Being consistent with the view taken by this co-ordinate Bench in the case of Komal Agrotech Pvt. Ltd. (supra), and in view of the facts and circumstances, we do not find any illegality or infirmity in the orders of the CIT(A). It is accordingly, confirmed for both the years under appeal.*

13. *In the result, the appeals filed by the Revenue are dismissed.*

12. In view of the above discussion we do not find any illegality and infirmity in the order passed by the Ld.CIT(A) in deleting the addition made towards unproved unsecured loans and therefore we affirm the order of the Ld.CIT(A).

ITA.NOs.3902 TO 3096/MUM/2017 FOR ASSESSMENT YEARS 2009-10 TO 2013-14:-

13. The facts being identical in the appeals for the Assessment Years 2009-10 to 2013-14, the decision taken by us in the appeal for the Assessment Year 2008-09 shall apply *mutatis-mutandis* to the appeals for the Assessment Years 2009-10 to 2013-14.

14. In the result all the appeals of the Revenue are dismissed."

2.8. In the aforesaid case, search proceedings were carried out in the case of Pravin Kumar Jain Group, wherein,

Shri Pravin Kumar Jain said to have deposed before the authorities that he was indulged in providing accommodation entries in the form of bogus bills/sale bills and unsecured loans. As per the information, the assessee involved in the case was beneficiary of such accommodation entries. The assessee was required to explain the genuineness of unsecured loans and identity and creditworthiness. The assessee furnished loan confirmation, bank statement, IT returns acknowledgment of lender companies and the proof of borrowable through regular banking channel. The Bench considered the factual matrix and held that no addition can be made towards alleged unsecured loans. Identical are the facts in the present appeal before us. Thus, this case clearly supports the case of the assessee. Identical ratio was laid down in the case of DCIT vs Bairagra Builders Pvt. Ltd. (ITA No.4691 and 4692/Mum/2015), order dated 14/09/2017 from the Mumbai Bench of the Tribunal.

2.9. The Hon'ble Delhi High court in CIT vs Laxman Industrial Resources Ltd. (ITA No.169 of 2017)(Del), held as under:-

“The Income Tax Appellate Tribunal's (ITAT) order upholding the Appellate Commissioner's opinion that the additions made in the course of reassessments were unsustainable, were challenged by the Revenue. The reassessment notice was issued to the assessee for AY 2002-03 on the ground that information received from the Investigation Wing pointed to its being the beneficiary of the accommodation entries that were subjected to addition under Section 68. The Assessing Officer (AO), in the reassessment proceedings, added a sum of 70,77,290/- . Upon appeal, the CIT(A) took note of the materials filed by the assessee and provided an opportunity to the AO to remand proceedings. The AO merely objected to the materials furnished but did not undertake any verification. The CIT(A), found favour with the assessee, and directed that the amounts brought to tax should be deleted *inter alia* observing as follows:

.....*Reliance is placed on the following decisions of the Apex Court and the jurisdictional High Court of Delhi:-*

- (i) *CIT v. Lovely Exports (P) Ltd. 2008 (216) CTR (SC) 195:*
- (ii) *CIT v. Divine Leasing & Finance Ltd. 2007 (299) ITR 268 (Del). Hon 'ble Delhi High Court in paras 13 & 16 has 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.

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 assess cc nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assess cc. (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.

ii() CIT vs. Value Capital Services Ltd. (2008) 307 ITR 334 (Dd.) — Hon'ble Delhi High Court has held as under:-

"5. While setting aside the order of the Commissioner of Income-tax (Appeals), the Tribunal relied upon two decisions of this court, namely CIT v. Stellar Investment Ltd. [1991] 192 ITR 287 and a Full Bench decision in CIT v. Sophia Finance Ltd [1994] 205 ITR 98. Several other decisions have been rendered by this Court following the above two decisions. The principle that has been laid down by the various decisions rendered by this Court from time to time is that if the existence of the applicant is proved, normally no further inquiry is necessary.

6. Learned counsel for the Revenue submits that the creditworthiness of the applicants can nevertheless be examined by the Assessing Officer. It is quite obvious that is very difficult for the assessee to show the credit-worthiness of strangers. If the Revenue has any doubt with regard to their ability to make the investment. Their returns may be reopened by the Department.

7. In any case what is clinching is the additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assess cc. This has not been done in so far as

the present case is concerned and that has been noted by the Tribunal also.

8. *Under the circumstances, we are of the the view that the Tribunal has not committed any error in deleting the addition.*

9. *No substantial question of law arises "*

iv) *CIT vs. TDI Marketing Pvt. Ltd. (2009) 26 DTR (Del.) 358, and*

v) *Bhav Shakti Steel Mines (P) Ltd. v. CIT (2009) 179 Taxmnan 25. wherein the Hon 'bie Delhi High Court has observed as under: -*

"In any event we also note that the Supreme Court in the case of CIT v. Lovely Exports (F) Ltd. [2008] 216 CTR 195 considered the question as to whether the share application money can be regarded as undisclosed income under Section 68 of the Income Tax Act, 1961. The Supreme Court dismissing the SLP observed that if the share money is received by the assessee company from alleged bogus shareholders whose names are given to the Assessing Officer, then the Department is free to proceed to assess them individually in accordance with law. The Supreme Court did not find any infirmity with the impugned judgment of the High Court which was a common order along with the decision in CIT v. Divine Leasing & Finance Ltd. [2008] 299 ITR 268 (Delhi). Since the Commissioner of Income-tax (A) has not only found that the identity of each of the shareholders stood established, but has also examined the fact that each of them were income-lax ass essees and had disclosed the share application money in their accounts which were duly reflected in their Income-tax return as well as in their balance sheets. In these circumstances we see merit in what the learned counsel for the appellant has submitted and we feel that the Tribunal was

unjustified incoming to the conclusion that the CIT(A) had not considered the matter in the right perspective. Consequently, we decide the question in favor of the assessee and set aside the order passed by the Tribunal."

5.4 In the present case the assessee can be said to have discharged its onus under section 68 of the Act. The appellant has given all the necessary details in order to establish the identity of the share applicants. After considering the entire material placed on record, it is fair to conclude that the share applicants were existing parties and the payments were made through banking channels, It is also observed that the Assessing Officer could not point out any discrepancy in the evidences relied upon by the assessee, He has neither brought out any direct or inferential evidence to contradict the contention of the assessee. It is further observed that even though A. O. has vast powers u/s 131 and 133(6) of the Act, he has not used any of his powers to verify the genuineness of the claim of the assessee by verifying the documents furnished by it. If A. O. had doubted the impugned transaction after receiving the evidences (in the remand proceedings in terms of Rule 46A(3) of the Income-tax Rules, 1962) which had been produced by the assessee in support of its claim it was very much open to the A. O. to do his independent enquiry and verification, This has not been done by the A.O. Though, the share-applicants could not be examined by the A O, since they were existing on the file of the Income Tax Department and their income-tax details were made available to the AO, it was equally the duty of the AO to have taken steps to verify their assessment records and if necessary to also have them examined by the respective A Os having jurisdiction over them (share-applicants), which

has not been done by him.

5.5 The AO has also given a finding that all the share-applicants were entry operators as per the information available on the basis of the investigation conducted by the Investigation Wing of the Income Tax Department. As contended on behalf of the appellant, the I. d. Assessing Officer did not provide any such information to the assessee to rebut the adverse material if any and he did not afford any opportunity of cross examination of all the adverse material on the basis of which impugned addition has been made in the assessment order. It is settled proposition of law that the information gathered behind the back of the assessee cannot be used against him unless until an opportunity of rebutting the same is given to the assessee, It is against the principle of natural justice. Reliance is placed on the decision of Hon 'ble Supreme Court in case of Prakash Chand Nahta v. Union of India 12001J 247 ITR 274 in support of the proposition that cross-examination of the witness is must, before the AO relies on the statement of the witness for making addition. Reliance is also placed on the decision of Allahabad High Court in the case of Nathu Ram Prmchand v. CIT [1963] 49 ITR 561, wherein the Hon'ble Court explained that it was the duty of the Assessing Officer to enforce the attendance of a witness. if his witness is material in exercise of his powers under order 16. Rule 10 of CPC and where the Officer does not do so, no inference can be drawn against the assessee. Reliance is also placed on the decision of the jurisdictional High Court, i.e. Delhi High Court in CIT v. Pradeep' Kumar Gupta and- Vijay Gupta (2008) 303 ITR 95 (Del) wherein it was held that reopening of assessment is not permissible on

mere adverse statements from others. Such statement by itself does not constitute information, unless the Assessing Of has made enquiries thereon and inferred understatement or Income. I am therefore inclined to agree with the submissions made on behalf of the appellant to the effect that the information, if any, gathered behind the back of the assessee without being subjected to cross examination cannot be fully admitted as evidence against the assessee.

5.6 Under the facts and circumstances of the case stated above, it is held that the addition of Rs. 70,00,000/- can not be sustained and accordingly, the same is directed to be deleted. The consequential addition on account of commission of Rs. 70,000/- for obtaining the said accommodation entries is also directed to be deleted. As a result, grounds no.5,6, 7,8 and 9 are allowed."

The ITAT confirmed the opinion of the CIT(A).

It is argued by the Revenue that the hAT should have taken appropriate steps and remitted the matter, not merely confirming the CIT(A)'s opinion since the Investigation Wing's report confirmed unequivocally that the assessee was beneficiary to bogus transactions whereby the genuineness of identity of the shareholders, the genuineness and identity of the share applicants and the genuineness of transactions was suspect.

This Court notices that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. It was not a case where the share applicants are merely

provided confirmation letters. They had provided their particulars, PAN details, assessment particulars, mode of payment for share application money, i.e. through banks, bank statements, cheque numbers in question, copies of minutes of resolutions authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the assessee as well as their master debt with ROC particulars. The AO strangely failed to conduct any scrutiny of documents and rested content by placing reliance merely on a report of the Investigation Wing. This reveals spectacular disregard to an AO's duties in the remand proceedings which the Revenue seeks to inflict upon the assessee in this case. No substantial question of law arises. The appeal is dismissed.”

2.10. Hon'ble Rajasthan High Court in Supertech Diamond Tools (P) Ltd. (44 taxman.com 460)(Rajasthan) observed/held as under:-

“By way of this appeal under Section 260A of the Income-tax Act, 1961 ('the Act'), the Revenue seeks to question the order dated 19.01.2012 passed by the Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur ('ITAT') in ITA No.211/Jodh/2009 for the Assessment Year 2004-05 whereby, the ITAT has affirmed the order dated 09.02.2009 passed by the Commissioner of Income Tax (Appeals), Central, Jaipur ['CIT(A)'] partly allowing the appeal preferred by the assessee and deleting the additions made by the Assessing Officer ('AO') in the assessment order dated 28.12.2007 to the tune of Rs. 79,80,000/- on account of unexplained share capital contribution

and Rs. 19,950/- on account of unexplained expenditure on commission for getting accommodation entries.

2. Put in brief, the relevant background aspects of the matter are as follows : The respondent Company is engaged in manufacturing of the segments used in the marble sawing. The Company came into existence on 16.06.2003. Thus, the previous year related with the Assessment Year 2004-05 had been the first year of the business of the assessee company. In the original return filed on 01.11.2004 under Section 139 of the Act, the assessee Company declared a loss of Rs.3,88,740/- . It appears that search and seizure operation under Section 132 of the Act were carried out on 23.01.2006 at the business premises of the assessee along with the residential as well as other business premises of Choudhary Group of Cases; and pursuant thereto, notices under Section 153A were issued. In the return filed on 06.12.2006 in response to the notice under Section 153A, the assessee company declared a loss of Rs.3,38,740/-

3. On the return so filed, the assessment was completed on 28.12.2007 at the total income of Rs. 76,61,210/- wherein, the Assessing Officer proceeded to make an addition of Rs. 79,80,000/- on account of share capital and share premium alleged to have been received from five Delhi based companies. Another amount of Rs. 19,950/- was also added as being the commission paid for arranging entries for share capital and share premium. In this regard, the AO relied upon the statements made by the persons related with the said Delhi based companies, including one Shri Pradeep Kumar Jindal. The AO observed that though they had confirmed about the companies having purchased the shares of the assessee company and such companies being assessed to tax but it was admitted in their statements that they were engaged in the business of sale and purchase of shares and providing accommodation entries in lieu of commission. The AO concluded that the assessee had routed its undisclosed funds through the banking channels of the accommodation entry providers and hence proceeded to make the addition.

4. Aggrieved against the assessment order dated 28.12.2007, the respondent assessee filed an appeal which was partly allowed by the CIT(A) in the order dated 09.02.2009. It is noticed that the CIT(A) considered the matter in thorough detail and even discussed the matter with the learned Assessing Officer threadbare. The CIT(A) found that the statement made by a third party at the back of assessee could not have been utilized against the assessee without providing an opportunity of cross-examination, which was not afforded by the AO. The CIT (A) also found that the AO could not bring any material to disapprove the genuineness of confirmations and affidavits; and following the decision of the Hon'ble Supreme Court in the case of *CIT v. Lovely Exports (P.) Ltd.* [2008] 216 CTR 195, found the additions unsustainable; and proceeded to delete the same. The CIT(A), inter alia, observed and held as under: —

"However, the assessee filed confirmations along with the affidavit of the directors of the 5 purchasing companies who had confirmed that they have

purchased the regular share and premium shares total at Rs.79,80,000/- from the assessee-company and made the payment through account payee draft. It is also fact that the Id. A.O. made direct independent inquiry from the directors of the purchaser company by issuing a letter u/s 133(6) of the I.T. Act 1961. The Id. A.O. Sh. V.K. Chakarvarty was heard and the case was discussed with him. On perusal of letter u/s 133(6) I find that no confirmations or comment was asked from the directors of the purchaser company about their statement in the search and seizure operation in their case. The Id. A.O's only reason for rejecting the confirmations and affidavits filed by aforesaid directors of the purchaser companies was that the directors did not retracted their statement in such confirmations or affidavits. The Id. A/R's contention is that the directors of the purchaser companies have fully replied against the Id. A.O's letter u/s 133(6). There is no question to retract against anything which is not mentioned in the letter u/s 133(6). Therefore, the rejection of confirmations and affidavits filed by the directors of the purchasing companies was not justified and the various case laws relied by him is still applicable in this case and binding on the department. Moreover the Id. A/R also submits that the statement made by third party on the back of the assessee can not be utilized against him without giving him opportunity of confrontation or cross-examination of such persons making such statement. This opportunity was not provided by the Id. A.O. Under such circumstances the addition on account of receipt of money for regular and premium sales of shares can not be sustained. Considering the facts and circumstances of the case, particularly that the Id. A.O could not bring any material to disprove the genuineness of the confirmations and affidavits and following the case laws mentioned supra, particularly the recent decision of Supreme Court in the case of CIT V/s Lovely Exports Pvt. Ltd (2008) 6 DJR SC 308 and other decisions of jurisdictional High Court and Jurisdictional ITAT, I hold that addition of Rs.79,80,000/- on account of receipt for sales of regular shares and premium shares of the company as unexplained share capital is not justified and the same is deleted. The A.O. is directed to take necessary action against the purchaser companies for such investment in purchase of shares.

Consequently the A.O's addition on account of commission payment for such transaction to the purchaser companies at a rate of 0.25% amounting to Rs 19,950/- also can not sustain and the same is deleted."

5. Aggrieved by the order dated 09.02.2009 so passed by the CIT(A), the Revenue preferred an appeal before the ITAT. The ITAT dismissed the Revenue's appeal by the impugned order dated 19.01.2012 finding no justification for the additions towards the share capital, share premium and alleged commission in the hands of the assessee company. The ITAT has, *inter alia*, held and observed as under:—

'We have gone through written submissions of Id. CIT D/R and also gone through various case laws relied upon and found that there is no evidence that assessee had paid any commission and has refunded the amount received under the garb of share application money. Various case laws

relied upon by Id. D/R are in respect of cash credits added under section 68. After considering the submissions and various case laws, it is seen that the submission of Id. CIT D/R is not helpful to the case of revenue. The Hon'ble Supreme Court in case of *Lovely Exports Pvt. Ltd.* had clearly held that even if the shareholders are bogus in that case no addition can be made in the hands of the company but AO can reopen the cases of shareholders. The contention of Id. CIT D/R that in case of *Lovely Exports Pvt. Ltd.* only bogus share application was found but the investors were genuine. However, in the present case even there are no genuine investors as all the companies are fabricated just to provide accommodation entries only as admitted by one of the Directors i.e. Shri Pradeep Jindal. Whether those companies were fictitious or bogus, the moot question here is that whether the assessee company had received share application money or not. It is seen that share capital was received through account payee cheques along with premium amount totalling to Rs.79,80,000/- from five private limited companies i.e. M/s. Sanraj Associates Pvt Ltd., M/s. Fortress Impex Pvt. Ltd., M/s. Sumit Overseas Pvt. Ltd., M/s. Pushpanjali Caps Pvt. Ltd. and M/s. B.P. Builtech Pvt. Ltd. all these companies are situated at Delhi. All these companies are assessed to tax and they are registered under the Companies Act. Return of allotment of shares in prescribed form No.2 to the Registrar of Companies was also filed before Assessing Officer as well as before Id. CIT (A). It is further seen that the addition is based on alleged statement of Shri Pradeep Jindal recorded under section 131 behind the back of the assessee on 15.4.2004. The assessee was not even afforded any opportunity of cross examination nor Shri Pradeep Jindal was examined in the course of assessment proceedings in case of assessee nor he was examined in presence of assessee company nor he was confronted with the documents of contemporary period showing investment in shares made by those five companies through regular banking channel. Therefore, in our view, the inference drawn by Assessing Officer was not correct. Even and otherwise, the issue is squarely covered by the decision of Hon'ble Supreme Court in case of *M/s. Lovely Exports Pvt. Ltd.*, 6 DTR 308 wherein it has been held that—

"If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee-company."

Similar view has been expressed by Hon'ble Delhi High Court in case of *CIT v. Divine Leasing and Finance Ltd.*, [2008] 299 ITR 268 (Delhi). The Hon'ble Rajasthan High Court has taken similar view in case of *CIT v. Shree Barkha Synthetics Ltd.* [2003] 182 CTR 175 and again reported in 197 CTR 432. Earlier, the Hon'ble Delhi High Court in case of *CIT v. Steller Investment Ltd.* [1991] 192 ITR 287 has taken similar view and this decision of Hon'ble Delhi High Court has been affirmed by Hon'ble Supreme Court in *CIT v. Steller Investment Ltd.* [2001] 251 ITR 263 wherein it is held that—

"It is evident that even if it be assumed that the subscribers to the increase share capital were not genuine, nevertheless, under no circumstances can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names the shares had been issued and money may have been provided by some other persons. If the assessment of the persons who were alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital could be assessed in the hands of the company itself."

The findings in these cases are squarely applicable on the facts of the present case and we noted that Id. CIT (A) has already taken a recourse for taking action against the respective shareholders as the Assessing Officer was directed to take necessary action against the purchaser company for such investment in purchase of shares.

10. We have also considered the contention of Id. D/R that the share application money which remained unproved can be added under section 68. We would like to observe here that there is a difference between cash creditor and shareholder. In case of cash creditor, the cash creditor has right to demand the money back from the assessee. However, in case of shareholder, there is no liability of the company to refund the amount as the shares can be sold in the market. Therefore, in case of cash creditor, heavy onus lies on the assessee to prove whether cash creditor was genuine or not. However, in case of shareholder, it is held by various High Courts and Hon'ble Supreme Court that if shareholders are not genuine, then in that case no addition can be made in the hands of the company but the case can be reopened of the shareholders for enquiring about their source of buying the shares in the company.

10.1 The contention of Id. CIT D/R that cash was deposited in the account of the respective five companies before issuing cheque to the assessee company for allotting the shares. Therefore, there is every likelihood that cash deposited in the account of those companies was belonging to assessee company for issuing cheque under the garb of issuing shares. In our view, this contention is without any evidence and if the cash deposited in the account of those companies then onus lies on those companies to prove that from which source the cash has been deposited in their account. Therefore, the AO should examine the case of those five companies instead of making addition in the hands of the assessee-company. The Id. CIT (A) has already directed, as stated above, to take action against the respective shareholders and, therefore, in our view, the Id. CIT(A) was justified in allowing the issue in favour of the assessee. Accordingly, without going into detail further, we are of the considered view that Id. CIT (A) was justified in allowing the claim of the assessee as the issue is squarely covered by the decision of Hon'ble Jurisdictional High Court as well as by the decisions of Hon'ble Supreme Court mentioned above. Accordingly, we confirm the findings of Id. CIT (A) on this issue.

12. In the result, appeal of the department is dismissed.'

6. Seeking to question the order so passed by the ITAT, it is submitted that the approach of the ITAT has been from an altogether wrong angle where it has failed to consider that the companies in whose names investments were shown, had no explainable source of the funds for investment in the assessee company; and the source of the funds was the cash deposits. It is submitted that all the referred companies were being managed by Shri Pradeep Jindal, who was engaged in the business of providing accommodation entries to various companies in lieu of commission; and who had admitted the facts in his statements recorded under Section 131 of the Act. It is also submitted that in the given status of record and the statement of the persons related with the assessee-company, the additions made by the AO had been justified and there was no reason for the CIT(A) in deleting the same.

7. Having given thoughtful consideration to the submissions made and having perused the material on the record, we are unable to find any reason to consider interference; and are clearly of the opinion that no substantial question of law is involved in this appeal.

8. The reference to the statements made by some of the persons related with the said investing companies is of no effect because such statements could not have been utilized against the assessee Company when the assessee-company had not been afforded an opportunity of confronting and cross-examining the persons concerned. There does not appear anything occurring in the statements of the persons relating with the assessee-company so as to provide a basis for the findings recorded by the AO.

9. In any case, the points as sought to be raised by the appellant in the present case are all the matters relating to appreciation of evidence. The relevant factors have been taken into account and considered by the appellate authorities before returning the findings in favour of the assessee. As regards the referred share capital contributors, it is noticed that they are existing assesseees having PA numbers; and are being regularly assessed to tax. The appellate authorities cannot be said to have erred in deleting the additions in their regard at the hands of assessee-company.

10. Ultimately, the question as to whether the source of investment or of credit has been satisfactorily explained or not remains within the realm of appreciation of evidence; and the Courts have consistently held that such a matter does not give rise to any substantial question of law. In the case of *CIT v. Orissa Corpn. (P) Ltd.* [1986] 159 ITR 78/25 Taxman 80F (SC), the Hon'ble Supreme Court held as under:—

"13. In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged

creditors. In those circumstances, the assessee could not do any thing further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

11. In *CIT v. Shree Barkha Synthetics Ltd.* [2004] 270 ITR 477/[2003] 131 Taxman 114 (Raj.), in a similar nature of matter, this Court observed that the Tribunal having found that the companies from which the share application money had been received by the assessee-company were genuinely existing and the identity of the individual investors were also established and they had confirmed the fact of making investment, the finding that assessee had discharged initial burden and addition under Section 68 could not be sustained, was essentially a finding of fact. This Court said,—

"19. A perusal of the aforesaid finding goes to show that deletion has been made on appreciation of evidence, which was on record Finding that there was existence of investors and their confirmation has been obtained, were found to be satisfactory. All these conclusions are conclusions of fact based on material on record and, therefore, cannot be said to be perverse so as to give rise to question of law, which may be required to be considered in this appeal under s.260A of the IT Act."

12. The ratio of the decisions aforesaid directly applies to the present case too. Herein, as noticed, the appellate authorities have returned the findings of fact in favour of the assessee after due appreciation of the evidence on record, on relevant considerations, and on sound reasonings. These findings have neither been shown suffering from any perversity nor appear absurd nor are of such nature that cannot be reached at all.

13. Needless to reiterate the law laid down by the Courts consistently that the department is free to proceed in relation to the individual investor in accordance with law but the amount of increased share capital cannot be assessed at the hands of the assessee company itself.

14. In the result, the appeal fails and is, therefore, dismissed."

2.11. In the case of CIT vs Orchid Industries Pvt. Ltd. (ITA No.1433 of 2014)(Bom.), Hon'ble jurisdictional High Court held as under:

"The Revenue has filed the appeal on following questions;

"6.3 Whether on the facts and in the circumstances of the case and in law, orders of the Tribunal was perverse in deleting the addition of Rs.

95,00,000/- made u/s. 68 of the Act, relying only on the documentary evidence produced by the Respondent Company while ignoring the key factor that these entities were not traceable at their given addresses.

6.4 Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating the observations made by the Delhi High Court in Nova Promoters and Finlease Pvt. Ltd. 18 Taxman.com 217 wherein the Court has observed that cases of this type cannot be decided only on the basis of documentary evidences above and there is need to take into account the surrounding circumstances.

6.5 The Tribunal ought to have taken note of the fact that the assessee was not able to produce even a single party before the AO despite agreeing before the CIT(A) that it will produce all parties before the AO during remand proceedings."

2. Mr. Pinto, the learned counsel for the Assessee submits that the Assessing Officer upon considering all the facts had added Rs. 95 lakhs as income under Section 68 of the Income Tax Act. It needs to be considered that the Assessee had not discharged its onus to establish that the amount was received by the Assessee from the share holders as share application money. The Assessee could not prove the identity of the creditors, their credit worthiness and the genuineness of the transactions. The party from whom the Assessee had received the share amount never responded to the summons issued by the Assessing Officer. The Assessing Officer has considered the said aspect and thereafter has added the amount under Section 68 of the Income Tax Act. According to the learned counsel, the Tribunal only on the basis that documents are available has accepted the case of the Assessee. The Tribunal has failed to consider the circumstances and the facts which are relevant.

3. The learned counsel for the Assessee supports the order and submits that the Assessee had discharged its onus. The Assessee had produced the PAN of all the creditors along with the confirmation, Bank Statement showing payment of share application money and relevant record is produced with regard to the allotment of shares to those parties. The share application form, allotment letter, share certificate are also produced. Even the balance-sheet, profit and loss account, the books of account of these creditors were produced on record showing that they had sufficient funds for investing in the shares of the Assessee. The learned counsel relies on the judgment of the Division Bench of this Court in case of CIT v. Gagandeep Infrastructure (P.) Ltd. [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 (Bom.) and the order of the Apex Court in case of CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195.

4. We have considered the submissions.

5. The Assessing Officer added Rs. 95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be

served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6. The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of *Gagandeep Infrastructure (P.) Ltd.* (*supra*) would be applicable in the facts and circumstances of the present case.

7. Considering the above, no substantial question of law arises. The appeal stands dismissed. However, there is no order as to costs.”

2.12. Hon'ble Bombay High Court in CIT vs Gangandeep Infrastructure (P) Ltd. (349 ITR 680)(Bom) observed/held as under:-

“ This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 23rd April, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. Mr. Suresh Kumar, the learned counsel appearing for the Revenue urges the following re-framed questions of law for our consideration:—

- "(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.7,53,50,000/- under Section 68 of the Act being share capital/share premium received during the year when the Assessing Officer held the same as unexplained cash credit?
- (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restricting the disallowance under Section 14A of the Act only to the amount of expenditure claimed by the assessee in the absence of any such restriction under Section 14A and/or Rule 8D?"

3. Regarding question no.(i):—

- (a) During the previous relevant to the subject Assessment Year the respondent-assessee had increased its share capital from Rs.2,50,000/- to Rs.83.75 lakhs. During the assessment proceedings, the Assessing Officer noticed that the respondent had collected share premium to the extent of Rs.6.69 crores. Consequently he called upon the respondent to justify the charging of share premium at Rs.190/- per share. The respondent furnished the list of its shareholders, copy of the share application form, copy of share certificate and Form no.2 filed with the Registrar of Companies. The justification for charging share premium was on the basis of the future prospects of the business of the respondent-assessee. The Assessing Officer did not accept the explanation/justification of the respondent and invoked Section 68 of the Act to treat the amount of Rs.7.53 crores i.e. the aggregate of the issue price and the premium on the shares issued as unexplained cash credit within the meaning of Section 68 of the Act.
- (b) Being aggrieved, the respondent carried the issue in appeal. By an order dated 24th May, 2011 the Commissioner of Income Tax (Appeals) (CIT(A)) deleted the addition of Rs.7.53 crores made by the Assessing Officer by holding that the Assessing Officer had given no reason to conclude that the investment made (inclusive of premium) was not genuine. This inspite of evidence being furnished by the respondent in support of the genuineness of the transactions. Further he held that the appropriate valuation of the shares is for the subscriber/investor to decide and not a subject of enquiry by the Revenue. Finally he relied upon the decision of the Apex Court in *CIT v. Lovely Exports (P.) Ltd.* [2008] 216 CTR 195 to hold that if the amounts have been subscribed by bogus shareholders it is for the Revenue to proceed against such shareholders. Therefore it held the Assessing Officer was not justified in adding the amount of share capital subscription including the share premium as unexplained credit under Section 68 of the Act.
- (c) Being aggrieved, the Revenue carried the issue in the appeal to the Tribunal. The impugned order of the Tribunal holds that the respondent-assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names, addresses of the shareholders, PAN numbers, bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the Registrar of Companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon, would be on capital

receipt and not in the revenue field. Further reliance was also placed upon the decision of Apex Court in *Lovely Exports (P.) Ltd. (supra)* to uphold the finding of the CIT(A) and dismissing the Revenue's appeal.

- (d) Mr. Suresh Kumar, the learned counsel appearing for the Revenue contends that proviso to Section 68 of the Act which was introduced with effect from 1st April, 2013 would apply in the facts of the present case even for A.Y. 2008-09. The basis of the above submission is that the *de hors* the proviso also the requirements as set out therein would have to be satisfied.
- (e) We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in *Lovely Exports (P.) Ltd. (supra)* in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.
- (f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.

- 4. (a) Admit the substantial question of law at (ii) above.

(b) The issue arising in question no. (ii) is essentially whether application of Rule 8D(2)(iii) of the Income Tax Act Rules would permit the Revenue to disallow expenditure not claimed i.e. much larger than the expenditure / debited in earning its total income. The Counsel inform us that there is no decision on this issue of any Court available and it would affect a large number of cases where similar issues arise. Therefore, this issue would require an early determination. In the above view, at the request of the Counsel, the appeal is kept for hearing on 17th April, 2017 at 3.00 p.m., subject to overnight part-heard.

5. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

6. Stand over to 17th April, 2017.”

2.13. In the aforesaid cases, the Hon'ble High Courts including Hon'ble jurisdictional High Court considered the factual matrix including the decision from Hon'ble Apex Court in CIT vs Lovely Export Pvt. Ltd. (2008) 216 CTR 195 (Supreme Court) and held that the proviso to section 68 of the Act was introduced by the Finance Act, 2012 w.e.f. 01/04/2013, thus, it would be effective only from Assessment Year 2013-14 onwards and not to the earlier years. The legislature did not introduce the proviso to section 68 of the Act with retrospective effect nor does the proviso so introduce states that it was introduce 'for removal of doubts' or that it is 'declaratory', therefore, it is not open to give it to retrospective effect by proceeding on the bases that the addition of proviso to section 68 of the Act is immaterial.

Thus, we find merit in the argument of the ld. counsel for the assessee.

2.14. Now, we shall deal with the cases relied upon by ld. DR. One such case is from Hon'ble Apex Court in *Sumati Dayal vs CIT* (1995) 80 taxman 89 (Supreme Court) order dated 23/03/1995 that is also with respect to cash credit and addition under section 68 of the Act. In that case, the facts are altogether different, therefore, cannot be applied to the case before us. Even otherwise, there are later decisions from Hon'ble Apex Court/Hon'ble High Courts and also from the Tribunal which on identical facts supports the case of the assessee. Identical is the situation in the case of *CIT vs Durga Prasad More* (1971) 82 ITR 540 (Supreme Court). The another decision relied upon by Ld. DR is from Hon'ble Gujarat High Court in *Pavankumar Sanghvi vs Income Tax Officer* (2018) 90 taxman.com 386 (Guj.), wherein, the assessee could not substantiate its claim and the Tribunal concluded that the entire loan transactions were not genuine, in that situation, it was decided in favour of the Revenue, whereas, in the facts before us, the assessee has

duly discharged its onus as provided under section 68 of the Act. Even otherwise, we are expected to consider the case of each case independently or the cases which are on similar facts can be applied.

2.15. Now, in the light of the foregoing discussion, we shall examine the facts of the present appeal. Admittedly, the assessee alleged to have obtained accommodation entries in the form of unsecured loans from entities controlled by Shri Pravin Kumar Jain. During the course of survey, statement of Shri Ajay maheshwari, one of the partners was recorded on 17/10/2014, on oath under section 131 of the Act. The details of unsecured loans taken during the Financial Year 2011-12 are summarized hereunder:-

Sl. No.	Name of the parties	Amount in Rs.
1.	Atharv Business Pvt. Ltd.	85,00,000/-
2.	Casper Enterprises Pvt. Ltd.	65,00,000/-
3.	Duke Business Park (JPK Trading Pvt. Ltd.)	50,00,000/-
4.	Olive Overseas Pvt. Ltd. (Realgold Trading Pvt. Ltd.)	90,00,000/-
5.	Viraj mercantile Pvt. Ltd.	75,00,000/-
6.	Nakshatra Business Pvt. Ltd.	1,05,00,000/-

	Total	4,70,00,000/-
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2.16. The statement of Shri **Anil Jetely**, broker, for the sale of flats/shops was recorded on 17/10/2014, wherein, he admitted that the assessee received on money of Rs. 44,00,000/- in cash from Mrs. Nitu Pugalia for purchase of flat at Shreedham Classic, developed by M/s Shreedham Construction Pvt. Ltd., a sister concern of the assessee.

2.17. Statement of Shri Atul Rupapara, salesman was also recorded. The statement of Shri Ajay Maheshwari, partner of the firm was also recorded, wherein, he tendered that they received accommodation entries in the form of unsecured loans in lieu of cash from Shri Pravin Kumar Jain. The statement of Shri Ajay Maheshwari has been reproduced in the assessment order which was heavily relied upon by the Assessing Officer for making the addition. It is noted that on 11/11/2014, Shri Ajay Maheshwari filed an affidavit retracting the statement recorded during survey after 23 days, wherein, he sworn (in the affidavit) that the loans were genuine and there were no corroborative evidence was found at the business premises during survey and the entire

transactions were conducted through banking channel/account payee cheque. As per this retraction, the survey party put mental pressure and the statement was recorded under high BP/hyper diabetic conditions. It is noted that the loan confirmations and copy of ITRs of the concerned parties were filed along with the address of the broker Shri Jitu Bhai. Summons were also issued to Shri Ajay Maheshwari. The addresses of the concerned persons were also filed by the assessee. The Ld. Assessing Officer issued summons under section 131 of the Act to all the lenders and other necessary details were collected from the bank. In response to the summons all the lenders filed their replies on 03/02/2005. The Ld. Assessing Officer observed that most of the lender companies opened their new bank accounts in IndusInd Bank, Opera house Branch on the same date/month, therefore, it was presumed that these are companies floated by Shri Pravin Jain. Undisputedly, even the Ld. Assessing Officer mentioned that the assessee repaid the loans taken from these companies in Financial Year 2014-15 out of the funds introduced by partners as capital.

The statement of brokers has been reproduced in the assessment order. The Ld. Commissioner of Income Tax (Appeal) has mentioned the observations made by Ld. Assessing Officer in the assessment order with respect to various parties/brokers. The Ld. Assessing Officer treated Rs.4.70 crores, introduced by the assessee in its books as unsecured loans/unexplained credit and added under section 68 of the Act and some unexplained expenditure under section 69C of the Act and also disallowed interest of Rs.5,73,193/-, paid on unsecured loan and disallowed the same under section 37 of the Act. It is noted that at the conclusion of the survey, the assessee vide letter dated 28/10/2014 requested for copy of statement. As per the assessee, the Assessing Officer did not provide the copy. As per the assessee, the cross examination of Shri Pravin Jain was also not provided. The assessee filed loan confirmation, acknowledgments of ITRs, relevant bank statement of lenders, proof of re-payment of such loans and on the summons issued to all the creditors and the brokers all of them furnished requisite details. It is noted that the financial

statements and other loan creditors were never disclosed by the Ld. Assessing Officer and by implication accepted that the assessee in fact received loans. This has been observed even by the First Appellate Authority at page-10(para-4.13 of the impugned order). It is further noted that on 21/10/2014, the assessee requested the Assessing Officer to provide the copy of statement recorded during survey, evidence of filing retraction on 11/11/2014, evidence of filing of loan confirmations, acknowledgment of ITRs and bank statement of parties vide letter dated 28/12/2014, copy of its submission on unsecured loans dated 16/02/2015, retraction affidavit of Shri Pravin Kumar Jain, dated 15/05/2014, repayment details of unsecured loans and its submissions dated 16/02/2015, wherein, present address, details of directors and shareholding patterns of lenders companies were filed by the assessee before the Ld. Assessing Officer. It is noted that before the First Appellate Authority, the assessee challenged the validity of assessment by raising an additional ground as the assessee was not allowed opportunity to cross examine Shri Pravin Kumar Jain and

other material used against the assessee, which was not confronted to it. The Ld. Commissioner of Income Tax (Appeal) vide letter dated 05/07/2016 asked the Ld. Assessing Officer to handover the statements pertaining to Shri Pravin Kumar Jain or its staff members or dummy directors to allow the assessee an opportunity to cross examine Shri Pravin Kumar Jain. The Ld. Assessing Officer was also asked to provide the evidences found during the course of survey action or any evidence that payment was made for obtaining unsecured loans and also efforts so made to examine the loan creditors. The Assessing Officer was asked to conduct necessary enquiries with respect to genuineness of the unsecured loans. The Ld. Assessing Officer vide letter dated 07/01/2017, submitted the remand report as has been reproduced at page-10 onwards of the impugned order. It has been mentioned in para 6.3 of the impugned order that Shri Pravin Jain produced the ledger accounts of Shreedham Builders in the books of his companies alongwith bank statement reflecting all the transactions and also audited balance sheet of last four year

along with the copy of the retraction of statement filed before CBDT. Nothing objectionable was found in the documents or statements. All the loan creditors were summoned and the statements of the directors were recorded, wherein, they have accepted of giving loan to the assessee. The Ledger copies of those companies reflecting loans given to the assessee were also produced. The Ld. Assessing Officer also provided the copy of statement recorded from Shri Pravin Kumar Jain under section 131 of the Act on 21/11/2006. In para 6.6 of the impugned order, there is an observation that the nature and source of business/amount was explained and the details of loan were also confirmed. All corroborative details were duly filed. From the record, we also note that the assessee also filed acknowledgment of filing of IT returns together with computation of total income (pages 1 & 2 of the paper book), audited annual accounts along with tax audit report for the year ending 31/03/2012 (pages 3 to 31 of the paper book), retraction of statement by Shri Ajay Maheshwari, partner, dated 10/11/2014 for the statement on oath recorded on 17/ & 18th October, 2014 (pages 32 to

37 of the paper book), remand report of the Assessing Officer dated 17/12/2016 filed before the Ld. Commissioner of Income Tax (Appeal) (pages 38 to 56 of the paper book), remand report of the Assessing Officer 04/01/2017 before the CIT(A) (pages 57 of the paper book), acknowledgment evidencing for filing of return for Assessment Year 2012-13, audited annual account for the year ending 31/03/2012, ledger confirmation, ledger account of the assessee in the books of the lender and bank statement of the lender (in the case of Athrav Business Pvt. Ltd. (page 58 to 72 of the paper book). Identically similar documents as a proof of evidence were filed from Casper Enterprises Ltd. (pages 71 to 83 of the paper book), Duke Business Pvt. Ltd. (J.P. K. Trading I. Pvt. Ltd.) (pages 84 to 96 of the paper book), Olive Overseas Pvt. Ltd. (pages 97 to 110 of the paper book), Viraj Mercantile Pvt. Ltd. (pages 111 to 119 of the paper book) and Nakshatra Business Pvt. Ltd. (Pages 120 to 131 of the paper book). All these documents neither disproved by the Ld. Assessing Officer nor any evidence was brought on record to falsify the claim of the assessee or the authenticity of these documents.

Thus, it can be said that the assessee discharged its onus as provided under section 68 of the Act. The interest was paid through banking channel by the assessee on such loans. It is also noted that so far as the disallowance of interest portion is concerned, the same was deleted by the ld. FAA and has not been challenged before this Tribunal by the Revenue further fortifies the case of the assessee. The loans were repaid along with interest before the date of survey i.e. 17/10/2014 and no cash was found during survey further fortifies the claim of the assessee. All the concerned parties appeared before the Ld. Assessing Officer during remand proceedings, the Ld. Assessing Officer recorded their statement and nothing adverse was pointed out even Shri Pravin Jain himself appeared before the Ld. Assessing Officer and even during remand proceedings enquiries were carried out and no adverse remark was made by the ld. Assessing Officer. The assessee as well as the other parties furnished all possible documents evidencing that the loans are not bogus. No cash was found deposited in the accounts of alleged six parties, thus, keeping in view, the totality of facts, attendant

circumstances, human probabilities, and in the presence of plausible explanation by the assessee, relevant material, and requirement of fulfillment of ingredients, enshrined in section 68 of the Act, we find that onus cast upon the assessee has been duly discharged, therefore, the addition made u/s 68 of the Act, which is purely based upon presumption or the statement recorded and later on retracted by the concerned parties, therefore, we find infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), resultantly, the appeal of the Revenue is dismissed.

Finally, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 04/06/2018.

Sd/-

(N.K. Pradhan)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 22/06/2018

Shekhar, P.S/निजी सचिव

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai,