

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : E : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA Nos.929 & 930/Del/2019
Assessment Years : 2013-14 & 2014-15

Nimbus (India) Ltd.,
C/o RRA TAXINDIA,
D-28, South Extension, Part I,
New Delhi.

Vs DCIT,
Central Circle,
Noida.

PAN : AABCN6610K

(Appellant)

(Respondent)

Assessee by	:	Dr. Rakesh Gupta, Advocate, Shri Somil Aggarwal, Advocate & Shri R.P. Basi, CA
Revenue by	:	Smt. Parmita M. Biswas, CIT, DR
Date of Hearing	:	09.12.2019
Date of Pronouncement	:	10.02.2020

ORDER

PER R.K. PANDA, AM:-

The above two appeals filed by the assessee are directed against the common order dated 30.11.2018 of the CIT(A)-4, Kanpur, relating to Assessment Years 2013-14 and 2014-15, respectively.

2. Since common issues are involved in both these appeals, therefore, these appeals were heard together and are being disposed of by this common order for the sake of convenience.

3. First we take up ITA No.929/Del/2019 as the lead case. Facts of the case, in brief, are that a search and seizure operation u/s 132 of the Act was conducted on 26th August, 2015 in the premises of the assessee comprising IITL Nimbus Group of cases. The group is engaged in the business of sale of plots in the territorial area of Ghaziabad, Delhi and Noida. In response to the notice issued u/s 153A dated 26th July, 2017, the assessee filed its return of income on 11th August, 2017, declaring total income at Rs.5,05,16,000/-. During the course of assessment proceedings, the AO noted that the assessee has issued 8% non-cumulative preferential shares of its companies to below mentioned companies at a premium of Rs.90/- per share, the details of which are as under:-

Subscriber Name	Addition during the year	Share Capital @ Rs.10/- per share	Share Premium @ Rs.90/- per share
Cindy Goods & Supply Pvt. Ltd.	14,50,00,000/-	1,45,00,000/-	13,05,00,000/-
M/s Pabla Leasing & Finance Pvt. Ltd.	15,00,00,000/-	1,50,00,000/-	13,50,00,000/-
	29,50,00,000/-	2,95,00,000/-	26,55,00,000/-

4. He, therefore, asked the assessee to furnish the details of share capital/share premium and source of investment. In response to the same, the assessee submitted copies of share certificates, copy of bank statements, income-tax return

and audited balance sheet. It was submitted that all the share subscription money were received through banking channel only. The subscribers are available on the address given and all the companies are also assessed to income-tax and carry on regular business. It was submitted that the investors have sufficient funds for making investments in the assessee company. It was further submitted that the sources of investment of a person is not his income only, but also include his capital and other sources of funds.

5. However, the AO was not satisfied with the arguments advanced by the assessee. So far as M/s Cindy Goods & Supply Pvt. Ltd. is concerned, he noted that the said company was incorporated on 21st March, 1995 with its registered office at Kolkata. This company is controlled and managed by the directors Mr. Madan Gopal Sharma and Mr. Virendra Tripathy who holds substantial shares in M/s Bonanza Vanijya Pvt. Ltd. and M/s Brijdham Merchandise Pvt. Ltd., having 49.96% shares each. These directors are also the directors in various other companies based in Kolkata. He noted that in the impugned assessment year, this company has declared income of Rs.11,146/- from business and profession. Its authorized share capital is Rs.4.51 crores and reserves and surplus is Rs.4,50,40,000/-. It has received an amount of Rs.34,37,25,000/- as share premium. From the analysis of the bank statements, he noted that an amount of Rs.5 crore was received from M/s World Resorts Limited on 07th September, 2012

and Rs.3.50 crores on 21st August, 2012 from various unknown entities and finally transferred to assessee company on 03.09.2012.

6. Similarly, in the case of M/s Pabla Leasing & Finance Pvt. Ltd., the AO noted that this company is also a company registered at Kolkata whose directors are Tarun Goel and Anil Kumar Goel. These directors are also common directors in the companies from which the Nimbus Group has taken loan/share capital. He noted that the annual return of these companies shows that 99.9% shareholding belongs to M/s Fling Management Consultant Pvt. Ltd. and M/s Orient Commodore Pvt. Ltd. This company has filed the income-tax return declaring total income at rs.30,85,540/-. There are no fixed assets and major funds are available in the form of share capital, reserves, surplus, etc.

7. From the report of the Investigation Unit, Kolkata, he noted that this company along with Giri Financial Services Pvt. Ltd., M/s Pabla Leasing & Finance Pvt. Ltd. and Intellectual Securities Pvt. Ltd., are used by different accommodation entry operators to facilitate accommodation entry operators. Further, the Directors of these companies have admitted that they were involved in providing accommodation entries on commission basis to IITL Nimbus group of companies.

8. To verify the source of the investment of the above companies, the AO obtained information u/s 133(6) of the Act from the respective banks and noted

that there are back to back transactions of same amount i.e., credit and debit of the same amount on the same dates/following dates with several other deposits and withdrawals. The AO, therefore, confronted the assessee and asked him to explain the identity and credit worthiness of the investor companies and genuineness of the transactions. Rejecting the various explanations given by the assessee and relying on the decision of the Hon'ble Supreme Court in the case of *B. Kishore Kumar vs. DCIT*, the AO made addition of Rs.29,50,00,000/- to the total income of the assessee being the amount of share capital and share premium of Rs.15 crore received from M/s Pabla Leasing & Finance Pvt. Ltd., and Rs.14,50,00,000/- being the share capital and share premium received from M/s Cindy Goods & Supply Pvt. Ltd.

9. So far as A.Y. 2014-15 is concerned, the AO made addition of Rs.20,51,00,000/- being the amount of share capital received from M/s Pabla Leasing & Finance Pvt. Ltd. of Rs.2,51,00,000/- and the amount of share capital received from M/s Giri Financial Services Pvt. Ltd. of Rs.18 crores.

10. Before the CIT(A), it was argued that the assessee has filed the confirmation and the income-tax return, copies of bank statements of the investors to establish that the three vital ingredients of cash credit, i.e., identity and credit worthiness of the creditor and genuineness of the transaction. It was further argued that the amounts in question were returned by the assessee to the investor companies in subsequent year. Further, the directors of the investor companies have appeared

whose statements were recorded and, therefore, the addition made by the AO deserves to be deleted. It was further argued before the CIT(A) that in absence of any incriminating material found during the course of search, no addition could have been made. However, the ld.CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the action of the AO. While doing so, the ld.CIT(A), relying on various decisions, held that the assessee miserably failed to prove the vital ingredients of credit worthiness of the creditors and genuineness of the transaction. Further, charging of huge premium of Rs.90 per share was not justified by the assessee with cogent evidences in the form of valuation report, etc. So far as the argument of the assessee that in absence of any incriminating material, no addition could have been made is concerned, the ld. CIT(A) also decided the issue against the assessee by relying on the decision of the Hon'ble Allahabad High Court in the case of *CIT vs. Raj Kumar Arora (2014) 367 ITR 517* and various other decisions.

11. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

ITA No.929/Del/2019 (A.Y. 2013-14)

01. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in assuming jurisdiction u/s 153A and further erred in passing the impugned assessment order.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in assuming jurisdiction and framing the impugned assessment order u/s 153A, is bad in law and against the facts and

circumstances of the case and the same is not sustainable on various legal and factual grounds.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making aggregate addition of Rs.29,50,00,000/- on account of non cumulative redeemable preference share capital/share premium by treating it as alleged unexplained transaction u/s 68 of the Act, more so when no incriminating material has been found as a result of search and impugned addition has been made by recording incorrect facts and findings and without providing the entire adverse material on record and without observing the principles of natural justice.

4. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in aggregate making addition of Rs.29,50,00,000/- on account of non cumulative redeemable preference share capital/share premium u/s 68 of the Act, is bad in law and against the facts and circumstances of the case.

5. That in any case and in any view of the matter, addition made in the impugned assessment order are beyond jurisdiction and illegal also for the reason that these could not have been made since no incriminating material has been found as a result of search.

6. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the impugned assessment order passed by Ld. AO without obtaining the valid approval u/s 153D as per law.

7. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234A, 234B, 234C & 234D of Income Tax Act, 1961.

8. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.

ITA No.930/Del/2019 (A.Y. 2014-15)

61. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in assuming jurisdiction u/s 153A and further erred in passing the impugned assessment order.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in assuming jurisdiction and framing the

impugned assessment order u/s 153A, is bad in law and against the facts and circumstances of the case and the same is not sustainable on various legal and factual grounds.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making aggregate addition of Rs.20,51,00,000/- on account of non cumulative redeemable preference share capital/share premium by treating it as alleged unexplained transaction u/s 68 of the Act, more so when no incriminating material has been found as a result of search and impugned addition has been made by recording incorrect facts and findings and without providing the entire adverse material on record and without observing the principles of natural justice.

4. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in aggregate making addition of Rs.20,51,00,000/- on account of non cumulative redeemable preference share capital/share premium u/s 68 of the Act, is bad in law and against the facts and circumstances of the case.

5. That in any case and in any view of the matter, addition made in the impugned assessment order are beyond jurisdiction and illegal also for the reason that these could not have been made since no incriminating material has been found as a result of search.

6. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the impugned assessment order passed by Ld. AO without obtaining the valid approval u/s 153D as per law.

7. That having regard to the facts and circumstances of the case, Ld.CIT(A) has erred in law and on facts in not reversing the action of Ld.AO in charging interest u/s 234A, 234B, 234C & 234D of Income Tax Act, 1961.

8. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.ô

12. The ld. Counsel for the assessee, at the time of hearing, fairly conceded that grounds of appeal N. 1 and 2 by the assessee for both the assessment years challenging the validity of assessment u/s 153A of the Act in absence of any incriminating material is decided against the assessee by the decision of the

Hon'ble Allahabad High Court in the case of Raj Kumar Arora (supra). In view of the above submission of the Id. Counsel, the grounds of appeal No.1 and 2 raised by the assessee for both the years are dismissed.

13. So far as the addition of Rs.15 crores in A.Y. 2013-14 and Rs.2.51 crore in respect of M/s Pabla Leasing & Finance Pvt. Ltd., Rs.14.50 crore from M/s Cindy Goods & Supply Pvt. Ltd. in A.Y. 2013-14 and Rs.18 crore from M/s Giri Financial Services in A.Y. 2014-15 is concerned, the Id. Counsel for the assessee drew the attention of the Bench to the various details of the parties from whom the assessee has received non-cumulative redeemable share capital during the year. Referring to various pages of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to the copies of the income-tax returns, balance sheets, copy of annual reports of the companies, bank statements, copies of the assessment orders of those companies, etc., and submitted that the assessee has discharged the onus cast on it by substantiating the identity and credit worthiness of the creditors and genuineness of the transactions.

14. So far as the amount of Rs.15 crores received from M/s Pabla Leasing & Finance Pvt. Ltd., for A.Y. 2013-14 and Rs.2.51 crore in A.Y. 2014-15 is concerned, he submitted that the director of the above company was produced before the AO whose statement was recorded u/s 131 of the Act and he has admitted the fact of investment made by the said company into the capital of the assessee company. Further, the entire preference share capital was also repaid

back in the year 2014 itself, i.e., even much before the date of search. Referring to page 125, 293 and 351 of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to the copy of acknowledgement of return of income for A.Y. 2013-14 filed by them on 22nd September, 2014 with the returned of income of Rs.30,85,540/-. Referring to page 149 of the paper book, he drew the attention of the Bench to the refund of the said investment to the investor company. Referring to pages 152 to 154 of the paper book, he drew the attention of the Bench to the bank statement of the assessee company showing redemption of the said amount to the investor company. Referring to pages 175 to 178 of the paper book, he drew the attention of the Bench to the order passed u/s 147/143(3) in the case of M/s Pabla Leasing & Finance Pvt. Ltd., which substantiates its identity. Referring to page 513 of the paper book, he drew the attention of Bench to the order passed u/s 144 of the Act in the case of M/s Pabla Leasing & Finance Pvt. Ltd., wherein the AO has determined the total income of the assessee at Rs.47,59,260/- as against the returned income of Rs.30,85,540/-. Referring to page 264 of the paper book, he drew the attention of the Bench to the notice issued by the AO u/s 133(6) to M/s Pabla Leasing & Finance Pvt. Ltd. Referring to page 265 to 334 of the paper book, he drew the attention of the Bench to the various documents filed by the said company before the AO substantiating the identity and credit worthiness of the investor company and the genuineness of the transaction. Referring to page 335 to 337 of the paper book, he drew the attention of the Bench to the statement of Shri Virendra Tripathy, Managing Director of M/s Pabla

Leasing & Finance Pvt. Ltd., whose statement was recorded u/s 131 of the Act by the AO wherein he has admitted to have invested the amount in the assessee company.

15. So far as M/s Cindy Goods & Supply Pvt. Ltd., is concerned, the Id. Counsel for the assessee drew the attention of the Bench to the paper book page 182 which is the copy of notice dated 21.11.2017 issued by the AO u/s 133(6) to M/s Cindy Goods & Supply Pvt. Ltd. Referring to page 183 to 243, the Id. Counsel for the assessee drew the attention of the Bench to the submission of the said company in response to notice u/s 133(6). Referring to page 244 to 246 of the paper book, he drew the attention of the Bench to the copy of the statement of Mr. Vipul Kumar, Director of M/s Cindy Goods & Supply Pvt. Ltd., whose statement was recorded by the AO u/s 131 of the IT Act wherein he has admitted to have invested in the assessee company. Referring to page 165 to 167 of the paper book, he drew the attention of the Bench to the order passed u/s 143(3) in the case of M/s Cindy Goods & Supply Pvt. Ltd., wherein the AO has considered the investment made by the said company at Rs.38,20,21,000/- as on 01.04.2010 and 36,92,01,000/- as on 31.03.2011 for computing the disallowance u/s 14A of the Act r.w. Rule 8D of the IT Rules. Referring to various pages of the paper book, he submitted that this company has shown continuous profit which is Rs.1,40,89,252/- for A.Y. 2012-13, Rs.75,37,804/- for A.Y. 2013-14 and Rs.11,81,118/- for A.Y. 2015-16. He submitted that while the AO has accepted the amount received from Intellectual

Securities Pvt. Ltd. as genuine which is also a Kolkata based company and from whom the shares were received at a premium of Rs.90 per share, however, he disbelieved the capacity of the said investor companies for the impugned assessment year and issue of shares at a premium. He submitted that for A.Y. 2015-16, the AO, in the order passed u/s 143(3), has accepted the amount received from M/s Pabla Leasing & Finance Pvt. Ltd., and no addition has been made. Similarly, in the case of M/s Cindy Goods & Supply Pvt. Ltd., the AO has accepted an amount of Rs.3,50,00,000/- in the order u/s 143(3) and no addition has been made. Therefore, the addition made by the AO and sustained by the CIT(A) is not justified.

16. So far as the amount of Rs.18 crore received from M/s Giri Financial Services (P) Ltd. in A.Y. 2014-15 is concerned, the ld. Counsel for the assessee submitted that the assessee has filed the requisite documents such as the copy of bank statement of the investor company, their audited accounts, income-tax return acknowledgement, Form 2 filed with the ROC, etc., to substantiate the identity and the credit worthiness of the investor company and genuineness of the transaction. Referring to paper book page 254, he submitted that Giri Financial Services (P) Ltd., is registered with RBI as a NBFC w.e.f. 16.02.2001. He submitted that in response to notice u/s 133(6), the director of the company Mr. Anshul Mittal had appeared and filed relevant document and he had confirmed to have invested in the assessee company. He submitted that in the A.Y. 2015-16, the AO, in the order

passed u/s 153A/143(3) has accepted a sum of Rs.11.34 crores towards share capital and share premium in the assessee company and no adverse view has been taken. Further, the investor company is showing continuous substantial income and, therefore, no addition is called for u/s 68 of the Act when the assessee has proved the three ingredients of section 68 of the IT Act, 1961.

17. So far as the addition made by the AO and continued by the CIT(A) are concerned, he submitted that it is the allegation of the lower authorities that these companies were used by different accommodation entry operators to facilitate accommodation entries in different firms of various beneficiary groups and the investor company is a paper company of know accommodation entry operators and the directors of the investor company have admitted that they were involved in providing accommodation entries. He submitted that such enquiry report or statement, if any, which has been referred to in the order and relied on by the AO were never confronted to the assessee which is evident from paper book page 79-84 of the paper book which is the reply given to the AO in the letter dated 06.11.2017. In the said letter, the assessee has categorically stated before the AO that the assessee company has never been confronted with any incriminating material/statement by which the transactions of these companies with the assessee company can be treated as accommodation entries. Relying on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries vs. Commissioner of Central Excise, reported in 281 CTR 0241, he submitted that any

statement which has not been cross-examined by the affected party cannot be relied upon. In any case, he submitted that even in the statement of Mr. Ankit Bagri which has been reproduced selectively in the assessment order does not make any reference to the name of the assessee and, therefore, the same cannot be used against the assessee.

18. So far as the allegation of the AO as well as the CIT(A) that the bank statement of the investor companies shows back to back transactions and the financials of the investor companies are so weak that it filed its return at negligible income or negative income is concerned, he submitted that even this fact was also never confronted to the assessee. In any case, some of the investor companies have sufficient funds with them or due to prudent financial planning by the said companies, they obtained funds from companies wherein they had invested earlier and subsequently invested in the assessee company, the same cannot be held against the assessee. Rather it supports the case of the assessee that there were source of the funds invested by the investor company. Referring to various pages of the paper book, he submitted that these companies have substantial income and the allegation of the AO that these companies are mere paper companies without doing any business is contrary to facts. Referring to page 507 to 512 of the paper book, he drew the attention of the Bench to the copy of the assessment order passed u/s 143(3) in the case of M/s Pabla Leasing & Finance Pvt. Ltd., for A.Y. 2014-15 and submitted that the AO in the assessment order has considered the

opening investment of Rs.41.20 crores as on 01.04.2013 and Rs.42.70 crores as on 31.03.2014 for the purpose of computation of disallowance u/s 14A.

19. So far as the allegation of the AO that Director of the assessee company was required to be produced for recording his statement and the allegation that no investor would invest crores of rupees in a non-listed company without any return and the recipient company even does not have the particulars/contact details of such investments and failed to justify the share premium by filing valuation report/documents, etc., is concerned, he submitted that the director of the investor company was not only produced, but his statement was recorded on oath wherein he has admitted to have invested in the share capital of the assessee company. This has also been admitted by the AO in the assessment order. Referring to the statement recorded by the AO, he submitted that not a single question was asked by the AO to the directors of the investor companies as to why they invested crores of rupees in the assessee company. Having not done so, when the director of the investor company was produced, it is not justified on the part of the AO to make an allegation that why a person would invest huge amount in the shares of the assessee company. He submitted that the entire observation of the AO is based on factual inaccuracies. So far as the allegation of the AO that the investment company was controlled and managed by Bipin Aggarwal and the statement of Shri Amit Bagri in which he had admitted that investor companies were used to provide accommodation entries to various beneficiaries in lieu of commission, he

submitted that neither any copy of such enquiry report or statement was ever confronted to the assessee. Therefore, in absence of any such confrontation by the AO regarding any adverse material used at the back of the assessee, no addition could have been made. The Id. Counsel for the assessee, relying on various decisions, submitted that since the assessee has proved the identity and credit worthiness of the investor companies and the genuineness of the transaction, therefore, no addition could have been made and no adverse view is called for.

20. Referring to the decision of the Hon'ble Delhi High Court in the case of *Director of Income-tax vs. Modern Charitable Foundation*, 335 ITR 105, he submitted that the Hon'ble High Court in the said decision has held that when unsecured loans were paid back in subsequent years, it shows that these were genuine loans taken by the assessee. Since, in the instant case, the assessee has fulfilled the three ingredients of section 68 of the Act and, in fact, has subsequently redeemed the non-cumulative preference shares during F.Y. 2014-15 which is much before the date of search, therefore, no adverse view should be taken. The Id. Counsel for the assessee has also filed the following chart to substantiate that the AO in the orders passed u/s 143/153(A) in preceding or subsequent years has accepted investment made by the above three companies as genuine and no addition has been made:-

In the case of M/s Nimbus India Ltd. For AY 2013-14 and 2014-15					
S.No.	Particulars	AY 2012-13	AY 2013-14	AY 2014-15	AY 2015-16
1.	M/s Pabla Leasing & Finance Ltd. (PB 173 of PB for Y 2013-14)		Rs.15,00,00,000/-	Rs.2,51,00,000/-	Rs.2,64,60,000/- (Preferential Share Capital) Rs.11,34,00,000/- (Equity Share Capital) Accepted and no addition made
2.	M/s Cindy Goods & Supply Pvt. Ltd. 164 of PB for AY 2013-14	Rs.3,50,00,000/- Accepted and no addition made	Rs.14,50,00,000/-	Rs.2,75,00,000/- Accepted and no addition made	
3.	M/s Giri Financial Services Pvt. Ltd. (PB 255 of PB for AY 2014-15)	-	-	Rs.18,00,00,000/-	Rs.11,34,00,000/- accepted and no addition made
Assessment status		Assessed u/s 153A and no addition has been made	Year under appeal	Year under appeal	Assessed and accepted in AY 2015-16 by order passed u/s 153A/143(3) (PB 503-506 of PB for AY 2013-14)

21. Referring to the decision of the Kolkata Bench of the Tribunal in the case *M/s Baba Bhootnath Trade & Commerce Ltd. vs. ITO*, vide ITA No.1494/Kol/2017, order dated 5th April, 2019, he submitted that under identical circumstances the ITAT has deleted the addition made by the AO u/s 68 and upheld by the CIT(A) after considering the decision of the Hon'ble Supreme Court in the case of PCIT vs. NRA Iron & Steel (P) Ltd. and various other decisions.

22. The ld. DR, on the other hand, heavily relied on the orders of the AO and CIT(A). He submitted that the assessee, in the instant case, has not justified as to how such huge premium of Rs.90/- per share as against the face value of Rs.10/-

has been commanded by the assessee. Further, the investor companies do not have sufficient business income during the year to invest such huge amount in the assessee company towards Non-cumulative preference shares. The assessee, in the instant case, has miserably failed to substantiate the credit worthiness of the investor companies to invest such huge funds in the assessee company and the genuineness of the transaction. Therefore, the order of the Id.CIT(A) should be upheld and the grounds raised by the assessee should be dismissed. The Id. DR has also relied on the following decisions:-

1. PCIT Vs NRA Iron & Steel (P.) Ltd. [2019] 103 taxmann.com 48 (SC);
2. PCIT Vs NDR Promoters Pvt. Ltd. (2019-TIQL-172-HC-DEL-IT);
3. ITO Vs Synergy Finlease Pvt. Ltd (ITA No.4778/Del/2013);
4. Prem Castings (P.) Ltd. Vs CIT[2017] 88 taxmann.com 189 (Allahabad);
5. CIT Vs MAF Academy (P.) Ltd (361 ITR 258);
6. CIT Vs Navodava Castle Pvt Ltd [2014] 367 ITR 306 (Del);
7. Konark Structural Engineering (P.) Ltd. Vs DCIT [2018] 96 taxmann.com 255 (SC);
8. Pratham Telecom India Pvt Ltd Vs DCIT (2018-TIOL-1983-HC-MUM-IT);
9. J J Development Pvt Ltd Vs CIT (2018-TIQL-395-SC-IT);
10. DRB Exports (P.) Ltd. Vs CIT [2018] 93 taxmann.com 490 (Calcutta);
11. CIT Vs Nipun Builders & Developers (P.) Ltd (30 taxmann.com 292, 214 Taxman 429, 350 ITR 407, 256 CTR 34);

12. CIT Vs Nova Promoters & Finlease (P) Ltd (18 taxmann.com 217, 206 Taxman 207. 342 ITR 169. 252 CTR 187);
13. CIT Vs Ultra Modern Exports (P.) Ltd (40 taxmann.com 458, 220 Taxman 165);
14. CIT Vs Frostair (P.) Ltd (26 taxmann.com 11, 210 Taxman 221);
15. CIT Vs N R Portfolio Pvt Ltd [2014] 42 taxmann.com 339 (Delhi)/[2014] 222 Taxman 157 (Delhi)(MAG)/[2014] 264 CTR 258 (Delhi);
16. CIT Vs Empire Builtech (P.) Ltd (366 ITR 110);
17. CIT Vs Focus Exports (P.) Ltd (51 taxmann.com 46 (Delhi)/[2015] 228 Taxman 88);
18. PCIT Vs Bikram Singh [2017] 85 taxmann.com 104 (Delhi)/[2017] 250 Taxman 273 (Delhi)/[2017] 399 ITR 407 (Delhi);
19. Rick Lunsford Trade & Investment Ltd Vs CIT [2016] 385 ITR 399 (Cal);
20. Rick Lunsford Trade & Investment Ltd Vs CIT [2016-TIOL-207-SC-IT] (Supreme Court)

23. The ld. Counsel for the assessee, in his rejoinder, submitted that the various decisions relied on the ld. DR are distinguishable and not applicable to the facts of the present case. So far as the decision of the Hon'ble Supreme Court in the case of NRA Iron & Steel (P) Ltd. (supra) is concerned, he submitted that the said decision does not apply to the facts of the present case, since the said decision was an *ex parte* decision and the Hon'ble Supreme Court in the said decision at more

than one place has held that the said decision is relevant only in the facts and circumstances of this case. In that case, the investors did not appear in response to the summons, whereas, in the present case, the directors of the investor companies have appeared in response to the notice u/s 133(6) and their statements were recorded wherein they have admitted to have invested in the assessee company. In the case of NRA Iron & Steel (supra), the field enquiries conducted by the AO revealed that notices were not served on such investor companies and none of the investors produced the bank statement to establish the source of funds in making such huge investment in shares and they were showing meager income in their return of income. However, in the instant case, notice u/s 133(6) were duly served on the investor companies and the directors of the investor companies have appeared before the AO and their statements were recorded u/s 131 of the Act, Their bank statements were produced and they were showing sufficient business income. Therefore, the Hon'ble Supreme Court's decision in the case of NRA Iron & Steel (supra) is not applicable to the facts of the present case.

24. So far as the decision of the Hon'ble Delhi High Court in the case of NDR Promoters Pvt. Ltd. (supra) is concerned, he submitted that in that case the adverse statements and adverse material were confronted to that assessee, whereas, in the present case, no such statements and adverse material were confronted to the assessee and it has surfaced for the first time in the assessment order. In the case of NDR Promoters, the company had shown nil income, whereas, in the present

case, the assessee has shown substantial income. Further, the Hon'ble Delhi High Court in the case of NDR Promoters has decided the case in the facts of that particular case which are not there in the present case. Therefore, the decision of the Hon'ble High Court in the case of NDR Promoters (supra) is also not applicable to the facts of the present case.

25. So far as the various other decisions are concerned, he submitted that these decisions are also not applicable to the facts of the present case and are distinguishable. In any case, he submitted that when the investor companies have sufficient funds available in their balance sheet, their assessments have been completed u/s 143(3) and the respective AO's have considered their investment for computation of disallowance u/s 14A r.w. Rule 8D, the directors of the investor companies appeared before the AO and their statements were recorded and they have admitted to have invested in the assessee company and since the amounts were subsequently redeemed to the investor companies much prior to the date of search, therefore, under the facts and circumstances of this case, the addition made by the AO and sustained by the CIT(A) is not justified.

26. We have heard the rival arguments made by both the sides, perused the orders of the AO, CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO, in the instant case, made addition of Rs.29,50,00,000/- to the total income of the assessee being the amount of Rs.14,50,00,000/- from M/s Cindy Goods & Supply

Pvt. Ltd., and Rs.15 crores from M/s Pabla Leasing & Finance Pvt. Ltd., on account of non-genuine share premium/share capital. Similarly for A.Y. 2014-15, the AO made an addition of Rs.20,51,00,000/- being an amount of Rs.2,51,00,000/- received from M/s Pabla Leasing & Finance Pvt. Ltd. and Rs.18 crores from Giri Financial Services Pvt. Ltd. treating the same as non-genuine and by invoking the provisions of section 68 of the IT Act. We find the ld.CIT(A) upheld the addition so made by the AO. It is the submission of the ld. Counsel for the assessee that the assessee has filed the requisite details such as copy of the bank account, copy of the Income-tax returns, copy of confirmations, details of allotment of shares, etc. before the AO to substantiate the identity and credit worthiness of the investor companies and the genuineness of the transaction. It is also his submission that the directors of the investor companies were produced before the AO whose statements were recorded u/s 131 in which they have confirmed to have invested in the shares of the assessee company. It is also his submission that in the preceding and subsequent assessment years, such share capital at high premium has been accepted by the AO in the order passed u/s 153A/143(3) and no adverse view has been taken. Further, it is also his submission that such non-cumulative non-participating optionally convertible redeemable preference shares were redeemed to the investor companies in the F.Y. 2014-15 much before the search and, therefore, under the facts and circumstances of the case no addition is called for.

27. We find some force in the above arguments of the Id. Counsel for the assessee. From a perusal of the various pages of the paper book, it is seen that the investor companies have declared their income for various assessment years which are as under:-

M/s Pabla Leasing & Finance Pvt. Ltd.

Paper Book Page	A.Y.	Income
293	2013-14	30,85,540
299	2014-15	(-)52,22,360
316	2015-16	93,18,181
384	2016-17	3,09,890

M/s Cindy Goods & Supply Pvt. Ltd.,

Paper Book Page	A.Y.	Income
193	2012-13	1,40,89,252
205	2013-14	75,73,804
216	2014-15	13,622
229	2015-16	11,81,118

Giri Financial Services Pvt. Ltd.

Paper Book Page	A.Y.	Income
351	2013-14	53,91,176
361	2014-15	9,16,779
371	2015-16	1,48,77,629
384	2016-17	13,40,307

28. A perusal of the submission filed by the assessee which has been reproduced at para 19 of this order shows that the AO, in the order passed u/s 143(3) has accepted an amount of Rs.3,50,00,000/- received by the assessee from M/s Cindy Goods & Supply Pvt. Ltd. towards share capital and share premium and no addition has been made. Similarly, in the case of M/s Pabla Leasing & Finance

Pvt. Ltd., the AO, in the order passed u/s 143(3) for A.Y. 2015-16, copy of which is placed at pages 503 and 504 of the paper book, has accepted an amount of Rs.2,64,60,000/- towards preferential share capital and Rs.11,34,00,000/- towards equity share capital and no addition has been made. Similarly, in the case of Giri Financial Services Pvt. Ltd., the AO, in the order passed u/s 143(3)/153A for A.Y. 2015-16, copy of which is placed at pages 505 and 506 of the paper book, has accepted the same and no addition has been made. Therefore, the allegation of the AO that these companies are paper companies without doing any business and these companies are existing only for being used by different accommodation entry operators to facilitate accommodation entries in different forms to various beneficiary groups is factually incorrect in view of the orders passed in case of these investor companies in preceding and subsequent years.

29. From a perusal of the assessment orders passed in the case of these investor companies, we find the AO in all those cases has considered the investments held by those companies for the purpose of computing the disallowance u/s 14A read with Rule 8D. In the orders passed u/s 143(3) in the case of those investor companies, the AO has considered the opening balance of investment and closing balance of investments to arrive at the equity investments for computing the disallowance u/s 14A r.w. Rule 8D. Therefore, when the AO of the investor companies was aware of the huge investments made by them and has considered the same for computing disallowance u/s 14A r.w. Rule 8D, we find merit in the

arguments of the Id. Counsel for the assessee that the investments made by the investor companies are genuine.

30. Further, a perusal of the income declared by the investor companies shows except for A.Y. 2014-15 in the case of M/s Pabla Leasing & Finance Pvt. Ltd., the investor companies for other years are showing substantial income. The most crucial fact in the instant case is that the submission of the Id. Counsel before the lower authorities that such non-cumulative non-participating optionally convertible redeemable preference shares were redeemed to the investor companies in the F.Y. 2014-15 much before the date of search has clearly been brushed aside by the lower authorities. We find, the Hon'ble Delhi High Court in the case of DIT vs. Modern Charitable Foundation (supra) has observed as under:-

67. After hearing the counsel for the parties, we are of the opinion that at this stage admission of the additional evidence admitted by the CIT(A) be not interfered with. It is moreso when the assessee is a Charitable organization. We may also record the submission of the learned counsel for the respondent that insofar as unsecured loans are concerned, they were paid back in subsequent years, which shows that these were the genuine loans taken by the assessee. .ô

31. We, therefore, find force in the arguments of the Id. Counsel for the assessee that when the redeemable preferential shares have been redeemed to the investor companies in subsequent years which is much prior to the search, therefore, these investments are genuine. We further find from the various pages of the paper book that in response to the notice issued u/s 133(6) to the investor companies, the directors of the respective investor companies appeared before the AO whose

statements were recorded u/s 131 and they have confirmed to have invested in the shares of the assessee company. Not a single question was put to any of the directors of these investor companies as to why they have invested crores of rupees in a non-listed company without any return. We, therefore, find merit in the argument of the Id. Counsel for the assessee that without discharging the onus cast on the AO by not putting a single query to the directors of the investor companies who appeared before him in response to notice u/s 133(6) and whose statements were recorded u/s 131 on oath, the AO cannot make an allegation in the assessment order as to why they have invested in such non-descript company. So far as the allegation of the AO that the bank account show back to back entries is concerned, we find merit in the argument of the Id. Counsel that the investor companies have withdrawn money from companies where funds were invested earlier and they invested money in the assessee company in the shape of preference shares and, therefore, this prudent financial planning should not be viewed adversely and, rather, it supports the case of the assessee that there was source of funds invested by the investor company in the shares of the assessee company. We further find the various inferences/statements/materials which were the basis for the addition by the AO were never confronted to the assessee before being used by the AO against the assessee.

32. From the various details furnished by the assessee, we find the assessee, in the instant case, has discharged the onus cast on it by producing the directors of the

investor companies whose statements were recorded and who have admitted to have invested in the assessee company. The directors have explained the source of such investment by producing relevant details such as bank statements, copy of the income-tax returns, audited accounts of the investor companies, etc. to substantiate the identity and credit worthiness of the loan creditor and genuineness of the loan transaction. Further, the amounts have subsequently been refunded to the investor companies during F.Y. 2014-15 which is much prior to the date of search.

33. We find, under somewhat identical circumstances, the Kolkata Bench of the Tribunal in the case of M/s Baba Bhootnath Trade & Commerce Ltd. (supra) has deleted the addition made by the AO and upheld by the CIT(A) by observing as under:-

66. We have heard the rival submissions. At the outset, we find that the Id CITA had recorded factually incorrect observations contrary to the materials available on record and contrary to facts stated in the assessment order. Hence the entire observation of the Id CITA deserves to be dismissed. On this count itself, the addition confirmed by the Id CITA against which assessee is in appeal before us, deserves to be allowed. We find that the assessee had furnished the following details before the Id AO :-

- a) Names and addresses of share subscribing companies.
- b) PAN of share subscribing companies
- c) ITR acknowledgements of share subscribing companies for Asst Year 2012-13
- d) Audited Balance Sheets for Asst Year 2012-13
- e) Computation of total income for Asst Year 2012-13

f) Copy of relevant page of bank statements of share subscribing companies indicating the amount invested in assessee company together with the details of immediate source of credit thereon.

g) Confirmation from share subscribing companies confirming the fact of making investment in shares of assessee company together with their respective sources of funds.

h) Memorandum & Articles of Association of assessee company

i) Bank statements of assessee company evidencing the receipt of share capital and share premium from various shareholders by account payee cheques.

6.1. We find that notices issued u/s 133(6) of the Act were duly complied with by all the share subscribing companies. Summons issued u/s 131 of the Act to certain directors of share subscribing companies by the Id AO were also duly complied with, wherein the respective directors appeared in person before the Id AO and submitted the PAN card as proof of identity and address, ITR acknowledgements for Asst Year 2012-13 and copy of bank statements highlighting the transactions of making investments in the assessee company together with the details of source of funds. All these facts are also noted by the Id AO in his assessment order. We find that the Id AO had observed that the share applicants did not have creditworthiness to make investment in assessee company. We find that the assessee company had received share capital and premium in the sum of Rs 2,04,00,000/- during the year under consideration from 23 companies who had sufficient creditworthiness as under:-

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6.2. From the aforesaid details, we find that in case of all the share applicants -

a) The share application form and allotment letters are available.

b) The share applicants are income tax assesseees and had filed their income tax returns regularly.

c) The investment in share application money were made out by account payee cheques.

d) The bank accounts of the share applicants reveal that there were no deposits of cash before issue of cheques to the assessee company.

e) The share applicants are having substantial creditworthiness in the form of free reserves and capital in their balance sheet.

6.3. As per the mandate of [section 68](#) of the Act, the nature and source of credit in the books of the assessee company has been duly explained by the assessee. The credit is in the form of receipt of share capital and share premium from share applicants. The nature of receipt towards share capital is well established from the entries passed in the respective balance sheets of the companies as share capital and investments, as the case may be. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. The identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and income tax returns. With regard to the creditworthiness of share applicants, these companies are having capital and reserves in several crores of rupees and the investment made in the assessee company is a small part of their capital as could be evident from the aforesaid table. These transactions are also duly reflected in the balance sheets of the share applicants. By this, the creditworthiness of share applicants is also proved beyond doubt. With regard to genuineness of transactions, the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their respective bank accounts. We find that the assessee had even proved the source of money deposited into the respective bank accounts of share applicants, which in turn had been used by them to subscribe to the assessee company as share application. Hence the source of source of source is also proved in the instant case though the same is not required to be done by the assessee as per law. The share applicants have confirmed the fact of investment in share capital and share premium in response to notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques. Summons issued u/s 131 of the act to the share applicants were also duly complied with by them by their personal appearance before the ld AO.

6.4. Undisputedly the Share Applicants in this case are the bank account holder in their respective banks in their own name and are sole owner of the credits appearing in their bank account from where they issued cheques to the appellant. For the proposition that a Bank Account holder himself is the 'owner' of 'credits' appearing in his account (with the result that he himself is accountable to explain the source of such credits in whatever way and form, the same have emerged) support can be derived from section 4 of Bankers Book Evidence Act 1891 which reads as under:-

"4. Mode of proof of entries in bankers' books Subject to the provisions of this Act, a certified copy of any entry in a bankers' book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded

in every cases where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

Following the said provisions, the co-ordinate bench of Allahabad Tribunal in the case of Anand Prakash Agarwal reported in 6 DTR (All-Trib) 191 held as under:-

"The question that remains to be decided now is whether the subject matter of transfer was the asset belonging to the transferor/donors themselves. There is enough material on record which goes to show that there were various credits in the bank accounts of the donors, prior to the transaction of gifts, which undisputedly belonging to the respective donors themselves, in their own rights. No part of the credits in the said bank' accounts was generated from the appellant and/or from its associates, in any manner. The certificates issued by the banks are construable as evidence about the ownership of the transferors or their respective bank accounts, as per s.4 of the Bankers' Books evidence Act 1891, which read as under:

"4. Where an extract of account was duly signed by the agent of the bank and implicit in its was a certificate that it was a true copy of an entry contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book was in the custody of the bank, it was held admissible in evidence. [Radheshyam v. Safiyabai Ibrahim](#) AIR 1988 Bom. 361 : 1987 Mah. 725: 1987 Bank J 552."

In view of the position of law as discussed above, it is always open for a borrower to contend, that even the "creditworthiness" of the lender stands proved to the extent of credits appearing in his Bank Account and he should be held to be successful in this contention."

6.5. We find that the Hon'ble Jurisdictional High Court in the case of [S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46\(3\), Kolkata](#) reported in 347 ITR 347(Cal) wherein the Court held as follows:

"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further

explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.

16. In the case before us, the appellant by producing the loan-confirmation- certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."

6.6. We find that the Hon'ble Jurisdictional High Court in yet another case of [Crystal Networks \(P\) Ltd vs CIT](#) reported in 353 ITR 171 (Cal) had held that when the basic evidences are on record, the mere failure of the creditor to appear before the Assessing Officer cannot be the basis to make addition. The relevant observations of the Hon'ble Court are as under:-

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The assessee's case before us stands on a much better footing in as much as the directors of share subscribing companies also appeared in person before the ld AO and offered themselves for examination after providing the requisite details that were called for by the ld AO. These facts are duly recorded in page 1 para 1 of the assessment order itself.

6.7. It is not in dispute that all the share applicant companies in the instant case before us are assessed to income tax. We find that the assessee had duly proved the source of source of source in the instant case. Even if the creditworthiness of the share applicants are to be doubted , then it would be the duty of the ld AO of the assessee to make enquiries through the ld AO of the concerned share applicants. Once the relevant details are filed by the assessee before the ld AO to prove the creditworthiness of share applicants, then the same cannot be questioned / disputed by the ld AO of the assessee as the same would be travelling beyond his jurisdiction. In other words, the creditworthiness of the share applicant companies would have to be examined by the Assessing Officer of those companies and not by the Assessing Officer of the assessee herein. However, it would be incumbent on the part of the ld AO of the assessee herein , to trigger the said verification process on the side of the department. It would be interesting to note in this regard that the Hon'ble Jurisdictional High Court in the case of [CIT Kolkata III vs M/s Dataware Private Limited](#) in ITAT No. 263 of 2011 dated 21.9.2011 had held as under:-

"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the

information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of [Section 68](#) of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."

6.8. We find that the Hon'ble Jurisdictional High Court in the case of [CIT vs Roseberry Mercantile \(P\) Ltd](#) in ITAT No. 241 of 2010 dated 10.1.2011 , while relying on the Hon'ble Supreme Court in the case of *Lovely Exports* reported in 216 CTR 295 (SC) , had held :-

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT (A) ought to have held that the assessee had not established the genuineness of the transaction. "

It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4, 00, 000/- and Rs.20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00, 000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under [Section 68/69](#) of the Income Tax Act and made addition of Rs.24,00,000/-.

On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of *Cl. T. vs. M/s. Lovely Exports Pvt.*

Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/ received from the investors was not liable to be treated under [Section 68](#) as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

6.9. We also find that the Hon'ble Jurisdictional High Court in the case of [CIT vs Leonard Commercial \(P\) Ltd](#) in ITAT No. 114 of 2011 dated 13.6.2011 had held as under:-

"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars

supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.

In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under [section 68](#) of the Income- tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

6.10. We also find that the co-ordinate bench of this tribunal in the case of VSP Steel P Ltd (formerly M/s Tikmani Metal P Ltd) in ITA No. 741/Kol/2014 for Asst Year 2010-11 had held as under:-

"We have heard the rival submissions. We find that the ld DR argued that the assessee had not proved the source of source of share applicants who had invested share application monies in the assessee company and accordingly prayed that the addition has been rightly made u/s 68 of the Act. He also placed reliance on the decision of this tribunal in the case of [Subhlakshmi Vanijya \(P\) Ltd vs CIT](#) reported in (2015) 60 taxmann.com 60 (Kolkata - Trib.) dated 30.7.2015. In response to this, the ld AR argued that there is no mandate in law that the assessee has to prove the source of source of share applicants. He argued that in the instant case, the assessee had duly discharged its complete onus by furnishing the requisite details. In case if the ld AO has got some doubts, he should have verified the same from the AO of those share applicants. We find from the plain reading of [section 68](#) of the Act, the duty cast on the assessee is to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share application money from five share applicants. The nature of receipt towards share application money is well established from the entries passed in the respective balance sheets of the companies as investments. Hence the nature of receipt

is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. In the instant case, we find that the identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns . With regard to the creditworthiness of share applicants, the Id AO himself states that the five share applicants had invested in assessee company's shares by taking money from some other companies. Hence the source of the share applicants for making investment in share application monies of assessee company is also proved. By this, the creditworthiness of the share applicants is also proved beyond doubt. Third ingredient is genuineness of the transactions. We find that the five share applicants had paid the monies to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts, which are quite evident from the bank statements enclosed in the paper book. We agree with the arguments of the Id AR that the source of source of share applicants need not be proved by the assessee herein. We hold that the decision rendered by this tribunal in Subhalakshmi Vanijya relied upon by the Id DR was rendered in the context of validity of revision proceedings u/s 263 of the Act and not on the merits of the case. This tribunal in that case decided the validity of invoking revisionary jurisdiction u/s 263 of the Act by the Id CIT and whether adequate enquiries were made by the Id AO in the facts and circumstances of that case. This tribunal in Subhalakshmi Vanijya case supra never had an occasion to look into the merits of the addition proposed to be made towards share capital in the facts and circumstances of that case and no decision was rendered thereon on merits of the issue. Hence the reliance placed thereon by the Id DR does not advance the case of the revenue. In the instant case, we find that the share applicants have not denied the fact of making investment in share application monies in assessee company, which is evident from the fact that they had confirmed in writing in response to notice issued u/s 133(6) of the Act which was admittedly done behind the back of the assessee. There is no whisper in the entire assessment order to doubt the veracity of the transactions and genuineness of share applicants and the transactions herein. In the instant case, the assessee had indeed proved the identity of the share applicants, creditworthiness of share applicants and genuineness of transactions beyond doubt. We find that the entire addition has been made by the Id AO based upon suspicion, surmises and conjectures and not upon proper evaluation and appraisal of the evidences and documents filed before him. We place reliance on the decision of the Hon'ble Apex Court in this

regard in the case of [Dhakeshwari Cotton Mills Ltd vs CIT](#) reported in 26 ITR 775 (SC) wherein it has been held that no addition can be made without material and on mere suspicion.

In these facts and circumstances, there is no need to treat the receipt of share application money from five share applicants as unexplained u/s 68 of the Act. Hence we do not find any infirmity in the order of the Id CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed."

6.11. We find that the co-ordinate bench of this tribunal recently in the case of [ITO vs Wiz-Tech Solutions Pvt Ltd](#) in ITA No. 1162/Kol/2015 dated 14.6.2018 had held as under:-

28. From the details as aforesaid which emerges from the paper book filed before us as well as before the lower authorities, it is vivid that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income,

(iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements,

(vi) in none of the transactions the AO found deposit in cash before issuing cheques to the assessee company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above.

29. As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share capital with premium from share applicants. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and investments. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. For proving the identity of share applicants, the assessee furnished the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, as we noted supra, these Companies are having capital in several crores of rupees and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants, so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then

AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application. Hence the source of source of source is proved by the assessee in the instant case though the same is not required to be done by the assessee as per law as it stood/ applicable in this assessment year. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.

30. *****

31. *****

32. We would like to reproduce the Hon'ble High Court order in [CIT vs. Gangeshwari Metal P.Ltd.](#) in ITA no. 597/2012 judgement dated 21.1.2013, the Hon'ble High Court after considering the decisions in the case of Nova Promoters and Finlease Pvt. Ltd. 342 ITR 169 and judgement in the case of [CIT vs. Lovely Exports](#) 319 ITR (St) 5(SC) held as follows:-

"As can be seen from the above extract, two types of cases have been indicated. One in which the Assessing Officer carries out the exercise which is required in law and the other in which the Assessing Officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer after noting the facts, merely rejected the same. This would be apparent from the observations of the Assessing Officer in the assessment order to the following effect:-

"Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee

company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tries to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance sheet etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income/ penalty proceedings under [Section 271\(1\)\(c\)](#) are being initiated separately.

The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case.

However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd. (supra). There was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under [Section 68](#) of the Income Tax Act 1961. Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law"

33. The case on hand clearly falls in the category where there is lack of enquiry on the part of the A. O. as in the case of Ganjeshwari Metals (supra).

b) In the case of Finlease Pvt Ltd. 342 ITR 169 (supra) in ITA 232/2012 judgement dt. 22.11.2012 at para 6 to 8/ it was held as follows.

"6. This Court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income Tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the ROC in relation to the share application affidavits of the directors, form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing

Officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under [Section 131](#) summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of S.68 of the Income Tax Act 1961. Having regard to the entirety of facts and circumstances, the Court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in *Lovely Exports* (supra).

The decision in this case is based on the peculiar facts which attract the ratio of *Lovely Exports* (supra). Where the assessee adduces evidence in support of the share application monies, it is open to the Assessing Officer to examine it and reject it on tenable grounds. In case he wishes to rely on the report of the investigation authorities, some meaningful enquiry ought to be conducted by him to establish a link between the assessee and the alleged hawala operators, such a link was shown to be present in the case of *Nova Promoters & Finlease (P) Ltd.* (supra) relied upon by the revenue. We are therefore not to be understood to convey that in all cases of share capital added under Section the ratio of *Lovely Exports* (supra) is attracted, irrespective of the facts, evidence and material. "

34. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we hold that an addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to uphold the order of the Ld. Commissioner of Income Tax (Appeals)

35. To sum up [section 68](#) of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income.

In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to I.T.A. No.1494/Kol/2017 Assessment year 2012-13 M/s Baba Bhootnath Trade & Commerce Ltd .

AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under [Section 68](#) of the Act. Therefore, we do not want to interfere in the impugned order of Ld. CIT(A) which is confirmed and consequently the appeal of Revenue is dismissed.

6.12. We find that the Hon'ble Supreme Court in the case of [M/s Earthmetal Electricals P Ltd vs CIT & Anr.](#) reported in 2010 (7) TMI 1137 in Civil Appeal No. 21073 / 2009 dated 30.7.2010 arising from the order of Hon'ble Bombay High Court had held as under:-

ORDER

Delay condoned.

Leave granted.

Heard learned counsel on both sides.

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

The appeal is allowed accordingly.

No order as to costs.

In the instant case before us, the share subscribing companies are duly assessed to income tax. It is not in dispute that the share subscribing companies are in existence. It is not in dispute that the share subscribing companies are duly assessed to income tax and their income tax particulars together with the copies of respective income tax returns with their balance sheets are already on record . Hence it could be safely concluded that they are genuine shareholders and not bogus and fictitious. The directors of share subscribing companies also presented themselves before the Ld AO in response to summons issued u/s 131 of the Act in the instant case. Accordingly, the

ratio laid down by the Hon'ble Apex Court in the case of M/s Earthmetal Electricals P Ltd supra would be squarely applicable to the facts of the instant case.

6.13. We would like to add that receipt of share capital for a company is not a prohibited transaction, as that is one of the main source of raising funds for a company to run its intended activities. Once the replies to notices issued u/s 133(6) of the Act were received from the share subscribing companies, which were later strengthened by compliance to summons u/s 131 of the Act by the directors of the share subscribing companies, there is absolutely no reason to draw an adverse inference on the impugned transactions.

6.14. We find that the reliance placed by the ld. DR on the decision of Hon'ble Calcutta High Court in the case of Rajmandir Estates supra was distinguishable on facts as the said decision was rendered in the context of validity of revisionary jurisdiction u/s 263 of the Act by the Learned Administrative Commissioner. This fact has already been addressed by this tribunal in the case of VSP Steel P Ltd supra. No decision whatsoever was rendered by the Hon'ble Jurisdictional High Court in the case of Raj Mandir Estates P Ltd. on merits of the addition and hence does not come to the rescue of the revenue in the facts of the instant case.

6.15. We find that the ld DR had filed a written submission placing the facts and by placing reliance on various case laws. But we find that the ld DR had factually erred in stating that the share capital and share premium were received from the share subscribing companies in cash. The various documents as listed supra go to prove that the entire monies were received only through account payee cheques. For the sake of convenience, the written submissions of the ld DR on the factual aspects are reproduced below:-

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6.16. We find that majority of the factual observations made by the ld DR are only his general comments which is not emanating from the records of the ld AO or by the ld CITA. The various general observations made by the ld DR are not at all relevant to the facts of the instant case as they are not even the case of the ld AO or ld CITA. The ld DR cannot improve the case of the revenue in second appellate proceedings before this tribunal. Hence the various submissions made by the ld DR deserves to be dismissed at source.

6.17. Finally the ld DR placed reliance on the recent decision of the Hon'ble Apex Court in the case of [Principal CIT vs. NRA Iron & Steel \(P\) Ltd](#) reported in 103 taxmann.com 48 (SC) wherein the decision on addition made towards cash credit was rendered in favour of the revenue. We have gone through the said judgement and we find in that case, the ld AO had made extensive enquiries and from that he had found that some of the investor companies

were non-existent which is not the case before us. Certain investor companies did not produce their bank statements proving the source for making investments in assessee company which is not the case before us. Source of funds were never established by the investor companies in the case before the Hon'ble Apex Court, whereas in the instant case, the entire details of source of source were duly furnished by all the respective share subscribing companies before the Id AO in response to summons u/s 131 of the Act by complying with the personal appearance of directors. Hence the decision relied upon by the Id DR is factually distinguishable and does not advance the case of the revenue.

6.18. We also find that the Hon'ble Apex Court recently in the case of [Principal CIT vs Vaishnodevi Refoils & Solvex](#) reported in (2018) 96 taxmann.com 469 (SC) wherein the SLP of the Revenue has been dismissed by the Hon'ble Apex Court. The brief facts were that the addition u/s 68 of the Act was made by the Assessing Officer in respect of capital contributed by the partner of the firm. The Hon'ble High Court noted that when the concerned partner had confirmed before the Assessing Officer about his fact of making capital contribution in the firm and that the said investment is also reflected in his individual books of accounts, then no addition could be made u/s 68 of the Act. The decision of Hon'ble Gujarat High Court is reported in (2018) 89 taxmann.com 80 (Guj HC). The SLP of the revenue against this judgement was dismissed by the Hon'ble Supreme Court.

6.19. To sum up, [section 68](#) of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its income of the previous year in which the same was received. In the facts of the present case, both the nature & source of the share capital received with premium were fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed before the Id AO. Accordingly, all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction were placed before the Id AO and the onus shifted to the Id AO to disprove the materials placed before him. Without doing so, the addition made by the Id AO is based on conjectures and surmises cannot be justified. At the cost of repetition, the addition was confirmed by the Id CITA by making factually incorrect observations which are contrary to the facts recorded by the Id AO in the assessment order. In the facts and circumstances of the case as discussed above, no addition was warranted under [Section 68](#) of the Act. Therefore, we direct the Id AO to delete the addition made u/s 68 of the Act and consequently the grounds raised by the assessee are allowed.

34. The various other decisions relied on by the Id. Counsel for the assessee also supports his case that no addition can be made u/s 68 of the IT act and in the instant case, when the assessee has substantiated the three ingredients of section 68 of the IT Act and moreover, such amount has been refunded to the investor companies in subsequent years which is much prior to the date of search.

35. So far as the decision relied on by the Id. DR in the case of NRA Iron & Steel (P) Ltd. (supra) is concerned, the same, in our opinion, is not applicable to the facts of the present case since, in that case, the investor did not appear in response to the summons, the AO got field enquiries conducted in respect of investor companies and notices were not served on such investor companies. None of the investors produced the bank statements to establish the source of funds in making such huge investments and investors were showing meager income in the return. However, in the instant case, the directors/MDs of the investor companies appeared before the AO in response to notice u/s 133(6) and their statements u/s 131 were recorded and they have confirmed to have invested in the shares of the assessee company. The investor companies have produced their bank statements and were showing substantial income and, moreover, the AO, in the preceding or succeeding year in the case of the investor companies have accepted the investment made by them in the shares of the assessee company in the orders passed u/s 153A/143(3). Therefore, the decision in the case of NRA Iron & Steel (P) Ltd. (supra), in our opinion, is not applicable to the facts of the present case.

36. So far as the decision in the case of NDR Promoters Pvt. Ltd. (supra) is concerned, the same also is not applicable in the facts of the present case especially when the directors of the investor companies appeared before the AO whose statements were recorded u/s 131 of the Act and who have confirmed to have invested in the assessee company, all the investor companies are assessed to tax, their orders have been passed u/s 143(3) in most of the years, the AO of the investor companies are aware of the huge investment made by them in various companies since while computing the disallowance u/s 14A r.w. Rule 8D, the AO has countered the huge opening and closing investment made by them towards share capital for computing the average investment for the purpose of calculation of disallowance u/s 14A r.w. Rule 8D. Therefore, the decision in the case of NDR Promoters Pvt. Ltd. (supra) is also not applicable to the facts of the instant case. The various other decisions relied on by the ld. DR are also not applicable to the facts of the present case and are distinguishable. In this view of the matter, we are of the considered opinion that the addition made by the AO and sustained by the CIT(A) is not justified. Accordingly, we direct the AO to delete the addition made by him u/s 68 of the Act for both the years.

37. In the result, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 10.02.2020.

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER
Dated: 10th February, 2020

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi