आयकर अपीलीय अधिकरण, अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, AHMEDABAD
(THROUGH VIRTUAL COURT)
BEFORESHRI RAJPAL YADAV, VICE PRESIDENT
And SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sl. No(s)	ITA No(s)	Asset. Year(s)	Appeal(s) by Appellant vs. Respondent	
			Appellant	Respondent
1.	1823/Ahd/2017	2009-10	The Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad	El Dorado Biotech Pvt. Ltd. 5, Jagnirman Society, Narvang High School, Naranpura, Ahmedabad-380013 **PAN No. AABCE1885F**

Revenue by :	Shri M.S.A. Khan, CITDR.
Assessee by :	Shri Ketan Shah & Aman Shah ARs

सुनवाई की तारीख/Date of Hearing : 21.10.2020
घोषणा की तारीख **/Date of Pronouncement : 11.11.2020**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The appeal has been filed by the Revenue for A.Y. 2009-10 which is arising from the order of the CIT(A)-2,Ahmedabad dated 18.05.2017, in the proceedings under Section143(3) r.w.s. 147of the Income Tax Act, 1961 (in short "the Act").

2. The Revenue has raised the following grounds of appeal:

"1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 29,82,89,600/- under Section 68 of the Act, without properly appreciating the facts of the case and the material brought on record.

2. The Ld. CIT(A) failed to appreciate that violation of natural justice, if any, cannot render the order a nullity, but can at best be a ground to set aside the impugned order to be done de-novo.

3. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."

3. The issue raised by the Revenue is that Learned CIT-(A) erred in deleting the addition made under Section 68 of the Act for Rs.29,82,89,600/- on the ground of violation of natural justice.

4. Briefly stated facts are that the assessee in the present case is a private limited company. The assessee in the year under consideration has issued 106532 equity shares having face value at Rs.10 and premium of Rs.2790/- per share aggregating to Rs.29,82,89,600/- only. The details of the companies which subscribed the shares of the assessee stand as under:

Sr. No.	*Name of the Party*	*PAN*	*No. of Shares*	*Amount Introduced (Rs.)*
1.	*Vitale Bio Science Ltd.*	*AACV2768D*	*39784*	*11,13,95,200*
2.	*Pioneer Mercantile Leasing Ltd.*	*AADCP3995R*	*42054*	*11,77,51,200*
3.	*Pooja Green Belt Realty Pvt. Ltd.*	*AAECP4485B*	*10410*	*2,91,48,000*
4.	*S.J. Securities Ltd.*	*AAICS9627C*	*7142*	*1,99,97,600*
5.	*Incap Financial Services Ltd.*	*AABCI0538B*	*7142*	*1,99,97,600*
		Total	***106532***	***29,82,89,600***

5. The assessee for the year under consideration filed its return of incomedeclaring total income at Rs. Nil dated 30th September 2009 which was processed under Section 143(1) of the Act.

6. Subsequently a letter dated 23rd March 2016 from the DDIT (Inv) Unit-1, Ahmedabad was received by the AO. Based on such letter the following informations were observed by him (the AO):

i. There was a search under Section 132 of the Act conducted at the premises of Shri Partik R. Shah who was controlling and managing the companies which have subscribed the shares of the assessee company.

ii. Shri Partik R. Shah in the statement recorded during the search has admitted that he was engaged in providing the accommodation entries in the form of share capital, bogus purchases, bogus sales and the bogus investments through the companies as discussed above.

7. In view of the above, the AO initiated the income escapement proceedings under Section 147 of the Act by issuing a notice dated 30th March 2016 under Section 148 of the Act.

8. The assessee in response to such notice filed its return of income dated 27th April2016 declaring total income at Rs. Nil. The assessee subsequently vide letter dated 15thDecember 2016 furnished the PAN and other documents in support of share capital received by it from the above companies. The assessee in the same letter also requested for the cross-examination of Shri Partik R. Shah as the entire addition was proposed to be made on the search proceedings conducted at Shri Partik Shah.

9. However, the AO, based on the enquiries conducted by the department, during the proceedings found that:

i. Two companies namely M/s pioneer mercantile Ltd and M/s Vital bioscience private Ltd were not traceable at the given address.
ii. The financial position of the companies which subscribed the shares of the assessee company as discussed above were not healthy and having the capacity to make such huge investment in the assessee company.

10. The AO also of the view that the onus lies on the assessee to justify the share capital received by it on the basis of documentary evidence as well as to produce the parties which have made investment in the company. But the assessee instead of producing the parties, has requested for the cross-examination of Shri Partik Shah.

As per the AO, the assessee is trying to shift its burden upon the Revenue by requesting the cross-examination of Shri Partik Shah which is very vague.

11. The AO further in the assessment proceedings for the Assessment Year 2014-15 found that all the companies as discussed above have subsequently transferred their shareholdings to a partnership firm namely M/s Atul D. Amin at the face value of Rs. 10 per share despite the fact that these companies have acquired shares in the Assessment Year 2009-10 at a premium of Rs. 2790/- per share. One of the director in the assessee company namely Shri Atul D. Amin is the partner in the firm M/s Atul Dhiraj Amin. Accordingly, the AO was of the opinion that the entire modus operandi adopted by the assessee was to acquire the share capital through the accommodation entries to account for its unaccounted income. Hence, the AO treated the entire amount of share capital of Rs. 29,82,89,600/- as unexplained cash credit under Section 68 of the Act and added to the total income of the assessee.

12. Aggrieved assessee preferred an appeal to the Learned CIT (A).

13. The assessee before the Learned CIT (A) submitted that the AO has made the addition on the statement furnished by Shri Partik R. Shah which was obtained during the search proceedings. As such the AO treated Shri Partik Shah as his witness but failed to provide the opportunity for the cross-examination.

The assessee also contended that it has already discharged its initial onus cast under Section 68 of the Act by providing the details of the companies which subscribed the share capital. But the AO without pointing out any specific defect in such details has rejected the contentions raised by the assessee.

14. The Learned CIT (A) after considering the submission of the assessee held that the AO was under the obligation to provide the opportunity for the cross-examination of Shri Partik R. Shah but failed to do so despite the specific request

made by the assessee. The Learned CIT (A) also observed that even the statement of Shri Partik Shah was not provided to the assessee on the basis of which the additions were made by the AO.

15. Similarly, there was no evidence brought on record by the AO suggesting that name of the assessee has been recorded in the statement of Shri Partik Shah for taking the accommodation entry in the guise of share capital. There was no detail available about the modus operandi adopted by the assessee for taking such accommodation entries from the companies as discussed above. Likewise there was no detail about the exchange of cash by the assessee in return of accepting the money through the banking channel.

16. The Learned CIT (A) also found that the assessee has discharged its onus under Section 68 of the Act by providing the basic details for the identity and creditworthiness of the parties and genuineness of the transactions to the AO during the assessment proceedings. Accordingly, the onus was shifted from the assessee to the AO to disprove the documents filed by the assessee. As such there was no defect pointed out by the AO by conducting the necessary enquiries from the parties which subscribed the shares of the assessee company.

17. Furthermore, the AO also observed that Shri Partik R. Shah was not the director of the companies as discussed above. Similarly the AO has not brought anything on record suggesting that Shri Partik Shah was having any nexus with the companies as discussed above.

18. The Learned CIT (A) also held that the first proviso to Section 68 of the Act, applicable to the closely held companies, was brought by the Finance Act 2012 and was made applicable with effect from 1st April to 2013, wherein it was required to offer the explanation about the nature and source of money in the hands of the shareholder for accepting share application money as genuine. However, such

amendment was not applicable for the year under consideration as held by the Hon'ble Bombay High Court in the case of CIT vs. Gagandeep Infrastructure Pvt. Ltd. in Income Tax appeal No. 1613 of 2014 dated 20.03.2017.

19. In view of the above, the Learned CIT (A) deleted the addition made by the AO by observing as under:

> *"3.24. The AO has relied upon the judgment in the case of M/s. Navodaya Castle Pvt. Ltd. (supra), in support of the addition. However, the said decision is not applicable on the facts of the case for the reason that in appellant's case, no such notices and summons were issued though specifically requested by the appellant to the AO. Also, no cash was found to have been deposited in the bank account of the share subscriber companies. Rather there were sources of sources by cheques which clearly establishes the genuineness.*
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> *3.25. The appellant has filed a paper book in the appellate proceedings and at Page No. 99, 202, 253, 312 and 398 it has provided the details of sources of the subscribing companies from which even sources of the sources i.e. from where they received funds are established duly supported by relevant bank statements. The amount recovered by some of the share applicants which they had lent in the past are noticed which had been accepted as such by the department in the past. Nothing is brought on record to rebut the factual position and explanation by the AO. In view of the judgments of Honourable Gujarat High Court in the case of Rohini Builders and Ranchhodbhai Jivabhai Nakhava (supra) and also the decision of Hounourable ITAT in the case of Shri Upendrabhai Chinubhai shah [ITA No. 1552/Ahd/2015], wherein it is held that once assessee discharges primary onus cast upon it, the AO was not justified in making addition without any cogent material and cross examination offered to the appellant. Respectfully following the aforesaid binding judgments, on merits, the appellant deserves to be succeed.*
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> *3.26. In view of the above discussion, and respectfully following the judgments / decisions, the appellant has duly proved the identity, genuineness and creditworthiness with regard to the share capital introduced by the said companies and hence the same could not be treated as unexplained in the hands of the appellant u/s. 68 of the Act. Therefore the addition made by the AO is uncalled for and hence the same is deleted."*

20. Being aggrieved by the order of the Learned CIT (A), the Revenue is in appeal before us.

21. The Learned DR before us submitted that the assessee has failed to discharge the onus imposed under Section 68 of the Act, more particularly, creditworthiness of the companies which subscribed the shares of the assessee company. Furthermore, all the companies subscribing the shares of the assessee company were engaged in providing accommodation entries as admitted by Shri Partik R Shah in the statement

recorded during search proceedings. The learned DR before us vehemently supported the stand of the AO by reiterating the findings contained in his (the AO) which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity.

22. On the contrary, the Learned AR before us filed a Paper Book running from pages 1 to 592 and submitted that the copy of the statement of Shri Partik R Shah was not provided to the assessee despite the request made to the AO. As per the Learned AR the entire addition was based on the search materials gathered and the statement recorded during the search proceedings but the same was not provided for cross verification. Therefore, the order itself is bad in law.

23. The Learned AR further submitted that the assessee has duly discharge its onus imposed under Section 68 of the Act by furnishing the details of the identity of the parties, genuineness of the transactions and creditworthiness of the parties which are available in the paper book.

24. Both the Learned DR and the AR vehemently supported the order of the authorities below as favourable to them.

25. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion we note that the entire income escapement proceedings under Section 147 of the Act for the addition of Rs.29,82,89,600/- as unexplained cash credit under Section 68 of the Act was revolving to the statement/documents found during the search in the case of Shri Partik Shah who admitted that he was engaged in providing accommodation entries. In-deed, the assessee disclosed the impugned amount of share capital in the income tax return filed dated 30thSeptember 2009 which was also processed under Section 143(1) of the Act. But no question/query was raised by the Department with regard to such share capital raised by the assessee in any of the proceedings. Thus the

materials gathered by the investigation wing in the case of the Shri Partik R. Shah including his statement during the search proceedings was used against the assessee for treating share capital raised by the assessee as unexplained cash credit under Section 68 of the Act.

26. The Principles of Natural Justice requires that the Department which seeks to rely on the statement of a witness (Shri Partik R. Shah)has to allow the adverse party (the assessee) an opportunity of cross-examination of such witness. Admittedly, the opportunity for the cross examination of Shri Partik R. Shah was not provided to the assessee despite the request made by it (the assessee) which was sine qua non before making any addition. In this respect the Hon'ble Bombay High court in the case of Addl. CIT v. Miss Lata Mangeshkar [1974] 97 ITR 696 (Bom.) held as under:

> *"Revenue has got a tendency to make an addition on the basis of entries appearing in the books of a third party or a statement recorded from a third party or loose papers seized from a third party. In all such cases, it is imperative to afford an opportunity to the assessee to cross-examine the said third party."*

27. Similarly in CIT v. Eastern Commercial Enterprises [1994] 210 ITR 103, the Hon'ble Calcutta High court held that "Cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him. This necessarily also postulates that he should cross-examine the witness.

28. The Hon'ble Supreme Court in case of Kalra Glue Factory v. Sales Tax Tribunal [1987] 167 ITR 498 set aside the order of the Tribunal as well as order in revision of the High Court on the ground that the statements of a partner of another firm upon which the Sales Tax Tribunal relied, had not been tested by cross examinations.

29. The Hon'ble Delhi High Court also in case CIT v. Pradeep Kumar Gupta [2008] 303 ITR 95 (Delhi) held that where addition was sought to be made in reassessment proceedings only on the basis of statement, it was held that it was mandatory for the revenue to produce the proprietor for cross-examination by the assessee on its specific demand in that regard. Therefore, the reopening of assessment based on deposition of the third party was not justified.

30. It is also important to note that the onus of ensuring presence of the witness upon which the Revenue is relying, cannot be shifted to assessee. In other words, wherever Revenue wants to rely on the statement of third person for making addition, onus is on the AO to ensure the presence of that third person. That onus cannot be shifted to the assessee as third person is a witness of the AO. In this respect Hon'ble Delhi High Court in case of PCIT v. Best Infrastructure (India) (P.) Ltd. [2017] 84 taxmann.com 287 (Delhi) held as under:

> *"A copy of the statement of 'T' recorded under Section 132(4), was not provided to the assessees and he was also not offered for the cross-examination. The remand report of the Assessing Officer before the Commissioner (Appeals) unmistakably showed that the attempts by the Assessing Officer, in ensuring the presence of 'T' for cross-examination by the assessees, did not succeed. The onus of ensuring the presence of 'T', whom the assessees clearly stated that they did not know, could not have been shifted to the assessees. The onus was on the revenue to ensure his presence. Apart from the fact that 'T' has retracted from his statement, the fact that he was not produced for cross-examination is sufficient to discard his statement. [Para 37]"*

31. In the case on hand, the AO has relied on statement of Shri PartikR Shah for drawing adverse inference against the assessee but without providing the opportunity of cross-examination despite it was demanded by the assessee during the assessment proceedings. As such the AO has considered the request made by the assessee for the cross examination as very vague and beyond belief. The relevant finding of the AO reproduced as under:

> *"The assessee instead of complying with the department's query for producing the above persons for cross examination has put the responsibility on the department to produce the above persons in front of the assessee for cross examination, which is very vague and beyond belief."*

32. From the above there remains no ambiguity that no opportunity was provided by the Assessing Authority to rebut the material on the basis of which the assessing authority intended to proceed.

33. In brief, if AO intends to rely, for the purposes of making addition to the total income of the assessee, on the statement of the third party as a witness, then he has to summon such witness, record his statement, offer that witness to the assessee for cross examination. In this regard, it may be noted that it is the AO who is duty bound to provide opportunity of cross-examination of the witness, if he relies on the statement of such witness to decide against the assessee, particularly when it is demanded by the assessee at the AO stage. The illegality creeps in, the moment request for cross-examination is denied or is not accepted to. We also note that in one of the case the addition was made by the Revenue, inter-alia on the statement furnished by Shri Partik R Shah during search proceedings but the Tribunal was pleased to delete the addition in the case of Shri Pragnesh Ramanlal Patel Vs. ITO bearing ITA Nos. 2807 & 2808/AHD/2017 for the Assessment Year 2013-14 and 2014-15 by observing as under:

> *"18.We have noticed that the assessee have provided all the details related to the trading in securities during the course of assessment proceedings to the Assessing Officer. We have further noticed that the assessing officer has not examined/investigated the transactions in order to prove that the transactions were bogus and not genuine. The A.O. has not contradicted the claim of the assessee that there was no prohibition on carrying out off market transactions. The A.O. has referred the statement of Shri Prakik R. Shah that Vitale Biotech Ltd. has provided entries in respect of Amarpali Group but the A.O. has not provided any copy of any material or statement which can demonstrate that accommodating entries were also provided in the case of the assessee as the referred statement pointed out providing of entries in respect of Amarpali Group. The A.O. has not provided any suchcopy of statement or cross-examination to prove that the transactions carried out in the case of the assessee were not genuine. In the case of the assessee, the A.O. has not proved that documents were not genuine.*
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> *19.None of the parties has been examined with respect to genuineness of transactions. It was also submitted by the ld. counsel that trade in such bonds take place with reference to period of bonds credit rating of the issues etc and one may entered in to transactions at agreed price that of purchase and sale. It was also submitted that in the referred statement of Shri Pratik R. Shah, there was no any reference to the assessee to show that the bogus entries were provided to the assessee. It was also submitted by the ld. counsel that in compliance to summon u/s. 131 dated 11/02/2016, the assessee has already submitted all*

the requisite details vide letter dated 22/02/2016. Thereafter, there was no further reference to personal examination of assessee in the show cause notice was made by the A.O. Regarding issuing of summons u/s. 131 dated 11/02/2016 the A.O. had called for the following through the referred summons:

Books of account/documents to be produced

1. Copies of all bank accounts statements.

2. Copies of all Demat A/c along with copies of slips issued to depository allowing to transfer the bonds from your account to the buyers a/cs."

34. The above order of the Tribunal was subsequently confirmed by the Hon'ble Gujarat High Court reported in 416 ITR 106 wherein it was held as under:

"we are of the opinion that in the instant case, there is no substantial question of law which could be said to be arising from the order of the Tribunal. It cannot be argued on behalf of the Tribunal that the findings recorded by the Tribunal are based on no evidence and or while arriving at a said finding relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence or the evidence has been misread. We are of the opinion that on a conspectus of the factual scenario, noted above, the conclusion of the Tribunal that the Assessing Officer had raised number of doubts about the genuineness of the transactions without any supporting substantial question of law. The Tribunal, being a final fact finding authority, in the absence of demonstrated perversity in its finding, the interference therewith by this Court is not warranted."

35. Yet, the another controversy arises whether not affording opportunity to cross-examine a witness upon whose statement AO sought to rely for making addition is illegality leading to vitiating the assessment or is irregularity leading to setting aside of the assessment for providing opportunity for cross-examination of the witness by the assessee. This controversy has been resolved by the judgment of the Hon'ble Apex Court in the case of Andaman Timber Industries v. CCE [2015] 62 taxmann.com 3/52 GST 355 (SC), wherein the Hon'ble Apex Court observed as under-

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority, though the statements of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. "

From the above judgment it flows that when statements of witnesses are made the basis for the addition but without allowing assessee to cross-examine such witnesses, then the illegality creeps in which makes the order nullity, as it amounts to violation of principles of natural justice.

36. In other words where AO wants to rely on the statement of a witness (such as statement of entry operator recorded by investigation wing) to hold that share application money received by the assessee is not genuine but is only an accommodation entry then he has to provide copy of such statement to the assessee. Where the AO does not provide the copy of the statement of the witness then it is violation of principle of natural justice, and entire addition solely based on such statement is likely to be deleted.

37. Now coming to the merit of the case, we note that the dispute in the instant case relates to the share capital received by the assessee in the year under consideration from certain parties amounting to Rs. 29,89,820000/- which was treated as unexplained cash credit under Section 68 of the Act. The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 of the Act. These are:

(i) identity of the investors;

(ii) their creditworthiness/investments; and

(iii) Genuineness of the transaction.

The departments exercise starts only when these three ingredients are established prima facie, by the assessee and the department is required to investigate into the facts presented by the assessee. As per the statutory provision of Section 68 of the Act and jurisprudence of the Hon'ble Courts, it is clear that the primarily onus is on the assessee to discharge that the credit received by it is from the sources whose identity can be proved, the genuineness of the transaction and the

creditworthiness of the creditor is proved by documentary evidence. If the assessee presents all these details during the assessment proceeding before the AO, the responsibility shifts to the AO to prove it wrong. If AO accepts such evidences without proving it wrong, it can be said that assessee has discharged his onus. If AO presents some contrary evidences, the responsibility again shifts upon the assessee to rebut such contrary evidences.

38. Admittedly, in the case on hand, the assessee has discharged its onus by furnishing the necessary details such as copy of PAN and CIN, MOA/AOA, confirmation of the parties, Bank extracts etc. to support the transactions. The necessary details of the parties in support of the transactions are available in the Paper Book. Similarly, there is also no dispute to the fact that all the transactions were carried out through the banking channel. What is the inference that flows from a cumulative consideration of all the aforesaid contending facts is that the assessee has discharged its onus imposed under Section 68 of the Act. The details filed by the assessee was not cross verified by the Revenue from the respective parties despite having the necessary details in its possession. Thus, we are of the view, Revenue cannot go to hold the addition under Section 68 of the Act in the given facts and circumstances. In holding so, we draw support and guidance from the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Chanakya Developers reported in 43 taxmann.com 91 wherein it was held as under:

> *"9. We are in complete agreement with CIT (A) and the Tribunal both, who have concurrently held that the onus which was required to be discharged on the part of the assessee respondent was duly done. Not only the identity of the persons concerned but also the PAN numbers were before the Assessing Officer. In the event of any further inquiry, it was open to the Assessing Officer to make inquiry under Section 133(6) of the Act. On its choosing not to exercise such powers, it was erroneous on the part of the Assessing Officer to make addition of a sum of Rs. 23,00,000/-, despite such cogent evidences having been put-forth by the assessee. Both the authorities have concurrently held the issue in favour of the assessee and moreover, the entire issue is essentially in the realm of facts. No question of law, therefore, arises and hence this issue deserves no further consideration."*

39. Further we note that in case of CIT v. Orissa Corp. (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80 (SC), the Hon'ble Supreme Court held that where the assessee had given the names and addresses of the alleged creditors and it was in the knowledge of the Revenue that the said creditors were income-tax assessee. The Revenue, apart from issuing notices under Section 131 at the instance of the assessee, did not pursue the matter further and 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. It was further held that there was no effort made to pursue the so called alleged creditors and in those circumstances, the assessee could not do anything further. The findings and conclusion of the Tribunal were upheld that the assessee had discharged the burden that lay on him.

40. Similarly in case of Deputy CIT v. Rohini Builders [2002] 256 ITR 360/[2003] 127 Taxman 523 (Guj.), the Hon'ble Jurisdictional High Court relying on the judgment of the Hon'ble Supreme Court in the matter of Orissa Corp. (P.) Ltd. (supra) held that the assessee had discharged the initial onus which lays on it in terms of Section 68 of the Act by proving the identity of the creditors by giving their complete addresses, GIR numbers/permanent accounts numbers and the copies of assessment orders wherever readily available and has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source. It was held that merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing

Officer under Section 131, by the alleged creditors will not be sufficient to draw an adverse inference against the assessee.

From the above it is inferred that the principle, which is made applicable to addition under Section 68 of the Act is that the initial onus in on the assessee to discharge by producing the evidence which is required of him and once the assessee produces the evidence which is in his power and possession and which evidence prima facie proves the - (i) identity of the creditor; (ii) the capacity/creditworthiness of the creditor to advance the money; and (iii) the genuineness of the transaction, the onus shifts to the Assessing Officer to make further inquiries. The Assessing Officer cannot perfunctorily reject the evidence produced and has to state cogent reasons for such rejection.

41. Before parting, it is also pertinent to note that the notice under Section 148 of the Act was issued dated 30th March 2016 and the time available with the AO for the completion of the assessment under Section 147 of the Act was up to 31stDecember 2016. In other words the available time with the AO was of 9 months from the date of the issue of notice under Section 148 of the Act for the completion of the assessment under Section147 of the Act. Admittedly, the Department was also aware of the time available with it for the completion of the assessment. Accordingly, it was expected from the Department to Act swiftly for completing the assessment by making necessary enquiries within the time prescribed under the law and not to carry the matter till the fag-end of the assessment. However, what we find is that the notice under Section 143(2) of the Act was issued dated 18th October 2016 by the DCIT, Cir 2(1)(1) Ahmedabad. But the charge of the DCIT, Cir 2(1)(1) was subsequently transferred to ITO Ward 2(1)(1) by the Principal CIT-2 vide order dated 4thNovember 2016 under Section 120 of the Act. Subsequently, afresh notice was issued under Section 143(2) of the Act by the ITO Ward 2(1)(1) dated 30th November 2016 and the assessment was completed vide order dated 24thDecember

2016 within a period of 24 days only. Thus what is transpired is that the revenue has not given enough time to the case on hand despite having the necessary powers and other supporting machineries. But the question arises, the assessee should be suffered on account of the inefficiency of the Department. The answers stands in negative. It is because the assessee should not be suffered on account of the inefficiency of the Income Tax Department. In holding so we draw support and guidance from the judgement of Hon'ble Bombay High Court in the case of Nu-tech Corporate Services Limited vs. ITO reported in 98 taxmann.com 454 wherein it was held that:

> *"By allowing the Writ Petition and without visiting the concerned officials with any consequences would send a wrong message. We must as a part of our duty send strong signal and message that we do not tolerate any inefficiency and lapse in the working and functioning of this Department. Hence, while we allow the Writ Petition, we impose costs on the Respondents which are quantified in the sum of Rs.1.5 Lakhs. The costs to be paid to the Petitioner within a period of four weeks from today. The costs be apportioned between the officer who is present in Court and the officer who was his predecessor. The amounts shall be in the first instance paid by the Respondents and thereafter they shall be recovered from the salaries of these two officers. Equally, the lapses and errors on their part be noted by taking due cognizance of this order. The superiors should enter in their Annual Confidential Reports these lapses and errors on account of which the Respondents faced this embarrassment in the Court. Once the Respondents could not justify their acts and solely because of the inefficiency of these officials, then, the superiors must initiate the requisite steps and if they include denial of any promotional or monetary benefits to such officials, then, even then such steps and measures be initiated in accordance with law. That is the minimal expectation of this Court."*

Moving further to the observation made by the AO that the aforesaid companies have transferred the shares in the subsequent year to a firm namely M/s Atul D. Amin in which one of the partner is a director in the company at face value only (without the share premium). In this regard, we note that the transaction for transferring the shares as discussed above has taken place in the subsequent years. This transaction can create a doubt/suspicion about the genuineness of the transactions but this is not sufficient enough to treat the share capital as unexplained cash credit under Section 68 of the Act for the reasons that the AO has not provided sufficient opportunity to the assessee which has been discussed in detail in the preceding paragraph. Moreover, there can be change in the facts and circumstances

in the year when the company has issued shares at premium viz a viz the year in which the director has acquired shares from the said companies.

There was no fact brought on record whether Shri Atul D. Aminwas also a director in the assessee company during the relevant time when the shares were issued to the aforesaid companies and he (ShriAtul D. Amin) was involved in the arrangement of issuing the shares at premium. There was neither recorded any statement nor any clarification sought from Shri Atul D. Amin by the AO under section 131/133(6) of the Act. This observation of the AO appears to be significant but the same cannot be referred in the absence of necessary verification by the AO.

42. We also note that the case law referred by the AO i.e. M/s Navodaya Castle Pvt. Ltd. vs. CIT reported in 56 taxmann.com 18 is factually distinguishable from the facts of the present case insofar the material gathered by the AO for making the addition was not confronted to the assessee. Accordingly, in our humble understanding, the same cannot be referred for deciding the issue on hand.

43. In view of the above, we are not impressed with the finding of the AO. Accordingly, we concur with the finding of the Learned CIT (A) and direct the AO to delete the addition made by him. Hence, the ground of appeal of the Revenue is dismissed.

44. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the Court on 11th November,2020 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 11/11/2020
TANMAY, Sr. PS

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

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

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy// **उप/सहायक पंजीकार** (Dy./Asstt.Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad