



ITA Nos.631 & 632/Mum/2019  
M/s. Bini Builders Pvt. Ltd.  
Assessment Years :2011-12 & 2012-13

**आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“B” BENCH, MUMBAI**

**माननीय श्री महावीर सिंह, उपाध्यक्ष एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No. 631/Mum/2019  
(निर्धारण वर्ष / Assessment Year: 2011-12)

&

आयकर अपील सं./ I.T.A. No.632/Mum/2019  
(निर्धारण वर्ष / Assessment Year: 2012-13)

<b>M/s. Bini Builders Pvt. Ltd.</b> 203/204, Raigad Darshan Opp. Indian Oil Co., J.P. Road Andheri West, Mumbai – 400053.	<b>बनाम/</b> <b>Vs.</b>	<b>DCIT-Central Range-7(3),</b> R. No. 655, 6 <sup>th</sup> Floor M.K. Road, Churchgate, Mumbai – 400020.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. <b>AACCB-3447-R</b>		
(□ पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	Mr. Vimal Punmiya- Ld. AR
<b>Revenue by</b>	:	Ms. Kavita P. Kaushik-Ld. DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	:	29/01/2020
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	12/03/2020

**आदेश / ORDER**

**Manoj Kumar Aggarwal (Accountant Member)**

1. As per the provisions of Section 68 of the Income Tax Act, 1961, where any sum is found credited in the assessee’s books and assessee offers no explanation about the nature and source thereof or the explanation furnished is found to be unsatisfactory, the sum so credited may be charged to Income-Tax as the income of the assessee of that



previous year. A proviso has been inserted to the said section by Finance Act, 2012 w.e.f. 01/04/2013 to provide that where the assessee is a company and the sum so credited consists of share application money, share capital, share premium etc., the explanation furnished by the assessee shall be deemed to be not satisfactory unless the person in whose name such credit is recorded also offers an explanation about nature and source of sum so credited and such explanation is found to be satisfactory. However, this proviso is applicable only from AY 2013-14 and the same is not retrospective in nature as held by Hon'ble Bombay High Court in the case of **CIT Vs. Gagandeep Infrastructure Private Limited [80 Taxmann.com 272]**. The said position has also been reiterated by Hon'ble Bombay High Court in its recent decision tilted as **Gaurav Triyugi Singh V/s ITO (ITA No.1750 of 207, dated 22/01/2020)** which also consider its earlier decision of **Pr.CIT V/s Veedhata Towers Pvt. Ltd. (2018 403 ITR 415)**.

2. It is settled position of law that to avoid the rigors of Section 68, the assessee must prove the identity, creditworthiness of the lenders / investors to advance such monies and genuineness of the transactions. Once these three ingredients are fulfilled by the assessee, the primary onus casted upon him, in this regard, could be said to have been discharged and accordingly, the onus would shift upon revenue to dislodge the assessee's claim by bringing on record material evidences and unless this onus is discharged by the revenue, no addition could be sustained u/s 68. The Hon'ble Supreme Court in the case of **Lovely Exports P. Ltd. [319 ITR 5]**, dismissing revenue's appeal, observed as under: -



ITA Nos.631 & 632/Mum/2019  
M/s. Bini Builders Pvt. Ltd.  
Assessment Years :2011-12 & 2012-13

2. Can the amount of share money be regarded as undisclosed income under section 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.
3. Subject to the above, Special Leave Petition is dismissed.

The ratio of said decision has subsequently been followed by various judicial authorities in catena of judicial pronouncements. The said decision has been followed by Hon'ble Bombay High Court in the case of **CIT Vs. Gagandeep Infrastructure Private Limited [80 Taxmann.com 272]** & subsequently in **CIT Vs. Orchid Industries Private Limited [88 Taxmann.com 502]**. The Hon'ble Delhi High Court followed the said decision in **Pr. CIT V/s Adamine Construction Pvt. Ltd. [107 Taxmann.com 84]** against which revenue's Special Leave petition was dismissed by Hon'ble Supreme Court reported at 107 Taxmann.com 85. Similar is the position of decision of Hon'ble Delhi High Court rendered in **Pr. CIT V/s Himachal Fibers Ltd. [98 Taxmann.com 72]** against which revenue's Special Leave Petition was dismissed by Hon'ble Supreme Court reported at 98 Taxmann.com 173. Similar is the decision of Hon'ble High Court of Madhya Pradesh in **Pr. CIT V/s Chain House International Pvt. Ltd. [98 Taxmann.com 47]** against which revenue's Special Leave Petition has recently been dismissed by Hon'ble Supreme Court on 18/02/2019 reported at 103 Taxmann.com 435.

3. Similar is the recent decision of Hon'ble Bombay High Court in **Pr. CIT V/s Ami Industries (India) Pvt. Ltd. [ITA No. 1231 of 2017, dated 29/01/2020]** which has been rendered after considering the principles laid down by Hon'ble Supreme Court in its recent decision titled as



## **Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd. [412 ITR 161]. The Hon'ble**

**Court held as under: -**

10. Mr. Suresh Kumar, learned standing counsel, revenue has taken us through the assessment order and submits therefrom that it cannot be said that assessee had discharged the burden to prove credit worthiness of the creditors. His further contention is that the assessee is also required to prove the source of the source. In this connection, he has placed reliance on a decision of the Supreme Court in **Pr. CIT Vs. NRA Iron & Steel Pvt Ltd**. He, therefore, submits that the finding returned by the Tribunal is wholly erroneous and requires to be interfered with by this Court.

11. Per contra, Mr. Padvekar, learned counsel for the respondent submits that from the facts and circumstances of the case, it is quite evident that assessee had discharged its burden to prove identity of the creditors, genuineness of the transactions and credit worthiness of the creditors. He submits that the legal position is very clear in as much as assessee is only required to explain the source and not source of the source. Decision of the Supreme Court in NRA Iron & Steel P Ltd (supra) is not the case law for the aforesaid proposition. In fact, the said decision nowhere states that assessee is required to prove source of the source.

11.1. Referring to the orders passed by the authorities below, Mr. Padvekar submits that in the present case, the investigation wing of the department had carried out detailed investigation at Kolkata and found the source of the credit to be genuine. This report of the investigation wing was not taken into consideration by the Assessing Officer. Therefore, lower appellate authorities were justified in deleting the additions made by the Assessing Officer. Being a finding of fact, no substantial question of law arises in the appeal. Therefore, the appeal should be dismissed.

12. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

13. Section 68 of the Act deals with cash credits. As per Section 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. Simply put, the section provides that if there is any cash credit disclosed by the assessee in his return of income for the previous year under consideration and the assessee offers no explanation for the same or if the assessee offers explanation which the Assessing Officer finds to be not satisfactory, then the said amount is to be added to the income of the assessee to be charged to income tax for the corresponding assessment year.

14. Section 68 of the Act has received considerable judicial attention through various pronouncements of the Courts. It is now well settled that under Section 68 of the Act, the assessee is required to prove identity of the creditor; genuineness of the transaction; and credit worthiness of the creditor. In fact, in NRA Iron & Steel (P) Ltd (supra), Supreme Court surveyed the relevant judgments and culled out the following principles:

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.
- ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor / subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.
- iii. If the inquiries



ITA Nos.631 & 632/Mum/2019  
M/s. Bini Builders Pvt. Ltd.  
Assessment Years :2011-12 & 2012-13

and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

15. It is also a settled proposition that assessee is not required to prove source of source. In fact, this position has been clarified by us in the recent decision in **Gaurav Triyugi Singh Vs. Income Tax Officer-24(3)(1)**.

16. Having noted the above, we may now advert to the orders passed by the authorities below.

17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under Section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under Section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that nonresponding to notice would not ipso facto mean that the creditors had no credit worthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and creditworthiness of the creditors were available, without any infirmity in such evidence and the explanation required under Section 68 of the Act having been discharged, Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

19. In appeal, Tribunal noted that before the Assessing Officer, assessee had submitted the following documents of the three creditors:

- a) PAN number of the companies;
- b) Copies of Income Tax return filed by these three companies for assessment year 2010-11;
- c) Confirmation Letter in respect of share application money paid by them; and
- d) Copy of Bank Statement through which cheques were issued.

20. Tribunal noted that Assessing Officer had referred the matter to the investigation wing of the department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the investigation wing was received, Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the investigation wing, it was mentioned that the companies were in existence and had filed income tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted credit worthiness of the three creditors. Finally, Tribunal held as under:

"5.7 As per the provisions of Section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following (a) Identity of the creditor (b) Genuineness of the transaction (c) Credit-worthiness of the party  
(i) In this case, the assessee has already proved the identity of the share applicant by furnishing their PAN, copy of IT return filed for asst. year 2010-11.



ITA Nos.631 & 632/Mum/2019

M/s. Bini Builders Pvt. Ltd.

Assessment Years :2011-12 & 2012-13

(ii) Regarding the genuineness of the transaction, assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii) Regarding credit-worthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their Board of Directors.

(iv) Regarding source of the source, Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, assessee need not to prove the source of the source.

(v) Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent company's own income from undisclosed sources.

Accordingly, no addition can be made u/s.68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In NRA Iron & Steel (P) Ltd (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

21. Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and credit-worthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. Appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

22. Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost.

4. Keeping abovesaid legal position in mind, we find that the assessee is under appeal before us for Assessment Years [in short referred to as 'AY'] 2011-12 & 2012-13 contesting the order of learned first appellate authority confirming certain addition u/s 68.



## **ITA No. 631/Mum/2019, AY 2011-12**

5.1 The assessee assails the order of Ld. Commissioner of Income-Tax (Appeals)-49, Mumbai [in short referred to as 'CIT(A)'], *Appeal No. CIT(A)-49/IT-164/2017-18 dated 05/12/2018* on following grounds of appeal: -

1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the reopening the case u/s 148 which is bad in law.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the assessment order passed u/s. 143(3) of the Income Act 1961 by the Ld. Assessing Officer is against the principal of natural justice, hence bad-in-law.
3. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the passing assessment order without providing opportunity to rebut the material relied by Ld Assessing Officer during the reassessment proceedings examination which is against the principal of natural justice and hence the said order is liable to be quashed.
4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition in respect of the Share Capital and Share Premium of Rs. 2,07,00,000/- as unexplained cash credit u/s. 68 of the Income Tax Act, 1961 without corroborative evidences.
5. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not permitting of business loss Rs.60,602/-
6. On the facts and circumstances of case and in law, Ld. CIT(A) erred in confirming initiation of penalty proceeding u/s.274 r.w.s 271 (1) (c) of Income Tax Act 1961.
7. On the facts and circumstances of the case and law the Ld. CIT (A) erred in set-aside for fresh calculations of interest under section 234A, 234B and 234C of the Income Tax Act, 1961.

Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged as *builders & developers* was subjected to an assessment u/s 143(3) r.w.s. 147 on 22/12/2017 wherein the income of the assessee was determined at Rs.207.60 Lacs after certain addition u/s 68 for Rs.207 Lacs as against returned income of Rs.0.60 Lacs e-filed by the assessee on 30/09/2011 which was processed u/s 143(1).

5.2 Subsequently, upon formation of belief that certain income escaped assessment in the hands of the assessee, the case was reopened as per due process of law vide issuance of notice u/s 148 dated 24/02/2017.



The reasons for reopening were duly communicated to the assessee. In response, the assessee offered original return of income. No objections were filed against initiate of reassessment proceedings. Subsequently, statutory notices u/s 143(2) & 142(1) were issued wherein the assessee was required to file the requisite details / information / documentary evidences etc. in support of certain transactions of Share Capital.

5.3 The reassessment proceedings were triggered pursuant to a search / seizure / survey action conducted by the department in the case of Lotus / Kamdhenu / Greenvalley group of cases wherein it transpired that the assessee received sum of Rs.207 Lacs as Share Capital from certain Kolkata based companies. The same comprised-off of 20,70,000 equity shares of Rs.10/- each totaling to Rs.207 Lacs. The details of the same was as follows: -

No.	Name of Investor entity	No. of Shares Allotted	Money recd. As Share Capital
1.	Limelight Dealcom P. Ltd.	1.5 Lacs	Rs.15 Lacs
2.	Classic Commotrade P. Ltd.	0.5 Lacs	Rs.5 Lacs
3.	Divy Prakash Suppliers Pvt. Ltd.	2.5 Lacs	Rs.25 Lacs
4.	Goldy Dealcom P. Ltd.	2.5 Lacs	Rs.25 Lacs
5.	Nextgen Tradecom P. Ltd.	1.8 Lacs	Rs.18 Lacs
6.	Rexnox Trexim P. Ltd.	2.0 Lacs	Rs.20 Lacs
7.	Rajlaxmi Dealcom P. Ltd.	1.8 Lacs	Rs.18 Lacs
8.	Vanila Tie-up P. Ltd.	1.5 Lacs	Rs.15 Lacs
9.	Kamakhya Goods P.Ltd.	2.4 Lacs	Rs.24 Lacs
10.	Camellia Commercial Pvt. Ltd.	1.0 Lacs	Rs.10 Lacs
11.	Anmot Commerce P.Ltd.	3.2 Lacs	Rs.32 Lacs
	<b>Total</b>	<b>20.7 Lacs</b>	<b>Rs.207 Lacs</b>

5.4 During the course of survey u/s 133A on 09/10/2014, Shri Rajesh Agarwal, an associate of the group, in his statement under oath u/s 131, made admission of sum of Rs.11.13 Crores as undisclosed income of the group. However, the said statement was retracted immediately on



16/10/2014 by submitting an affidavit that the statements were extracted by applying undue influence without there being any incriminating evidences on record.

5.5 The findings of search operations revealed that entities of Shri Rajesh Agarwal received unsecured loan / share application money of around 30 Crores from various Kolkata based parties. Shri Rajesh Agarwal was stated to be director of around 28 entities including that of assessee. It transpired that the assessee company received total share capital of Rs.432.22 Lacs during financial years 2008-09 to 2011-12. The amount disclosed with respect to the assessee entity was Rs.90.45 Lacs for financial years 2008-09 to 2011-12. However, it was noted that money also came from 25 other entities also which had common addresses with admitted as well as non-admitted companies /common directors with admitted as well as non- admitted companies. It also transpired that the entities of Shri Rajesh Agarwal received share capital from 67 companies, the details of which have been extracted on page nos. 14 to 21 of the quantum assessment order.

5.6 In case of the assessee, to verify the transactions, notices u/s 133(6) were issued to the 11 entities. However, no reply was received in 8 cases and the notice remained unserved in 4 cases.

5.7 Summon u/s 131 were issued to Shri Rajesh Agarwal during the course of assessment proceedings and his statement was record on 09/12/2016 wherein the Shri Rajesh Agarwal stood by the retraction affidavit. He maintained that the he was coerced by survey team to make false deposition and the conclusion that bogus share money was received was merely on the basis of surmises and conjectures.



5.8 However, disregarding the same, allegation was leveled that investor entities gifted money to the assessee for no apparent business purposes. The retraction was nothing but an after-thought. Since, the assessee could not prove the source and nature of transactions, the stated amount was added to the income of the assessee u/s 68.

6.1 Aggrieved, the assessee assailed the action of Ld. AO on legal grounds as well as on merits. Challenging reassessment proceedings, the assessee submitted that the assessee's group had no connection with Lotus / Kamdhenu / Greenvalley group except that Shri Bhagwanji Patel of Lotus group was one of the ex-directors in one of the group companies of the assessee viz. Axayraj Buildwell Pvt. Ltd. and Shri Bhagwanji Patel ceased to be director of Axayraj Buildwell Pvt. Ltd. in 2009. The assessee submitted that in the absence of tangible material, Ld. AO had no jurisdiction to issue notice u/s 148.

6.2 However, the legal submissions challenging reassessment proceedings could not find favor with Ld. CIT(A) who observed that no scrutiny took place u/s 143(3) and there was no scope for Ld. AO to examine the share capital / share premium. The Ld. AO had authentic information by way of appraisal report of the search in the case of Lotus group and the assessee's admissions during search compelled him to take action u/s 147. The subsequent retraction would not have any relevance since the onus would be on assessee to prove that the statement was factually wrong. The Ld.AO recorded elaborate reasons after giving analysis of the companies which have not only invested in assessee company but also of the companies which have invested in the investor companies. Therefore, Ld. AO had sufficient reason to believe



that income had escaped assessment in the hands of the assessee. Therefore, the legal grounds challenging reassessment proceedings were dismissed. The reasons that triggered reassessment proceedings have been extracted in para 6.0 of the impugned order, which we have perused.

6.3 On merits, the assessee assailed the quantum addition by way of elaborate submissions which have been extracted in para 7.1 of the impugned order. The assessee drew attention to the documents submitted by the assessee with respect to investor entities to establish their identity, creditworthiness and genuineness of the transactions. It was submitted that each and every shareholder confirmed the stated transactions therefore, findings rendered by Ld.AO run contrary to the provisions of Sec. 68. The assessee maintained that by submitting these details, it had discharged the primary onus of proving the stated transactions. All the investor entities had enough funds to invest in the assessee company. Reliance was placed on catena of judicial pronouncements to support the said submissions. These have already been tabulated in assessee's submissions. Therefore, the assessee submitted that additions as made by Ld. AO were uncalled for in the light of documentary evidences furnished by the assessee.

6.4 The Ld. CIT(A), at para 7.3 of the impugned order, noted that the assessee had submitted share application form, copy of cheque, cheques deposit slips, copy of assessee's bank statement, copy of share certificates, copy of source of funds, copy of board resolution, certificate of incorporation, copy of Memorandum of Association (MOU) etc. with respect to 11 investor entities. However, the same would not prove the



genuineness of the transactions. It was observed that investor entities did not have any genuine business activity which was evident from the fact that main object of the investor entities contained all activity possible and would indicate the mala-fide intentions of the assessee. Any genuine company with a real motive of doing business would have a concrete object to be followed. Further, there was no justification for Kolkata based entities to make investment in Mumbai based entity and that too, at a premium of Rs.90/- per share. At para 7.6, it was noted that all the entities purchased the shares of the assessee at premium of Rs.90/-per share but they exited at face value of Rs.10/- per share. Further, the retraction would not have any relevance in the light of decision of Mumbai Tribunal in Hiralal Maganlal and Co V/s DCIT (97 TTJ 377). The case laws being relied upon by the assessee were held to be distinguishable rather reliance was placed on the decision of Hon'ble Delhi High Court in **Nova Promoters & Finlease Pvt Ltd. 342 ITR 169** to confirm the additions. Finally, the additions were confirmed by observing as under: -

**7.8** The Learned Counsel also alleged that the AO made the addition on the basis of suspicion and not evidences. This also is not correct as the AO had brought in enough evidences both direct and corroborative to come to the conclusion that the share capital and premium received by the assessee are not genuine. As could be seen from the assessment order and from the discussion made above, the Learned Counsel further alleged that the AO has no material in his possession to prove the same and that he made the addition on the basis of information from investigation wing and without any independent enquiry made by the AO. This also is incorrect as the AO had in-depth information not only about the 11 companies which have invested in the assessee company but also about the 67 companies which have invested in the said 11 companies. The AO had made exhaustive enquiry and analysis before reaching to this conclusion. The Learned Counsel has also alleged that the Third Party Unilateral Act cannot be the basis of addition but the addition, in this case, has been made not on the basis of Third Party Unilateral Act but on the basis of the assessee's own admission supported by other



corroborative evidences. In the light of these facts and circumstances, the addition made by the AO is confirmed. The grounds of appeal are dismissed.

Aggrieved the assessee is under further appeal before us.

7. We have carefully heard the arguments advanced by respective representatives and perused relevant material on record including documents placed in the paper-book. We have also deliberated on various judicial pronouncements as cited before us. We have already appreciated the settled legal position regarding addition u/s 68 as enumerated by us in the opening paragraphs. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

8.1 Upon careful consideration, the facts that emerges are that the assessee has issued 20.70 Lacs shares to as many as 11 corporate entities during the year as tabulated in para 5.3 above. As evident from documents on record, these shares were issued at face value of Rs.10/- per share. The Share Capital of the assessee increased by Rs.207 Lacs during the year under consideration. In the light of settled legal position as enumerated by us in the opening paragraphs, it is quite evident that the primary onus was on assessee to prove the fulfilment of three ingredients of Sec. 68 viz. (i) identity of the investor; (ii) creditworthiness of the investors; & (iii) genuineness of the transactions.

8.2 To demonstrate fulfillment of these ingredients, the assessee had during the course of assessment proceedings as well as appellate proceedings, furnished following broad documentary evidences with respect to all the 11 entities: -

- (i) Share Application Form
- (ii) Copy of Cheque
- (iii) Copy of Cheque Deposit Slip
- (iv) Copy of investor's Bank Statement



- (v) Copy of Share Certificate Counterfoil
- (vi) Copy of Audit Report along with financial statements of the investor entity
- (vii) Copy of ITR acknowledgement of the investor entity
- (viii) Copy of Certificate of incorporation of investor entity
- (ix) Memorandum & Articles of Association of investor entity
- (x) Company Master Data showing status as active
- (xi) Copy of Board Resolution

The assessee's own bank statement was also placed on record which would show that all the transactions have taken through banking channels. Upon careful consideration of these documents, we find that so far as the identity of the investor entities are concerned, the same stand proved by certificate of incorporation which is held to be conclusive proof of registration of a corporate entity. The creditworthiness of the entities would stand satisfied by the financial statements of the investor entities, which are also placed on record. The genuineness of the transactions would stand proved by the fact that the transactions were duly supported by share application form, share certificates, copy of board resolution and by the fact that ultimately the shares were allotted to all these entities. The assessee has tabulated the net worth of all these entities in the following manner: -

No.	Name of Investor	Amount of Share Capital invested	Share Capital of investor entity	Reserves of Investor entities	Net worth of investor entities
1	Limelight Dealcom P. Ltd.	15,00,000	16,85,000	3,01,30,806	3,18,15,806
2	Classic Commotrade P. Ltd.	5,00,000	6,51,800	2,70,49,015	2,77,00,815
3	Divy Prakash Suppliers Pvt. Ltd.	25,00,000	1,00,02,450	33,68,50,695	34,68,53,145
4	Goldy Dealcom P. Ltd.	25,00,000	7,21,000	3,04,44,166	3,11,65,166
5	Nextgen Tradecom P. Ltd.	20,00,000	57,65,000	10,76,35,000	11,34,00,000
6	Rexnox Trexim P. Ltd.	18,00,000	1,15,57,100	15,93,97,977	17,09,55,077
7	Rajlaxmi Dealcom P. Ltd.	18,00,000	60,10,000	11,22,95,755	11,83,05,755
8	Vanilla Tie-up P. Ltd.	15,00,000	13,50,000	6,12,92,898	6,26,42,898
9	Kamakhya Goods P. Ltd.	24,00,000	7,72,000	3,29,46,126	3,37,18,126



ITA Nos.631 & 632/Mum/2019  
M/s. Bini Builders Pvt. Ltd.  
Assessment Years :2011-12 & 2012-13

10.	Camellia Commercia P Ltd	10,00,000	8,32,280	3,58,97,644	3,67,29,924
11	Anmol Commerce P Ltd	32,00,000	1,81,03,500	28,24,38,553	30,05,42,053
	<b>TOTAL</b>	<b>207,00,000</b>	<b>5,74,50,130</b>	<b>1,21,63,78,635</b>	<b>1,27,38,28,765</b>

The perusal of net worth chart would reveal that all the investor entities had sufficient net worth to make stated investment in the assessee company. Upon perusal of all these documentary evidences, it could safely be concluded that the assessee had successfully discharged the onus casted upon him u/s 68 and the onus was on revenue to rebut assessee's evidences.

8.3 Proceeding further, we find that the sole basis of making impugned addition is the statement of one of the directors as recorded during the course of survey proceedings u/s 133A. However, this statement has been retracted within a span of 7 days. It is settled law that statements recorded during the course of survey proceedings would not have much evidentiary value unless the same are backed by credible evidences. This position has been settled by Hon'ble Supreme Court in the case of **CIT V/s S.Khader Khan & Sons (25 Taxmann.com 413)**. The CBDT instructions No. F.No.286/98/2013-IT (Inv. II) dated 18/12/2014 also discourages confessional statements without any credible evidences. No incriminating material is shown to have been found during the course of survey proceedings.

8.4 We also find that learned CIT(A) has gone by irrelevant considerations to confirm the impugned additions. The object clause of the investor entities would have no relevance vis-à-vis proposed additions in the hands of the assessee u/s 68. It is trite law that no



additions could be made merely on the basis of suspicion, conjectures or surmises.

8.5 The Ld. DR has relied upon the case of Hon'ble Supreme Court in **Sumati Dayal Vs CIT (80 Taxman 89) & Durga Prasad More (82 ITR 540 26/08/1971)**. No doubt that the revenue authorities were not required to put blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the documents produced before them. However, we find that no such inquiries have been made by the authorities except for the allegations that the share capital was bogus in nature. Nothing was brought on record that to substantiate the fact that the assessee's unaccounted money was routed in the books in the garb of share capital.

8.6 The entirety of facts and circumstances as enumerated hereinabove do not convince us to concur with the stand of Ld. CIT(A). The impugned additions, in our considered opinion, could not be sustained under law in the light of binding judicial pronouncements as enumerated by us in the opening paragraphs. Therefore, we delete the same. Consequently, the set-off of losses, as allowable under law, would be available to the assessee. Ground Nos. 4 stand allowed. Ground No.5 stand allowed for statistical purposes. Ground Nos. 6 to 8, being consequential in nature, would not require any specific adjudication on our part.

8.7 So far as the legal grounds are concerned, we find that the original return was processed u/s 143(1) and the only requirement in law to trigger assessment was that Ld. AO certain reasons to believe that certain income escaped assessment in the hands of the assessee. We



ITA Nos.631 & 632/Mum/2019  
M/s. Bini Builders Pvt. Ltd.  
Assessment Years :2011-12 & 2012-13

find that Ld. AO was clinched with tangible information from investigation wing which suggested possible escapement of income in the hands of the assessee. In our opinion, nothing more was required at this stage since Ld. AO had sufficient reasons to form such a belief. Therefore, we do not find much substance in assessee's legal grounds. Ground Nos. 1 to 3 stand dismissed.

8.8 The appeal stands partly allowed in terms of our above order.

**ITA No. 632/Mum/2019, AY 2012-13**

9. Facts are pari-materia the same in this year. An assessment was framed u/s 143(3) r.w.s. 147 on 22/12/2017 on similar lines wherein the assessee was saddled with addition u/s 68 for Rs.75 Lacs. The impugned order is on similar lines. The assessee is before us broadly with similar grounds of appeal. The assessee, in support of transactions, has placed on record similar set of documentary evidences. Facts being pari-materia the same, our adjudication as for AY 2011-12 shall *mutatis mutandis* apply to this year also. Resultantly, the appeal stands partly allowed.

**Conclusion**

10. Both the appeals stand partly allowed.

*Order pronounced in the open court on 12<sup>th</sup> March, 2020.*

**Sd/-**  
**(Mahavir Singh)**

उपाध्यक्ष / **Vice President**

**Sd/-**  
**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 12/03/2020  
Sr.PS, Jaisy Varghese



ITA Nos.631 & 632/Mum/2019  
M/s. Bini Builders Pvt. Ltd.  
Assessment Years :2011-12 & 2012-13

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**