

**HIGH COURT OF JUDICATURE FOR RAJASTHAN  
BENCH AT JAIPUR**

D.B. Income Tax Appeal No. 143/2018

M/s Shreenath Heritage Liquor Pvt. Ltd. , G 1/110 Riico Area,  
Jhunjhunu 333001

----Appellant

Versus

Pr Commissioner Of Income Tax, Central Circle 3, Central ,  
Revenue Building Department Of Income Tax, Statue, Circle C-  
Scheme, Jaipur Rajasthan

----Respondent

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|-------------------|---|--------------------------------------|
| For Appellant(s)  | : | Mr. S.L. Poddar for Mr. N.L. Agarwal |
| For Respondent(s) | : |                                      |

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**HON'BLE MR. JUSTICE KALPESH SATYENDRA JHAVERI  
HON'BLE MR. JUSTICE VIJAY KUMAR VYAS**

**Judgment**

**25/07/2018**

1. By way of this appeal, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has dismissed the appeal filed by the assessee.

2. Counsel for the appellant has framed the following questions of law:-

i) Whether the Id. ITAT was justified under law while passing of the impugned order dated 18.12.2017 without applying its mind and by merely reproducing the contents of order passed in its own earlier judgment in ITAT No. 702/JP/2014 titled ACT Circle I, Jaiur vs. Bright Metals Indian Pvt. Ltd. Jaipur dated 24.02.2017 and simply recording that the assessee company being a private limited company the burden of proof on higher pedestal ignoring the law laid down by Hon'ble Apex Court in various cases referred in the impugned order itself particularly at page 9 & 11 of the impugned order?

ii) Whether the Id. ITAT was justified under law while confirming the findings of the authorities below it by ignoring the fact that the assessee-company has furnished the detail particulars of the bank accounts, passport, PAN card, addresses and earnings by the shareholder-cum-Director who had invested money in the assessee-company, particularly when the investment was made through banking channel?

iii) Whether the Id. ITAT was justified under law while confirming the findings of Id. CIT(A) and the Id. AO wherein the Id. AO for treating the investment of share money by Sh. Jagjit Singh who is British NRI as unproven?

iv) Whether the Id. ITAT was justified under law while sustaining the additions made by Id. CIT(A) in the hands of the Assessee-Company u/s 68 of the IT Act, 1961 by merely recording that the burden of proof is on higher pedestal on the assessee-company as compare to public limited companies in terms of creditworthiness and genuineness of the transaction without analysing the fact of the higher burden?"

3. Counsel for the appellant contended that the Tribunal and all the authorities have committed serious error in dismissing the appeal inasmuch as the provisions of Section 68 were inserted with effect from 1<sup>st</sup> April, 2013 whereas the assessment order relates to the year 2011-12.

4. Counsel for the appellant has taken us to the order of Tribunal wherein it has been observed as under:-

**"11.** Now, coming to various legal authorities on the subject which have been quoted by the Id AR in support of his contentions, the same have recently been analysed by us (speaking through one of us) in exhaustive detail in case of ACIT Circle-1, Jaipur vs. Bright Metals Pvt. Ltd. Jaipur (ITA No.702/JP/14) dated 24.02.2017 as under:-

**"3.** In order to appreciate the rival contentions, we refer to various legal authorities on the subject which has been brought to our notice by both the parties.

3.1 In case of Navodaya Castle (P) Ltd (supra) which is a case of a private limited company, it is noted that the SLP has been rejected by the Hon'ble Supreme Court holding that the Court do not see any merit in the SLP against the order of Hon'ble Delhi High Court. In this case, the Hon'ble Delhi High Court has referred to catena of earlier decisions such as case of CIT v. Nova Promoters & Finlease (P.) Ltd. [2012] 342 ITR 169, CIT v. N.R. Portfolio (P.) Ltd. [2014] 222 Taxman 157, CIT v. Sophia Finance Ltd. [1994] 205 ITR 98(Delhi) (FB), CIT v. Divine Leasing & Finance Ltd. [2008] 299 ITR 268, CIT v. Durga Prasad More [1971] 82 ITR 540 (SC) and CIT v. Nipun Builders & Developers [2013] 350 ITR 407 and has held as under:

"12. The main submission of the learned counsel for the assessee is that once the assessee had been able to show that the shareholder companies were duly incorporated by the Registrar of Companies, their identity stood established, genuineness of the transactions stood established as payments were made through accounts payee cheques/bank account; and mere deposit of cash in the bank accounts prior to issue of cheque/pay orders etc. would only raise suspicion and, it was for the Assessing Officer to conduct further investigation, but it did not follow that the money belonged to the assessee and was their unaccounted money, which had been channelized.

13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies, but thereafter no further inquiries were conducted. The second set of cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, identification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of the

transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.

14. Certificate of incorporation, PAN etc. are relevant for purchase of identification, but have their limitation when there is evidence and material to show that the subscriber was a paper company and not a genuine investor.

18. Lovely Exports (P.) Ltd. (supra) was also considered and distinguished in N.R. Portfolio (P.) Ltd. (supra) and it was held that the entire evidence available on record has to be considered, after relying upon CIT v. Nipun Builders and Developers [2013] 350 ITR 407/214 Taxman 429/30 taxmann.com 292 (Delhi), wherein it has been held that a reasonable approach has to be adopted and whether initial onus stands discharged would depend upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call money, dividends, warrants, etc. have to be sent and the relationship remains a continuing one. Therefore, an assessee cannot simply furnish some details and remain quiet when summons issued to shareholders remain un-served and uncomplied. As a general proposition, it would be improper to universally hold that the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders' attendance in spite of the fact that the shareholders were missing and not available. Their reluctance and hiding may reflect on the genuineness of the transaction and creditworthiness of the creditor. It would be also incorrect to universally state that an Inspector must be sent to verify the shareholders/subscribers at the available addresses, though this might be required in some cases. Similarly, it would be incorrect to state that the Assessing Officer should ascertain and get addresses from the Registrar of Companies' website or search for the addresses of shareholders themselves. Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment or had, acted as angel investors after due diligence or for personal reasons. The final

conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish creditworthiness of the shareholders.

20. Now, when we go to the order of the tribunal in the present case, we notice that the tribunal has merely reproduced the order of the Commissioner of Income Tax (Appeals) and upheld the deletion of the addition. In fact, they substantially relied upon and quoted the decision of its coordinate bench in the case of MAF Academy (P.) Ltd., (supra) a decision which has been overturned by the Delhi High Court vide its judgment in MAF Academy (P.) Ltd (supra). In the impugned order it is accepted that the assessee was unable to produce directors and principal officers of the six shareholder companies and also the fact that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer has observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions.

21. In view of the aforesaid discussion, we feel that the matter requires an order of remit to the tribunal for fresh adjudication keeping in view the aforesaid case law. The question of law is, therefore, answered in favour of the Revenue and against the respondent-assessee, but with an order of remit to the tribunal to decide the whole issue afresh. One of the reasons, why we have remitted the matter is that the cross objections of the respondentassessee questioning notice under Section 147/148 were dismissed as infructuous and even if we decide the issue on merits in favour of the Revenue, the cross objections would got revived and require adjudication. The appeal is accordingly disposed of."

3.2 We now refer to another leading case of Lovely Exports (P) Ltd. (supra) which has been considered and referred in Navodaya Castle case (supra) and which has also been quoted by the Id AR in support of its contention. It was a case of public limited company where shares were subscribed by public and the facts thereof have been set out in the judgment of Hon'ble Delhi High Court reported as Divine Leasing & Finance Ltd.[2008] 299 ITR 268. The petition for leave to appeal against this order was dismissed by the Hon'ble Supreme Court observing "We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to

the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment." In that case, the Hon'ble Delhi High Court has held as under:-

"6. We find it indeed remarkable that the attention of the Sophia Finance Full Bench had not been drawn to the decision of the Supreme Court in CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78, which if cited would really have left no alternative to the Full Bench but to arrive at the conclusion it did. The books of account of the assessee contained three cash credits aggregating Rs. 1,50,000 allegedly received as loans from three individual creditors under hundis. Letters of confirmation as well as the discharged hundis were produced; but notices/summons sent to them remained unserved because they had reportedly 'left' that address. The view of the Tribunal was that merely because the assessee could not produce these three parties, there was nevertheless no justification to draw an adverse inference. This approach as accorded approval by the Supreme Court in these words :

"In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises." (p. 84)

This reasoning must apply a fortiori to large scale subscriptions to the shares of a public company where the latter may have no material other than the application Forms and Bank transaction details to give some indication of the identity of these subscribers. It may not apply in circumstances

where the shares are allotted directly by the company/assessee or to creditors of the assessee. This is why this Court has adopted a very strict approach to the burden being laid almost entirely on an assessee which receives a gift.

7. Sumati Dayal v. CIT [1995] 214 ITR 801 (SC) a succinct yet complete precis on the essentials of income-tax liability can be discerned from these words - "In all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if the receipt is in the nature of income, the burden of proving that it is not taxable because it falls within the exemption provided by the Act lies upon the assessee." This decision is adequate authority for the proposition that by virtue of section 68 of the Income-tax Act the assessee is obliged to establish that amounts credited in the accounts do not represent its income; in that case the assessee's version that she had won them through betting on horse racing in two consecutive years did not attract credibility. The Apex Court had followed its earlier decision, namely, Orissa Corpn. (P.) Ltd.'s case (supra) wherein it had held that since the assessee had given the names and addresses of the creditors, all of whom were income-tax assesseees, the failure of the creditors to respond to the Department's notices would not justify an adverse inference being drawn against the assesseees. The Court also kept in perspective the fact that the documentation had also been produced by the assessee. It is obvious that the Supreme Court considered that in these circumstances the onus of proof had been discharged by the assessee. It is also palpable that the Supreme Court was of the further opinion that the Department had not discharged the burden of proof that had shifted to it, since it did nothing more than issue notices under section 131 of the Income-tax Act. Therefore, the Department ought to have made efforts to pursue these notices/creditors to determine their creditworthiness. These observations sound the death-knell for the contentions raised on behalf of the Department in the present batch of appeals.

13. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and

complexity of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of sections 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company.

16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of section 68 of the Income-tax Act. The assessee has to prima facie prove (1) the identity of the creditor/sub-scriber; (2) the genuineness of the transaction, namely: whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable explanation by the assessee. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."

3.4 We now refer to the decision of the Hon'ble Delhi High Court in case of Commissioner of

Income-tax v. Nova Promoters & Finlease (P) Ltd. [2012] 342 ITR 169 (Delhi), which is again a case of a private limited company and which has been followed in case of Navodaya Castles(supra). In this case, the Hon'ble Delhi High Court has held as under:-

"38. The ratio of a decision (in case of Lovely Exports) has to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec. 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan - a smokescreen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec. 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry

into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.

39. The case of CIT v. Orissa Corporation (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80 (SC) exemplifies the category of cases where no action is taken by the Assessing Officer to verify or conduct an enquiry into the particulars about the creditors furnished by the assessee, including their income-tax file numbers. In the same category fall cases decided by this court in CIT v. Dolphin Canpack [2006] 283 ITR 190 , CIT v. Makhni & Tyagi (P.) Ltd. [2004] 267 ITR 433 / 136 Taxman 641 , CIT v. Antartica Investment (P.) Ltd. [2003] 262 ITR 493 / 133 Taxman 605 and CIT v. Achal Investment Ltd. [2004] 268 ITR 211/ 136 Taxman 335 .

3.5 We now refer to the decision of the Hon'ble Delhi High Court in case of Commissioner of Income-tax v. N.R. Portfolio (P.) Ltd [2014] 222 Taxman 157 which is again a case of a private limited company and which has been followed in case of Navodaya Castles(supra). In this case, the Hon'ble Delhi High Court has held as under:

"18. In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. This according to us is the correct and true legal position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee,

did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions

29. In CIT v. Nipun Builders & Developers (P.) Ltd. [2013] 350 ITR 407/214 Taxman 429/30 taxmann.com 292 (Delhi), this principle has been reiterated holding that the assessee and the Assessing Officer have to adopt a reasonable approach and when the initial onus on the assessee would stand discharged depends upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call monies, dividends, warrants etc. have to be sent and the relationship is/was a continuing one. In such cases, therefore, the assessee cannot simply furnish details and remain quiet even when summons issued to shareholders under Section 131 return unserved and uncomplied. This approach would be unreasonable as a general proposition as the assessee cannot plead that they had received money, but could do nothing more and it was for the assessing officer to enforce share holders attendance. Some cases might require or justify visit by the Inspector to ascertain whether the shareholders/subscribers were functioning or available at the addresses, but it would be incorrect to state that the assessing officer should get the addresses from Registrar of Companies' website or search for the addresses of shareholders and communicate with them. Similarly, creditworthiness was not proved by mere issue of a cheque or by furnishing a copy of statement of bank account. Circumstances might require that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment, acted as angel investors, after due diligence or for personal reasons. Thus, finding or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unimpeachably establish creditworthiness of the shareholders.

30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them."

31. The respondent herein is a Private Limited Company. It is not the case of the respondent that the Directors or persons behind the companies making the investment in their shares were related or known to them. It is highly implausible that an unknown person had made substantial investment in a private limited company to the tune of Rs.63,80,100/- and Rs.75,60,200/- in two consecutive assessment years 2002-03 and 2003-04 respectively without adequately protecting the investment and ensuring appropriate returns. Other than the share application forms, no other agreement between the respondent and third companies had been placed on record. The persons behind these companies were not produced by the respondent. On the other hand respondent adopted prevaricate and non- cooperation attitude before the Assessing Officer once they came to know about the directed enquiry and the investigation being made. Evasive and transient approach before the Assessing Officer is limpid and perspicuous. Identity, creditworthiness or genuineness of the transaction is not established by merely showing that the transaction was through banking channels or by account payee instrument. It may, as in the present case required entail a deeper scrutiny. It would be incorrect to state that the onus to prove the genuineness of the transaction and creditworthiness of the creditor stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to

each; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the object and purpose for which payment/investment was made etc. These facts are basically and primarily in knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious. What is unmistakably visible and apparent, cannot be spurred by formal but unreliable pale evidence ignoring the patent and what is plain and writ large."

3.6 We now refer to the decision in case of CIT vs. Shree Barkha Synthetics Ltd. (supra) wherein the Hon'ble Rajasthan High Court has held as under (head notes):

"The assessee having been asked to furnish explanation about the receipt of capital money on account of share application, had furnished the details of the identity of persons who had made such investments. The particulars of the receipt and GIR number of the persons, who had made such investments in the matter of companies registered under the Companies Act, 1956, were furnished. Notices of 5 companies out of 7 companies were received unserved with the remark of the postal department that they had shifted their addresses. But no attempt was made by the department to pursue the enquiry thereafter which, notwithstanding the remark about shifting of addresses, prima facie established genuineness of such companies as existing persons. It had come on record that another company did exist and was under liquidation, the existence of which at relevant time could not be doubted. Likewise, in the case of individual investors, the Tribunal had reached the finding that their identities had been established by the assessee. [Para 10] Applying the principle enunciated by the Supreme Court in CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F, the irresistible conclusion was that the conclusion of the Tribunal that the assessee had discharged his initial burden in respect of 6 companies and 9 individual investors, was based on evidence and additions made by the Assessing Officer were enquired into without pursuing correctness of material placed before it

by the assessee. No question of law could be said to be arising in such circumstances in respect of finding arrived at by the Tribunal, which was essentially a finding of fact and did not stand vitiated in law. [Para 11]"

3.7 In case of Riddhi Promoters (P) Ltd (supra), the Hon'ble Delhi High Court held as under:

"6. It is not sufficient that the identity of the share applicant or the creditor should be established for the assessee to discharge the initial onus, which is upon the assessee. Under the requirement of section 68, the assessee has to further satisfy the revenue as to the genuineness of the transaction and the creditworthiness of the share applicant or the individual who is advancing amounts. The assessee's reliance upon the order of the Commissioner (Appeals) to contend that the sources of the funds were in essence as directors, is, in this context, of no avail. The assessee has contended that it was incorporated just before the end of the financial year. However, the assessee had to necessarily show that the amount which it indicated as borrowed from the six applicants in fact belonged to them. The creditworthiness of the share applicants had to be seen in the context of the assertion made by them or the materials presented before the Assessing Officer at the relevant time. The materials on record disclosed that some information from at least two individuals indicated that the money had not been given by them. The appeal is accordingly dismissed."

3.8 In the case of Jansampark Advertising & Marketing (P) Ltd (supra), the Hon'ble Delhi High Court has held as under (Head Notes):

"The further inquiry envisaged under section 250(4) is generally by calling what is known as 'remand report'. The purpose of this enabling clause is essentially to ensure that the matter of assessment reaches finality with all the requisite facts found. The assessment proceedings reopened on the basis of preliminary satisfaction that some part of the income has escaped assessment, particularly when some unexplained credit entries have come to the notice (as in section 68), cannot conclude, save and except by reaching satisfaction on the touchstone of the three tests mentioned earlier; viz. the identity of the third party making the payment, its creditworthiness and genuineness of the

transaction. Whilst it is true that the assessee cannot be called upon to adduce conclusive proof on all these three questions, it is nonetheless legitimate expectation of the process that he would bring in some proof so as to discharge the initial burden placed on him. Since section 68 itself declares that the credited sum would have to be included in the income of the assessee in the absence of explanation, or in the event of explanation being not satisfactory, it naturally follows that the material submitted by the assessee with his explanation must itself be wholesome or not untrue. It is only when the explanation and the material offered by the assessee at this stage passes this muster that the initial onus placed on him would shift leaving it to the Assessing Officer to start inquiring into the affairs of the third party. [Para 39]

The Commissioner (Appeals) and consequently the Tribunal were right to the extent of their conclusion that the assessee had come up with some proof of identity of some of the entries in question. But, from this inference, or from the fact that the transactions were through banking channels, it does not necessarily follow that satisfaction as to the creditworthiness of the parties or the genuineness of the transactions in question would also have been established. [Para 41]

The Assessing Officer here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But the Commissioner (Appeals), having noticed want of proper inquiry, cannot close the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of the Tribunal, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under section 148 issued by the Assessing Officer, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a 'further inquiry' in exercise of the power under section 250(4). This approach not having been adopted, the impugned order of the Tribunal, and consequently that of the Commissioner (Appeals), cannot be approved or upheld. [Para 42]"

3.10 In the case of Empire Buildtech (P) Ltd (supra), the Hon'ble Delhi High Court has held as under (Head Notes):

"In Lovely Exports (supra), the Supreme Court emphasized that the initial burden is upon the assessee to show as to the genuineness of the identity of the individuals or entities which seek to subscribe to the share capital. In the instant case, the Assessing Officer in his order, has produced the tabular statement describing the number of shares subscribed by the investors, the amounts paid by them, the individuals who paid the amount towards share capital and the gross income reported by each of such investors to the revenue. A look at that chart would show that the investors had, by and large, reported amounts far less as compared to the sums invested by them towards share capital. Furthermore, the Assessing Officer had, during the course of assessment, issued notices under section 133(6) to the investors - 28 of them responded; 2 did not receive the notice and 9 of them received the notices and responded but did not submit any confirmation. [Para 7] Having regard to the circumstances, particularly, the fact that these investors not only did not submit confirmation but had concededly reported far less income than the amounts invested, the assessee could not, under the circumstances, be said to have discharged the burden which was upon it. It is not sufficient for the assessee to merely disclose the addresses or identities of the individuals concerned. The other way of looking at the matter is that having given the addresses, the inability of the noticees who are approached by the Assessing Officer to afford any reasonable explanation as to how they got the amounts given the nature of their income which was disproportionally less than what they subscribed as share capital would also amount to the revenue having discharged the onus if at all which fell upon it. The assessee in this case was incorporated barely few months before the commencement of the assessment year, and there is no further information, or anything to indicate why its mark up of the share premium thousand fold in respect of the shares which were of the face value of Rs. 10 lakhs was justified. [Para 8]"

3.11 In the case of Ultra Modern Export(P) Ltd (supra), the Hon'ble Delhi High Court has held as under:

"9. As noticed previously, the CIT (A) was of the opinion that the assessee had discharged the basic onus which was cast upon it after considering the ruling in Lovely Exports (P.) Ltd.'s case (supra). The material and the records in this case show that notice issued to the 5 of the share applicants were returned unserved. The particulars of returns made available by the assessee and taken into consideration in paragraph 3.4 by the AO in this case would show that the said parties/applicants had disclosed very meager income. The AO also noticed that before issuing cheques to the assessee, huge amounts were transferred in the accounts of said share applicants. This discussion itself would reveal that even though the share applicants could not be accessed through notices, the assessee was in a position to obtain documents from them. While there can be no doubt that in Lovely Exports (P.) Ltd. (supra), the Court indicated the rule of "shifting onus" i.e. the responsibility of the Revenue to prove that Section 68 could be invoked once the basic burden stood discharged by furnishing relevant and material particulars, at the same time, that judgment cannot be said to limit the inferences that can be logically and legitimately drawn by the Revenue in the natural course of assessment proceedings. The information that assessee furnishes would have to be credible and at the same time verifiable. In this case, 5 share applicants could not be served as the notices were returned unserved. In the backdrop of this circumstance, the assessee's ability to secure documents such as income tax returns of the share applicants as well as bank account particulars would itself give rise to a circumstance which the AO in this case proceeded to draw inferences from. Having regard to the totality of the facts, i.e., that the assessee commenced its business and immediately sought to infuse share capital at a premium ranging between Rs. 90-190 per share and was able to garner a colossal amount of Rs. 4.34 Crores, this Court is of the opinion that the CIT (Appeals) and the ITAT fell into error in holding that AO could not have added back the said amount under Section 68. The question of law consequently is answered in favour of the Revenue and against the assessee."

3.12 In case of M/s Shubh Mines Pvt Ltd, the Hon'ble Rajasthan High Court has held as under:

"(7) A bare perusal of the assessment order reveals that the AO has made the addition on suspicion which is based on the statements of

third party Shri Asseem Kumar Gupta, admittedly, recorded in the back of the assessee. It has come on record that the share application money of Rs. 50,00,000/- was received from Moderate Credit Corporation Ltd., a listed company. It is not disputed before this court that the investment made was received by account payee cheque and the same was refunded by an account payee cheque when the company dropped its project. In the considered opinion of this court, in absence of any cogent evidence on record establishing that the money shown to have received as share application money, was as a matter of fact, unaccounted money belonging to the assessee company, the finding arrived at by the AO, which is based on suspicion, has rightly been held not sustainable in the eyes of law. Suffice it to say that the finding arrived at by the CIT(A), affirmed by the ITAT, which remains a finding of fact, cannot be said to be capricious or perverse."

3.13 In case of Softline Creations Pvt Ltd 387 ITR 636 (Del), the Hon'ble Delhi High Court has held as under:

"(4) This court has considered the concurrent order of the CIT(A) as well as the ITAT. Both these authorities primarily went by the fact that the assessee had provided sufficient indication by way of PAN numbers, to highlight the identity of the share applicants, as well as produced the affidavits of Directors. Furthermore, the bank details of share applicants too had been provided. In the circumstances, it was held that the assessee had established the identity of the share applicants, the genuineness of transactions and their credit-worthiness. The AO chose to proceed no further but merely added the amounts because of the absence of the Directors physically present themselves before him.

6 We are of the opinion that no question of law arises, having regard to the concurrent findings of fact. The assessee has, in our opinion, complied with the law spelt out by the Supreme Court in CIT vs. Lovely Exports Pvt. Ltd. 216 CTR (SC) 195. The appeal is meritless and is consequently dismissed."

5. The Tribunal has dismissed the appeal on the ground of Judgment in its own earlier judgment in Bright Metals Indian Pvt. Ltd. Jaipur against which he submits that appeal has been

**K.K. Construction Co.**  
(Proprietor Shri Zanardan sharma)  
Head Office at 2627, Tri Nagar, Delhi-110035  
Site Office at SC-244, Shastri Nagar, Ghaziabad, U.P.

| Particulars                       | Amount     | Particulars                        | Amount     |
|-----------------------------------|------------|------------------------------------|------------|
| <b><u>Capital</u></b>             |            | <b><u>Fixed Assets</u></b>         | 25,750,877 |
| Capital Account 14,791,019        |            | (As Per Schedule Attached)         |            |
| Add: Introduced during year       |            |                                    |            |
| 3,049,116                         |            |                                    |            |
| Add: Profit during the year       |            |                                    |            |
| 750,423                           |            |                                    |            |
| 18,590,588                        |            |                                    |            |
| Less: Drawings 1,222,360          | 17,368,198 | <b><u>Investments:</u></b>         |            |
| <b><u>Loans (Liabilities)</u></b> |            | Shares in Indian companies         | 5,320,000  |
| <b><u>Secured Loans</u></b>       |            |                                    |            |
| Andhra Bank – Term Loan           |            | <b><u>Loans &amp; Advances</u></b> |            |
| 1404 12,537,498                   |            | J K K Builders Pvt. Ltd.           | 961,660    |
| Andhra Bank – CC A/c              |            |                                    |            |
| 8,494,998                         |            |                                    |            |
| Term Loan-2537 667,132            |            |                                    |            |
| Loan – Truck 2218                 |            |                                    |            |
| 1,055,711                         |            | <b><u>Current Assets</u></b>       |            |
| Term Loan – 3891                  |            | FDRs                               | 2,598,454  |
| 4,759,895                         | 27,515,234 | Sundry Debtors                     | 11,466,033 |
| <b><u>Unsecured Loans</u></b>     |            | Bank Balance                       | 2,212      |
| (As per annexure attached)        | 4,743,097  | Cash – In – Hand                   | 348,658    |
| <b><u>Current Liabilities</u></b> |            | Closing Stock                      | 8,350,000  |
| Sundry creditors 2,953            |            | Security (EMD)                     | 175,290    |
| Current Liabilities 5,615,172     |            | TDS Receivable                     | 293,942    |
| Audit Fee Payable 22,472          | 5,640,597  |                                    |            |
|                                   | 55,267,126 |                                    | 55,267,126 |

For K.K. Construction  
Prop.

ts सत्यमेव जयते

### **Capital Account For The Year Ended 31.03.2012**

| Date       | Particulars                          | Amount(Rs.) | Date       | Particulars                          | Amount(Rs.) |
|------------|--------------------------------------|-------------|------------|--------------------------------------|-------------|
| 05.04.2011 | Cash Drawings                        | 50,000      | 01.04.2011 | By Opening Balance                   | 14,791,019  |
| 17.05.2011 | Cash Drawings                        | 50,000      |            | <u>By Capital</u>                    |             |
| 20.06.2011 | Cash Drawings                        | 50,000      |            | <u>Introduced</u>                    |             |
| 18.07.2011 | Cash Drawings                        | 60,000      |            | <u>Cash recd. From</u>               |             |
| 08.08.2011 | Cash Drawings                        | 65,000      |            | <u>Sale of Shares</u>                |             |
| 07.09.2011 | Cash Drawings                        | 70,000      | 05.09.2011 | -J.K.K. Builders & Engineer Pvt. Ltd | 500,000     |
| 14.09.2011 | Cash Drawings for purchase of shares | 500,000     | 03.11.2011 | -Comfort Buildwell Pvt. Ltd.         | 500,000     |
| 05.10.2011 | Cash Drawings                        | 50,000      |            |                                      |             |
| 07.11.2011 | Cash Drawings for purchase of shares | 500,000     | 15.11.2011 | -J.K.K. Builders & Engineer Pvt.     | 500,000     |

|            |                                      |                   |            |                                       |                   |
|------------|--------------------------------------|-------------------|------------|---------------------------------------|-------------------|
| 14.11.2011 | Cash Drawings                        | 60,000            |            | Ltd                                   |                   |
| 01.12.2011 | Cash Drawings for purchase of shares | 1,000,000         | 25.11.2011 | Cash Recd. From Sale of wife's shares | 1,750,000         |
| 08.12.2011 | Cash Drawings                        | 75,000            | 16.12.2011 | Cash recd. From Sale of Wife's Shares | 1,750,000         |
| 07.01.2012 | Cash Drawings                        | 60,000            |            | -Insurance claim Received             | 1,049,116         |
| 14.01.2012 | Cash Drawings for purchase of shares | 1,000,000         |            |                                       |                   |
| 09.02.2012 | Cash Drawings                        | 60,000            | 31.03.2012 | By Net Profit during the year         | 750,423           |
| 14.03.2012 | Cash Drawings                        | 70,000            |            |                                       |                   |
|            | Other Drawing                        | 502,360           |            |                                       |                   |
| 31.03.2012 | Closing Balance                      | 17,368,198        |            |                                       |                   |
|            |                                      | <u>21,590,558</u> |            |                                       | <u>21,590,558</u> |

### **Cash Account For The Year Ended 31.03.2012**

| Date       | Particulars                            | Amount(Rs.)       | Date       | Particulars                           | Amount(Rs.)       |
|------------|----------------------------------------|-------------------|------------|---------------------------------------|-------------------|
| 01.04.2011 | Opening Balance                        | 975,738           | 05.04.2011 | Cash Drawings                         | 50,000            |
|            | Cash Recd. From Sale of Shares         |                   | 17.05.2011 | Cash Drawings                         | 50,000            |
| 05.09.2011 | -J.K.K. Builders & Engineers Pvt. Ltd. | 500,000           | 20.06.2011 | Cash Drawings                         | 50,000            |
| 03.11.2011 | -Comfort Buildwel Pvt. Ltd.            | 500,000           | 18.07.2011 | Cash Drawings                         | 60,000            |
| 15.11.2011 | -J.K.K. Builders & Engineer Pvt. Ltd.  | 500,000           | 08.08.2011 | Cash Drawings                         | 65,000            |
| 25.11.2011 | Cash recd. From Sale of Wife's Shares  | 1,750,000         | 07.09.2011 | Cash Drawings                         | 70,000            |
| 13.12.2011 | Andhra Bank CC 0113                    | 825,000           | 14.09.2011 | Cash Drawings for purchase of shares  | 500,000           |
| 15.12.2011 | Andhra Bank CC 0113                    | 875,000           | 05.10.2011 | Cash Drawings                         | 50,000            |
| 16.12.2011 | Cash recd. From Sale of Wife's Shares  | 1,750,000         | 07.11.2011 | Cash Drawings for purchase of shares  | 500,000           |
| 24.12.2011 | Andhra Bank CC 0113                    | 200,000           | 14.11.2011 | Cash Drawings                         | 60,000            |
| 30.12.2011 | Andhra Bank CC 0113                    | 900,000           | 01.12.2011 | Cash Drawings for purchase of shares  | 1,000,000         |
| 25.01.2012 | Andhra Bank CC 0113                    | 900,000           | 08.12.2011 | Cash Drawings                         | 75,000            |
| 30.01.2012 | Andhra Bank CC 0113                    | 1,421,000         | 07.01.2012 | Cash Drawings                         | 60,000            |
| 25.02.2012 | Andhra Bank CC 0113                    | 900,000           | 14.01.2012 | Cash Drawings for purchase of shares  | 1,000,000         |
| 31.03.2012 | Andhra Bank CC 0113                    | 600,000           | 09.02.2012 | Cash Drawings                         | 60,000            |
| 31.03.2012 | Andhra Bank CC 0113                    | 700,000           | 14.03.2012 | Cash Drawings                         | 70,000            |
| 31.03.2012 | Andhra Bank CC 0113                    | 60,000            | 16.03.2012 | Andhra Bank CC 0113                   | 570,000           |
|            | Cash Recd. From Sundry Debtors         | 1,561,128         | 2011-12    | Cash Expenses during the year         | 9,477,148         |
|            |                                        | <u>14,917,866</u> |            | - Audit Fees Payable                  | 22,060            |
|            |                                        |                   |            | -Cash paid to previous year Creditors | 780,000           |
|            |                                        |                   | 31.03.2012 | Closing Balance                       | 348,658           |
|            |                                        |                   |            |                                       | <u>14,917,866</u> |

6. The first question of law which has been framed is a question of fact and in view of circular and observations made by the tribunal while considering the matter which reads as under:-

"4. After going through the various legal authorities as narrated above, the legal proposition that emerges in the context of section 68 is as under:

4.1 Where any sum is found credited in the books maintained by the assessee, Section 68 requires that the assessee should offer an explanation about the nature and source of such sum found credited in its books of accounts to the satisfaction of the Assessing officer. In absence of explanation, or in the event of explanation being not found satisfactory, the sum so credited would be included in the income of the assessee.

4.2 The primary requirements, which should be satisfied cumulatively by the assessee in such cases is identification of the shareholder, creditworthiness of shareholder and the genuineness of the transaction.

4.3 The explanation offered and material submitted by the assessee in support of its explanation should be wholesome, credible and verifiable. These three requirements thereafter have to be tested by the Assessing officer not superficially but in depth having regard to the human probabilities and normal course of human conduct. It is only when the explanation and the material offered by the assessee at this stage passes this muster that the initial onus placed on it would shift leaving it to the Assessing Officer to start inquiring into the affairs of the third party.

4.4 Whilst it is true that the assessee cannot be called upon to adduce conclusive proof on all these three requirements, it is nonetheless legitimate expectation of the process that he would bring in sufficient proof, which is credible and at the same time verifiable, so as to discharge the initial burden placed on him. Whether initial onus stands discharged would depend upon facts and circumstances of each case.

4.5 The degree of burden of proof on the assessee will vary from assessee to assessee. In case of private limited companies where shares are allotted through private placement to persons generally known to directors or shareholders, directly or indirectly, burden of proof is on higher pedestal as compared to public limited companies where the large scale subscription are offered through public issue and shares are subscribed by general public. In case of private limited

companies, the Courts have laid down a strict approach in terms of satisfying such burden of proof.

4.6 In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call money, dividends, warrants, etc. have to be sent and the relationship remains a continuing one. Therefore, an assessee cannot simply furnish some details and remain quiet when summons issued to shareholders remain un-served and uncomplied. As a general proposition, it would be improper to universally hold that the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders' attendance in spite of the fact that the shareholders were missing and not available. Their reluctance and hiding may reflect on the genuineness of the transaction and creditworthiness of the shareholder. It would be also incorrect to universally state that an inspector must be sent to verify the shareholders/subscribers at the available addresses, though this might be required in some cases. Similarly, it would be incorrect to state that the Assessing Officer should ascertain and get addresses from the Registrar of Companies' website or search for the addresses of shareholders themselves.

4.7 Unlike the case of private limited companies, in the case of public limited company which has gone for a public issue and got share subscriptions from prospective shareholders across the length and breadth of the country, the legal regime may not be the same. In such cases, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents, bank transactions details and other related KYC documents submitted along with the share application.

4.8 The word "identity" means the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business

and recognition of the said company in the eyes of public. Merely producing certificate of incorporation, PAN number or assessment particulars did not establish the identity of the person. PAN numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. The actual and true identity of the person or a company was the business undertaken by them. Further, these documents have their limitation and cannot be relied upon blindly when there are surrounding circumstances to show that the subscriber was a paper company and not a genuine investor.

4.9 In respect of the genuineness of the transaction and creditworthiness of the shareholder, it would be incorrect to state that the onus to prove the same stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends on whether the two parties are related or known to each other; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation and due diligence to protect the investment and the pay back on such investment, whether the investor professes and was an angel investor, the object and purpose (profit motive) behind the investment and whether any dividend declared and distributed in the past or not. Whether share subscribers have their own profit making apparatus and were involved in any tangible business activity or were they merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. Creditworthiness and genuineness of the transaction is therefore not proved by showing merely issue and receipt of a cheque or by furnishing a copy of statement of bank account of share subscriber, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment.

4.10 The entire evidence available on record has to be considered and a reasonable approach has to be adopted. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish identity, creditworthiness of the shareholders and the genuineness of the transaction.

4.11 Where the assessee has discharged the initial burden placed upon him under sec. 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction, the burden of proof shifts on the Assessing officer. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. If the Assessing Officer harbours any doubts of the legitimacy of any subscription, he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings or has no material in his possession, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company."

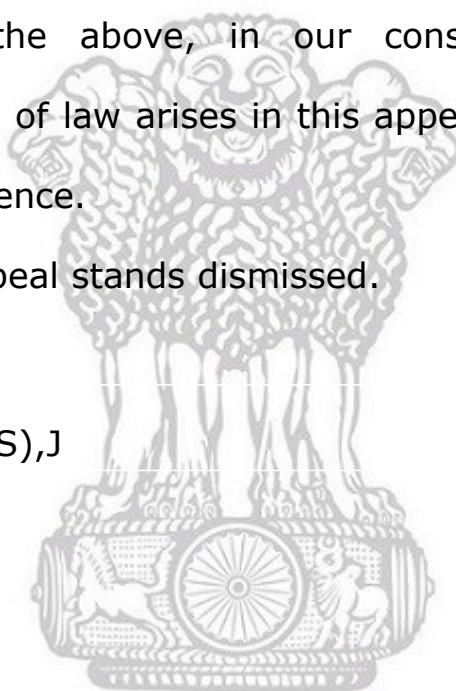
7. In view of the above, in our considered opinion, no substantial question of law arises in this appeal. It is merely a re-appreciation of evidence.

8. Hence, the appeal stands dismissed.

(VIJAY KUMAR VYAS),J

(K.S.JHAVERI),J

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