IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "G" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA.No.2106/Del./2013
Assessment Year 2003-2004

Shri Shyam Sunder Infrastructure (P) Ltd., [Formerly known as M/s. Shalom Exim (P) Ltd., and then as Mamram Developers P. Ltd.,] G-18 & 19, Mamram Majesty Mall Plot, Road No.43, Guru Harkishan Marg, Pitampura, Delhi – 034 PAN AAHCS2266E	vs.	The Income Tax Officer, Ward – 8 (3), New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Vinod Kumar Bindal, CA
For Revenue :	Shri Prakash Dubey, Sr. DR

Date of Hearing :	12.05.2021
Date of Pronouncement :	19.05.2021

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-XI, New Delhi, Dated 31.01.2013, for the A.Y. 2003-2004.

2. We have heard the Learned Representatives of both the parties and perused the material on record.

3. Briefly the facts of the case are that in this case original return of income was filed on 30.05.2003 declaring income of Rs.14,156/-. Subsequently, notice under section 148 was issued on 22.03.2010 after recording the reasons that assessee has been beneficiary of accommodation entries being provided by certain entry operators and received unexplained credits in its bank account during the assessment year under appeal. The assessee was requested to file return of income under section 148 of the I.T. Act. In response to the same, the assessee filed letter Dated 21.04.2010 that original return filed on 30.05.2003 may be treated as return filed in response to notice issued under section 148 of the I.T. Act. The assessee asked for copy of the reasons recorded under section 148 of the I.T. Act which have been supplied. The A.O. asked the assessee to give details of the shareholders from whom share application was received during assessment year under appeal. The

assessee submitted before A.O. that it has received share capital/premium money totalling to Rs.98 lakhs from 14 parties mentioned at Pages 1 and 2 of the assessment order. The assessee furnished share application form, affidavit, copy of the return of income and copy of the bank account of all the share applicants. However, the summons issued under section 131 of the I.T. Act returned un-served. The assessee was asked to produce the Principal Officers of the share applicants, however, assessee failed to produce the same. The A.O, therefore, made addition of Rs.98 lakhs under section 68 of the I.T. Act, 1961. The A.O. also made addition of Rs.1,96,000/- on account of commission paid by assessee @ 2%. The A.O. completed the assessment under section 144/147 of the I.T. Act, 1961, Dated 30.12.2010.

3.1. The assessee challenged the reopening of the assessment as well as additions on merit before the Ld. CIT(A), however, the appeal of assessee has been dismissed vide impugned Order.

4. The assessee filed the present appeal in which 04 issues were raised i.e., (1) Jurisdiction of the A.O. to pass the re-assessment order; (2) Re-assessment proceedings under section 147/148 of the I.T. Act to be *void abinitio*; (3) Addition of Rs.98 lakhs on account of share capital / share application money under section 68 of the I.T. Act and (4) Addition of Rs.1,96,000/- on account of Commission on different grounds of appeal.

4.1. The appeal was initially heard with regard to the jurisdiction of the A.O. and the appeal was decided by the ITAT, Delhi Bench vide Order Dated 22.11.2013. The gist of the details are mentioned in this Order of the Tribunal in which it is briefly noted that assessee was incorporated as M/s. Shalom Exim (P) Ltd., which was later on changed to Mamram Developers P. Ltd., and PAN was also changed. The intimation about name change was given to the A.O. and request was also made to the Ld. CIT to transfer the record to the concerned A.O. It was also noted in the Order that ultimately name was also changed to Shri Shyam

Sunder Infrastructure (P) Ltd., **[**Present Assessee**]**. The Tribunal considering the change in name of assessee, PAN and jurisdiction of the different Assessing Officer's held that the assessment order passed by the A.O. is without jurisdiction and not sustainable in the eye of Law and the assessment order was quashed vide Order Dated 22.11.2013. The other remaining grounds in the appeal were not decided.

4.2. The Revenue challenged the Order of the Tribunal Dated 22.11.2013 before the Hon'ble Delhi High Court in Income Tax Appeal.No.236/2014. The Hon'ble Delhi High Court considering the issue in the light of Section 124(3)(a) of the I.T. Act held that the conditions of Section has been overlooked by the ITAT, therefore, the Order of the Tribunal was set aside and issue was answered in favour of the Revenue. The matter was remitted for consideration on merits of the appeal before ITAT vide Judgment Dated 04.02.2015.

4.3. The assessee being dissatisfied with the Judgment of Hon'ble Delhi High Court preferred SLP against the Judgment of the Hon'ble Delhi High Court Dated 04.02.2015 in which notice was issued. Ultimately, the assessee filed an I.A.No.31031/2021 in Civil Appeal No.5105/2015 and submitted before the Hon'ble Supreme Court that assessee does not want to proceed with this appeal. The appeal of assessee was accordingly dismissed as withdrawn vide Order Dated 09.04.2021. Copy of the Judgment is placed on record by the Learned Counsel for the Assessee.

4.4. In the background of the above facts, Learned Representatives of both the parties submitted that the appeal of the assessee may be decided on merits barring the issue of jurisdiction of the A.O. which has already been decided by the Hon'ble Delhi High Court.

4.5. Considering the above facts, it is clear that the issues which are to be decided now are mainly two i.e., (1) Challenge to the re-assessment proceedings under section

147/148 of the I.T. Act and (2) Addition of Rs.98 lakhs under section 68 of the I.T. Act with addition of Rs.1.96 lakhs on account of Commission. We proceed to decide both the issues as under :

ISSUE No.1 - [Challenge to re-assessment proceedings under section 147/148 of the I.T. Act, 1961] :

5. The assessee raised several grounds before the Ld. CIT(A) to challenge the reopening of the assessment under section 148 of the I.T. Act. The assessee submitted that notice4 issued under section 148 is illegal and *void abinitio* and that there were no reason to believe that the petitioner's income has escaped assessment which is must for assuming lawful jurisdiction under section 148 of the I.T. Act, 1961 and that reopening is barred before A.O. has not himself formed any belief as to the escapement of income, but, has merely acted upon the direction of the Investigation Wing. Notice under section 148 have been issued on general statement and is vague and as such reopening of the assessment is illegal and unjustified and is

liable to be quashed. The Ld. CIT(A), however, decided that when A.O. has reason to believe that income has escaped assessment, therefore, initiation of re-assessment proceedings is valid. The Ld. CIT(A), accordingly, dismissed this ground of appeal of assessee.

5.1. The assessee on Ground No.6 has raised the following ground :

> *"6. The CIT(A) erred in law and on facts by not considering that the reasons to belief recorded by the ITO, Ward-8(1), New Delhi were not bonafide as the same had many infirmities and were just stereotyped without application of mind."*

5.2. Learned Counsel for the Assessee referred to the reasons recorded for reopening of the assessment Dated 17.03.2010 copy of which is filed at PB-1/page-18 which reads as under :

"17.03.2010 : Reasons for issue of notice u/s 148 in the case of M/s. Shalom Exim Pvt. Ltd., New Delhi A.Y. 2003-04.

Information has been received from DIT (Inv.) New Delhi that M/s. Shalomi Exim Pvt. Ltd., New Delhi has been beneficiary of accommodation entries being provided by certain entry operators. On the basis of the information chart forwarded by the DIT (Inv.), New Delhi it is seen that the assessee is involved in the following bogus transactions detailed in the chart forwarded by the DIT (Inv.) New Delhi.

Beneficiary Name	*M/s. Shalom Exim Pvt. Ltd.,*
Beneficiary Bank Name	*ICICI Bank*
Beneficiary Bank Branch	*Pitampura D.P. Block*
Value of entry taken	*Rs.1,47,00,000/-*
Instrument No. by which entry taken	--
Date on which entry taken	*7.3.03, 18.3.03, 24.3.03, 6.3.03, 08.3.03, 10.3.03, 11.03.03, 12.3.03, 21.3.03, 22.3.03.*
Name of account holder of entry giving account.	*K.R. Fincap P. Ltd., Transpan Financial Services, Shriniwas Leasing Finance, Basant Agency P. Ltd., Changia Steels P. Ltd., Chintpurni Credits, Division Trading P. Ltd., Right Choice Const. P. Ltd., Sekhawati Finance P. Ltd., Ganga Infin P. Ltd., Nishant Finvest P. Ltd., Sober Associates P. Ltd., Sparrow Marketing P. Ltd., Particular Manage Finlease P. Ltd.,*
Bank of entry given bank	*SBBJ, SBP*

Account No. entry giving account.	*26422,*	*24625,*	*24657,*
	24645,	*50104,*	*50058,*
	50105,	*50124,*	*50111,*
	50122,	*50080,*	*60061,*
	50083,	*50050*	

I have therefore reason to believe that an amount of Rs.1,47,000/- has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Since 4 years have since been elapsed, the facts are submitted for your kind perusal and approval of the Addl./Jt. CIT, Range-8, New Delhi as per section 151(2) of the Income Tax Act, 1961 for issuance of notice u/s. 148 of the Income Tax Act.

Sd/- J.S. Nagar,
Income Tax Officer,
Ward 8 (1), New Delhi.

Jt. CIT, R-8, New Delhi."

5.3. He has submitted that the A.O. in the above reasons has mentioned name of the beneficiary as "M/s. Shalom Exim Pvt. Ltd.," and value of the entry taken as Rs.1,47,00,000/-. He has submitted that A.O. has recorded

both incorrect facts in the reasons. He has submitted that the assessee company was incorporated in the name of M/s. Shalom Exim Pvt. Ltd., vide Certificate of Incorporation Dated 27.02.2003. Copy of the Incorporation Certificate is filed along with the written submissions. Later on the name of M/s. Shalom Exim Pvt. Ltd., was changed to M/s. Mamram Developers P. Ltd., vide fresh Certificate of Incorporation Dated 03.11.2003 copy of which is filed along with the written submissions and w.e.f. 26.11.2009 the name of M/s. Mamram Developers P. Ltd., was changed to Shri Shyam Sunder Infrastructure (P) Ltd., [Present Assessee]. Copy of the Certificate of Incorporation is also furnished along with the written submissions. He has submitted that in the first round of proceedings before the Tribunal these facts were highlighted to show that the intimation of change of name was even notified to the A.O. way back in November, 2003. Therefore, A.O. has mentioned name of beneficiary as M/s. Shalom Exim Pvt. Ltd., incorrectly without verifying the facts and ultimately,

A.O. made addition of Rs.98 lakhs only in the re-assessment order, but, made wrong facts in the reasons by noting that entry was taken of Rs.1,47,00,000/-. He has, therefore, submitted that A.O. recorded wrong and incorrect facts in the reasons for reopening of the assessment. The A.O. was having no reason to believe that income chargeable to tax has escaped assessment and merely relied upon the report of the Investigation Wing. No name of entry provider have been mentioned in the reasons. The assessee also filed objections to the reopening of the assessment which have not been considered in proper perspective, copy of which is filed in the PB. The A.O. has not applied his mind to the information so received from Investigation Wing, therefore, reopening of the assessment is illegal and bad in Law and liable to be quashed.

6. On the other hand, the Ld. D.R. relied upon the Orders of the authorities below and submitted that original name of the assessee is M/s. Shalom Exim Pvt. Ltd., therefore, A.O. recorded correct name in the reasons

recorded for reopening of the assessment. The A.O. received information from Investigation Wing that assessee has received entry of Rs.1,47,00,000/-, therefore, A.O. recorded correct facts in the reasons for reopening of the assessment.

7. We have considered the rival submissions as well as taken into consideration written submissions filed by assessee and considered the material available on record. It is well settled law that validity of the reopening of the assessment is to be determined with reference to the reasons recorded for reopening of the assessment. Learned Counsel for the Assessee filed copy of the reasons recorded for reopening of the assessment at Page-18 of PB-1 which is reproduced above. The Hon'ble Punjab & Haryana High Court in the case of CIT vs., Atlas Cycle Industries [1989] 180 ITR 319 held as under :

> *"Held, (i) that the Tribunal was right in cancelling the reassessment as both the grounds on which the reassessment notice was issued were not*

found to exist, and, therefore, the Income-tax Officer did not get jurisdiction to make the reassessment."

7.1. The Hon'ble Delhi High Court in the case of Pr. CIT vs., SNG Developers Ltd., [2018] 404 ITR 312 (Del.) in which it was held as under :

"Held, dismissing the appeal, that the reasons recorded by the Assessing Officer for reopening the assessment under section 147, issuing a notice under section 148 did not meet the statutory conditions. As already held by the Appellate Tribunal, there was a repetition of at least five accommodation entries and the total amount constituting the so-called accommodation entries would therefore, not work out to Rs.95,65,510. It was unacceptable that the Assessing Officer persisted with his "belief" that the amount had escaped assessment not only at the stage of

rejecting the assessee's objections but also in the reassessment proceedings, where he proceeded to add the entire amount to the income of the assessee. Therefore there was non-application of mind on the part of the Assessing Officer. The Appellate Tribunal was justified in confirming the order of the Commissioner (Appeals) and holding that the reopening of the assessment was bad in law."

7.2. The Hon'ble Delhi High Court in the case of Shamshad Khan vs., ACIT [2017] 395 ITR 265 (Del.) in which it was held as under :

"Held, allowing the petition, that the form for recording the reasons for initiating the proceedings under section 148 of the Act for obtaining approval of the Commissioner itself proceeded on the erroneous basis that the quantum of income which had escaped assessment was Rs.28,75,000

whereas the assessee had filed returns showing income of merely Rs.20,56,145 and it was on this basis that the Additional Commissioner and the Commissioner granted their approval for reopening the assessment. Even though the assessee highlighted this fundamental error at the initiation of the case by stating that his income was mentioned as Rs.20,56,145 instead of Rs.69,71,191, this was summarily rejected stating that it was a clerical mistake and that the latter figure would be treated as his income. If the correct income i.e. Rs.69,71,191 was put before the Commissioner at the time of seeking his approval, he might have taken a different view. There was nothing on record to show that the clerical mistake of substituting Rs.20,56,145 for Rs.69,71,191 was ever brought to the notice of the Commissioner either before or after approval or sanction under section 151(1) of the Act. The

initiation of the case for reopening of the assessment was erroneous and without application of mind especially since the Assessing Officer had not examined the return filed, which would have revealed that the assessee had filed regular returns, had sufficient opening balance in his account and the withdrawals therefrom substantiated the donation made. Therefore, the reopening of the assessment was unsustainable in law and the notice issued under section 147 of the Act was to be quashed."

7.3. The Hon'ble Bombay High Court in the case of Siemens Information Systems Ltd., vs., ACIT & Others [2007] 293 ITR 548 (Bom.) held as under :

"The petitioner had several EOU/STP units engaged in the business of export of software. In response to the notice for reopening the assessment for the assessment year 1999-2000,

the petitioner, objecting to the issuance of the notice, stated that the reasons furnished by the authority had quoted the provisions of section 10A as amended by the Finance Act, 2000, with effect from the assessment year 2001-02 and as such could not have been made applicable to the assessment year 1999-2000 and the notice had been issued under the mistaken belief about the correct position of law. However, opportunity to show cause was given to the petitioner as to why the loss claimed should not be disallowed to be carried forward. On a writ petition :

Held, allowing the petition, (i) that it would be clear from the reasons given that the authority proceeded on the presumption that the law applicable was the law after the amendment and not the law in respect of which the petitioner had filed the return for the year 1999-2000. This by itself clearly demonstrated that there was total

non-application of mind on the part of the authority and consequently, the notice based on that reason would amount to non-application of mind.

(ii) That the income derived by the assessee from an industrial undertaking to which section 10A applies could not be included in the total income of the assessee. Therefore, the petitioner was right in filing the return by excluding the income in terms of section 10A."

7.4. The crux of the above Judgments had been that, in case, incorrect, wrong and non-existing reasons are recorded by the A.O. for reopening of the assessment and that A.O. failed to verify the information received from Investigation Wing, the reopening of the assessment would be unjustified and is liable to be quashed. The ITAT, F-Bench, New Delhi in the case of Shri Pankaj Sapra, New Delhi vs., ITO, Ward-23(2), New Delhi in ITA.No.5747/ Del./2018 vide Order Dated 22.11.2009 on identical facts

quashed the reopening of the assessment in para-9 which reads as under :

> *"9. We have heard both the parties and perused all the materials available on record. The issue relating to proceedings initiated u/s 148 whether the same is valid or not, has already been decided in assessee's own case for A.Y. 2007-08 by the Tribunal. The Tribunal held as under :*
>
> > *"8. I have considered the rival submissions made by both the sides and perused the orders of the authority below. I find the AO on the basis of the information received from the investigation wing of the Department that the assessee has made cash deposit of Rs.4,97,452/- reopened the assessment by issuing notice under section 148 and thereafter made addition of*

Rs.4,97,452/- to the total income of the assessee by invoking the provisions of Section 68 of the I.T. Act, 1961. I find the learned CIT(A) upheld the action of the AO, the reasons of which have already been reproduced in the preceding paragraph. It is the submission of the learned counsel for the assessee that there is complete non application of mind of the AO while recording the reasons and he has not verified the facts properly and the reopening was made on the basis of report of the investigation wing. Further the deposits in the bank accounts are fully explained and therefore no addition is called for.

9. I find force in the above arguments advanced by the learned counsel for the assessee. A perusal of the

notice issued under section 148 shows that the notice has been issued in a very casual manner, Clause 3 of the notice reads as under :-

"Notice under section 148 of the Income Tax Act, 1961.

3. This notice is being issued after obtaining the necessary satisfaction of the commissioner of Income Tax…/the Central Board of Direct Taxes. "

10. Similarly, a perusal of the bank account maintained with Vijaya Bank account no. 004427, copy of which has been placed at page no. 25 and 26 of the paper book, shows that an amount of Rs.2,50,000/- was by way of clearing of Cheque No.719443 and not cash deposit. If the same is excluded from the total deposits made during the year from the two bank

accounts then there is no such cash deposit of Rs.4,97,452/ - in the two bank accounts maintained by the assessee. Therefore, I find force in the argument of learned counsel for the assessee that the reasons recorded are either vague reasons or not based on ITA.No.4253/Del./2018 & ITA.No.4254/Del. /2018 6 any application of mind. In any case, the assessee has explained the source of each deposit made both in cash as well as in cheque and therefore, even on merit also no addition is called for. I, therefore, set aside the order of the learned CIT(A) and direct the AO to delete the addition. The ground raised by the assessee is allowed. "

7.5. Learned Counsel for the Assessee has placed on record copy of the Incorporation Certificate of the assessee company at the initial stage in the year 2003 when it was registered as M/s. Shalom Exim (P) Ltd., which was later on

changed to M/s. Mamram Developers P. Ltd., in the year 2003 itself and thereafter in the year 2009 it was changed to Shri Shyam Sunder Infrastructure (P) Ltd., [Present Assessee]. An intimation was given to the A.O. about change in the name of the assessee. Despite all these material on record before A.O, A.O. has mentioned the name of non-existing assessee i.e., M/s. Shalom Exim (P) Ltd., in the reasons Dated 17.03.2010 recorded for reopening of the assessment, that beneficiary is non-existing company. The name of the present assessee is nowhere mentioned. The A.O. has also wrongly recorded that assessee has received entry of Rs.1,47,00,000/- and made deposit in ICICI Bank despite no such amount was found deposited in the Bank A/c of the assessee and ultimately addition is made of Rs.98 lakhs only. The A.O, thus, recorded wrong, incorrect and non-existing reasons in the reasons recorded for reopening of the assessment and has merely relied upon the report of Investigation Wing without any verification. The information received by the A.O. is vague and do not lead to formation of

belief that any income chargeable to tax has escaped assessment. In these circumstances, it was the duty of the A.O. to verify the facts before coming into the conclusion that there is an escapement of income on account of credit entries received in the Bank A/c of the assessee. The A.O. even did not verify the information received from the Investigation Wing and even did not verify the name of the assessee. Thus, the A.O. recorded incorrect and wrong reasons for reopening of the assessment and did not apply his mind to the facts of the case before recording reasons for reopening of the assessment. Even the Sanctioning Authority has not applied his mind to the conclusion drawn by the A.O. based on specific material on record which clearly reveal that reasons recorded by the A.O. are wrong, incorrect and based on no evidence. It is, therefore, clear case of non-application of mind by the A.O. at the time of recording reasons for reopening of the assessment. We also rely upon following decisions in support of our conclusion.

7.6. In the case of Pr. CIT vs., RMG Polyvinyl (I) Ltd., [2017] 396 ITR 5 (Del.) the Hon'ble Delhi High Court held as under :

> *"Where information was received from investigation wing that assessee was beneficiary of accommodation entries but no further inquiry was undertaken by Assessing Officer, said information could not be said to be tangible material per se and, thus, reassessment on said basis was not justified."*

7.7. In the case of Pr. CIT vs., Meenakshi Overseas (P) Ltd., 395 ITR 677 (Del.), the Hon'ble Delhi High Court held as under :

> *"Reassessment notice condition precedent recording of reasons to believe that income has escaped assessment mere reproduction of investigation report in reasons recorded absence of link between tangible material and formation of ceding illegal Income Tax Act, 1961, Sec.147, 148"*

7.8. In the case of Pr. CIT vs., G And G Pharma India Ltd., [2016] 384 ITR 147 (Del.), the Hon'ble Delhi High Court held as under :

> *"Reassessment condition precedent application of mind by assessing officer to materials prior to forming reason to believe income has escaped assessment - No independent application of mind to information received from Directorate of Investigation and no prima facie opinion formed- reassessment order invalid".*

7.9. In the case of Sarthak Securities Co. (P) Ltd., 329 ITR 110 (Del.), the Hon'ble Delhi High Court held as under :

> *"No independent application of mind by the Assessing officer but acting under information from Inv. Wing - Notice U/s. 147 to be quashed".*

7.10. Considering the totality of the facts and circumstances of the case and in the light of material on record, we are of the view that reopening of the assessment

is illegal and bad in Law and is liable to be quashed. We, accordingly, set aside the Orders of the authorities below and quash the reopening of the assessment. Resultantly, all additions stand deleted. This issue is decided in favour of the Assessee.

ISSUE No.2 – **[**Addition of Rs.98 lakhs on account of share capital/premium under section 68 of the I.T. Act, 1961 and addition of Rs.1,96,000/- on account of Commission**]**.

8. Learned Counsel for the Assessee submitted that A.Y. 2003-04 under appeal is the first year of incorporation of the assessee company as the assessee company was originally incorporated on 27.02.2003 in the name of M/s. Shalom Exim (P) Ltd., In assessment year under appeal, assessee company has received share application money from different applicants as mentioned in the impugned Orders of Rs.98 lakhs. The details of the same are also given in the paper book. The A.O. has mentioned in the assessment order that assessee has furnished Share

Application Form, Affidavits, copy of the return of income and copy of the Bank A/cs of all the share applicants, copies of which are also filed in the paper book. These details have not been considered by the authorities below in proper perspective. Learned Counsel for the Assessee has furnished a chart in the written submissions to show that all the documentary evidences mentioned above along with the balance-sheet of the Investors have been filed before the authorities below and copies of the same are filed in the paper book as well. The details would also show net worth of the Investors which were far more than the amount invested in assessee company. He has submitted that since it was the initial year of the assessee and assessee is incorporated on 27.02.2003 only i.e., at the end of the financial year, therefore, assessee would not have earned the amount of Rs.98 lakhs as unaccounted income. Therefore, on this reason only the addition is liable to be deleted. He has submitted that the A.O. issued summons under section 131 of the I.T. Act after lapse of 7 to 8 years

and also directed the assessee to produce the Principal Officers of the share applicants after gap of 7 to 8 years, therefore, assessee was not in a position to produce the Principal Officers of the Investors. The assessee has made a request to the A.O. to issue summons under section 131 of the I.T. Act to the Investors vide letter Dated 16.12.2010 [PB-5/Page-841]. But, the Investors were not summoned on the request of the assessee and they were not produced, therefore, there is no fault of the assessee in production of the Investors at the assessment proceedings. He has submitted that the matter was remanded by the Ld. CIT(A) to the A.O. and the A.O. issued notice Dated 9/13.01.2012 [PB-5/Page-864] to the assessee to produce the Directors / Principal Officers of the Investor Companies. The assessee in reply submitted the details of current address and PAN of these companies, copies of which are filed at PB-5/pages 865-867. Then the A.O. issued notice under section 133(6) of the I.T. Act, 1961 Dated 09.02.2012 to the share applicant companies. Copies of the replies in respect of the

same from the share applicant companies are filed at PB-5/Pages 878 to 1047. The Investors have also filed documentary evidences duly confirming the investment in assessee company. Therefore, non-service of the summons or absence of parties before A.O. could not be attributable to the assessee and no addition could be made against the assessee. he has submitted that this cannot be alone reason for making addition against the assessee. Learned Counsel for the Assessee relied upon the following decisions :

1.	CIT vs., Divine Leasing & Finance Ltd., 299 ITR 268 [Delhi-HC]
2.	CIT vs., Creative World Telefilms Limited [2011] 15 taxmann.com 183 [Bombay].
3.	Pr. CIT vs., Softline Creations (P) Ltd., [2016] 387 ITR 636 [Delhi-HC]
4.	CIT vs., Victor Electrodes Limited [2010] 329 ITR 271 [Delhi-HC].
5.	Pr. CIT vs., Rakam Money Matters Pvt. Ltd., ITA.No.778/2015 [Delhi]HC].
6.	CIT vs., Orchid Industries (P.) Ltd., [2017] 88 taxmann.com 502 (Bom.).
7.	CIT vs., Vrindavan Farms (P) Ltd., ITA.No.72/2015 Dated 12.08.2015 [Delhi-HC].
8.	CIT vs., Oasis Hospitalities Pvt. Ltd., 198 taxmann.com 247 [Delhi-HC].

8.1. Learned Counsel for the Assessee, therefore, submitted that no addition could be made on account of unexplained share capital because the initial onus upon the assessee has been discharged. He has submitted that there is no evidence on record to prove that assessee paid any commission to any party. Therefore, there were no justification to make any addition of Rs.1,96,000/-.

9. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that assessee failed to produce Directors of the Investor Companies before A.O, therefore, addition have been rightly made and confirmed by the Ld. CIT(A).

10. We have considered the rival submissions and perused the material on record. It is not in dispute that assessee filed all the documentary evidences before the authorities below in respect of explaining the genuine share application money received from the Investor Companies. The assessee filed copies of the Share Application Forms, Affidavits, Board Resolution, Confirmations, Copy of Income

Tax Returns, Balance-Sheet and Profit & Loss A/c, Bank Statements, Certificates of Incorporation, PAN and Jurisdiction of the A.O. in respect of the Share Applicant Companies. Copies of the same are also filed in the PB. All the Investors have confirmed making investment in assessee company. The bank statements of the Investors shows that they are having sufficient balances with them to make investment in assessee company. All are assessed to tax and are Incorporated Companies. Their balance-sheets shows that they have net worth to make investment in assessee company. The Investors have made investments in small amounts of Rs.4.5 lakhs to Rs.9 lakhs only in assessee company and the net worth of the Investor Companies are in several lakhs. The details of the same are mentioned in the written submissions of the assessee. The documentary evidences filed by the assessee have not been doubted by the A.O. The A.O. did not accept the explanation of assessee because the summons issued under section 131 of the I.T. Act were returned un-served and that assessee failed to

produce the Directors/Principal Officers of the Share Applicant Companies before A.O. The assessee has however, made a request to the A.O. before conclusion of the assessment proceedings on Dated 16.12.2010 to issue summons again to the Investor Companies under section 131 of the I.T. Act, but, no efforts have been made in this regard. The Hon'ble Madhya Pradesh High Court in the case of CIT vs., Ramesh Chand Shukla in MAIT No.71/2003 decided on Dated 01.04.2005 held that **"***it is now well settled that where the assessee requests the A.O. to issue summons, to enforce attendance of the Creditors to establish the genuineness and capacity of the creditor, it is the duty of the A.O. to enforce attendance by issuing summons. If the A.O. does not choose to issue summons and examine the creditors, he cannot, subsequently, treat the loans standing in the name of such creditors as non-genuine; nor add the amount thereof to the assessee's income.***"**

10.1. The Hon'ble Allahabad High Court in the case of Mannalal Muralidhar 79 ITR 540 held that **"***A.O. should*

assist the assessee by exercising the power to enable the assessee to produce evidences, otherwise, assessment would vitiate." Learned Counsel for the Assessee has referred to PB-5/Page-864 when the matter was remanded by the Ld. CIT(A) to the A.O. in this regard, A.O. issued letter to the assessee to produce the Directors/Principal Officers of these Investor Companies. The assessee submitted Current Address and PAN of these Companies on which A.O. issued notice under section 133(6) of the I.T. Act on Dated 09.02.2012 to the Share Applicant Companies and in turn, the Investor Companies have confirmed the transactions with the assessee and confirmed investment made by them supported by the documentary evidences. Therefore, their non-production before the A.O. would not be a ground to make the addition against the assessee. Since the initial onus to prove genuine credits received by assessee from the Investor Companies have been duly discharged by the assessee and no material have been produced by the A.O. to rebut the documentary evidences

filed by the assessee, therefore, there were no reason for the authorities below to make any addition against the assessee. In support of our contention, we rely upon the following decisions.

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

> *"Once adequate evidence/material is given, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has "created" evidence, the Revenue is supposed to make thorough probe before it could nail the assessee and fasten the assessee with such a liability under s.68; AO failed to carry his suspicion to logical conclusion by further*

investigation and therefore addition under s.68 was not sustainable."

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

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

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

"The CIT(A) took note of the material filed by the assessee and provided opportunity to the AO in Remand proceedings. The AO merely objected to the material furnished but did not undertake any verification. The CIT(A) deleted the addition by relying upon the decision of the Hon'ble Apex Court in the case of Lovely Exports Pvt.Ltd. (supra) and judgment of Delhi High Court in the case of CIT vs Divine Leasing & Finance Ltd. [2008] 299 ITR 268. The ITAT confirmed the opinion of the Ld.CIT(A). Hon'ble High Court in view of the above findings noted that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. The assessee provided details of share applicants i.e. copy of the PAN, Assessment particulars, mode of amount invested through banking channel, copy of resolution and copies of the balance sheet. The AO

failed to conduct any scrutiny of the document, the departmental appeal was accordingly dismissed.

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

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

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

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

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

> *"Dismissing the appeals, that if the assessee had received subscriptions to the public or rights issue through banking channels and furnished complete details of the shareholders, no addition could be made under section 68 of the Income-tax Act, 1961, in the absence of any positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented the company's own income from undisclosed sources. It was nobody's case that the non-resident Indian company was a bogus or non-existent company or that the amount subscribed by the company by way of share subscription was in fact the money of the assessee. The assessee had established the identity of the investor who had provided the*

share subscription and that the transaction was genuine. Though the assessee's contention was that the creditworthiness of the creditor was also established, in this case, the establishment of the identity of the investor alone was to be seen. Thus, the addition was rightly deleted. CIT v. Lovely Exports P. Ltd. [2009] 319ITR (St.) 5 (SC) applied."

10.8. Decision of Hon'ble jurisdictional High Court in the case of CIT vs. (i) Dwarakadhish Investment P. Ltd., (ITA.No. 911 of 2010) and (ii) Dwarkadhish Capital P. Ltd., (ITA.No.913 of 2010) (2011) 330 ITR 298 (Del.) (HC), in which it was held as under :

"In any matter, the onus of proof is not a static one. Though in section 68 of the Income Tax Act, 1961, the initial burden of proof lies on the assesses yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income-tax assessment

number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "source of source". The assessee-company was engaged in the business of financing and trading of shares. For the assessment year 2001-02 on scrutiny of accounts, the Assessing Officer found an addition of Rs.71,75,000 in the share capital of the assessee. The Assessing Officer sought an explanation of the assessee about this addition in the share capital. The assessee offered a detailed

explanation. However, according to the Assessing Officer, the assessee failed to explain the addition of share application money from five of its subscribers. Accordingly, the Assessing Officer made an addition of Rs.35,50,000/- with the aid of section 68 of the Act, 1961 on account of unexplained cash credits appearing in the books of the assessee. However, in appeal, the Commissioner of Income-tax (Appeals) deleted the addition on the ground that the assessee had proved the existence of the shareholders and the genuineness of the transaction. The Income-tax Appellate Tribunal confirmed the order of the Commissioner of Income-tax (Appeals) as it was also of the opinion that the assessee had been able to prove the identity of the share applicants and the share application money had been received by way of account payee cheques. On appeal to the High Court: Held, dismissing the

appeals, that the deletion of addition was justified."

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

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

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

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

"Dismissing the appeal, that the additional burden was on the Department to show that even if the share applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose."

10.11. Judgment of Hon'ble Supreme Court in the case of Commissioner of Income Tax, Orissa vs., Orissa

Corporation P. Ltd., [1986] 159 ITR 78 (SC) in which it was held as follows :

> *"Held, that in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was*

unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such arose. The High Court was right in refusing to state a case."

10.12. It is also an admitted fact that originally assessee company was incorporated on 27.02.2003 and the financial year ended on 31.03.2003 relevant to assessment year 2003-2004 under appeal. It is difficult to believe that during a period of about one month assessee would have earned such a huge unaccounted money of Rs.98 lakhs. Since it is the first year of the business and Incorporation of the Assessee-Company and share application money is received at the end of the financial year after Incorporation of the Assessee-Company, therefore, there were no justification to held that assessee received unexplained share application money. The Hon'ble Supreme Court in the case of CIT vs., Bharat Engineering And Construction Co. [1972] 83 ITR 187 [SC) held as under :

"The assessee, an engineering-construction company, commenced its business in May, 1943. In its accounts there were several cash credit entries in the first year of its business totalling Rs.2,50,000. Though the explanation regarding the cash credit entries was found to be false, the Appellate Tribunal held that these cash credits could not represent the income or profits of the assessee as they were all made very soon after the company commenced its activities :

Held, *that the inference drawn from the facts proved was a question of fact and the Tribunal's finding on that question was final. A construction company took time to earn profits and it could not have earned a huge profit within a few days after the commencement of its business. Hence, it was reasonable to assume that the cash credit entries represented capital receipts though for one reason or another the assessee had not come out with the true story as regards the source of the receipts.*

Decision of Allahabad High Court affirmed."

10.13. Considering the facts of the case in the light of material on record, it is clear that assessee produced sufficient documentary evidences before A.O. to prove ingredients of Section 68 of the I.T. Act, 1961. The Investors have directly confirmed making investment in assessee company in reply to the notice under section 133(6) of the I.T. Act, 1961 at the appellate stage. Therefore, the assessee has discharged its initial onus to prove the identity of the Investor Companies, their creditworthiness and genuineness of the transaction. No evidence have been brought on record by the A.O. if assessee paid any commission to any person of RS.1,96,000/-. Therefore, there is no justification to make both the additions against the assessee. In view of the above discussion, we set aside the Orders of the authorities below and delete both the additions of Rs.98 lakhs and Rs.1.96 lakhs under consideration. This issue is decided in favour of the assessee.

11. In the result, appeal of the Assessee allowed.

Order pronounced in the open Court.

Sd/-	Sd/-
(N.K. BILLAIYA)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated May, 2021

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'G' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.