

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**Kolkata Bench, Kolkata**

**(Bench – “B”)**

**BEFORE SHRI ABY. T. VARKEY, JUDICIAL MEMBER AND  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**I.T.A. No.1494/Kol/2017**

(Assessment year 2012-13)

<b>M/s Baba Bhootnath Trade &amp; Commerce Ltd.</b> [PAN :AADCB 3010 D]	-Vs-	<b>ITO, Ward-9(2), Kolkata.</b>
(Appellant)	..	(Respondent)

For the Appellant	Shri S. M. Surana, Advocate & Shri Abhishek Bansal, Advocate
For the Respondent	Shri Robin Choudhury, Addl. CIT- Sr. DR.
Date of Hearing	29.03.2019
Date of Pronouncement	05.04.2019

**ORDER**

**Per M. Balaganesh:**

This appeal of the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals) -16, Kolkata [in short ld CITA] in Appeal No.703/CIT(A)-16/W-9(2)/2015-16 dated 20.02.2017 against the order of assessment framed by Learned Income Tax Officer, Ward 9(2), Kolkata [in short the ld AO] u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) on 29.03.2015 for the Assessment Year 2012-13.

2. The only issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in deleting the addition made towards share capital u/s 68 of the Act in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee issued part of the equity shares during the year at a premium and the total share capital and share premium received during the financial year 2011-12 was Rs 2,04,00,000/-. The assessee allotted shares to the following persons:-

Sl. No	Name of share applicants	Amount invested in 'a' company investment (6) to Net Worth (5)
		6
<b>ALLOTMENT ON 01.11.2011</b>		
01	Anubhav Infrastructure Limited	800,000
02	Balasria Holdings Private Limited	800,000
03	Bluemoon Commotrade Private Limited	800,000
04	Calvin Vanijya Private Limited	800,000
05	Highlife Commotrade Private Limited	800,000
06	Imperial Retails Private Limited	800,000
07	Jatadhari Commodeal Private Limited	800,000
08	Neelkanth Conclave Private Limited	800,000
09	Panchmukhi Commotrade Private Limited	800,000
10	Primerose Commosales Private Limited	800,000
11	Rockwell Vincom Private Limited	800,000
12	Trustworthy Viniyog Private Limited	800,000
13	Zigma Steels Private Limited	800,000
<b>ALLOTMENT ON 30.03.2012</b>		
14	Capricon Iron & steel Traders Pvt. Ltd.	1,000,000
15	Dhanlabh Techno Solutions Advisors Pvt. Ltd.	1,000,000
16	Dharmik Khad Suppliers Pvt. Ltd.	1,000,000
17	Diksha Stationery Merchants Pvt. Ltd.	1,000,000
18	Exclusive Ad consultants Pvt. Ltd.	1,000,000
19	Green Valley Financial Consultants Pvt. Ltd.	1,000,000
20	Greenview land & building Advisors Pvt. Ltd.	1,000,000
21	Green Valley land Advisors Pvt. Ltd.	1,000,000
22	Limelight Real Estate Consultants Pvt. Ltd.	1,000,000
23	Virgo Iron & Steel Traders Pvt. Ltd.	1,000,000
	<b>TOTAL</b>	<b>20,400,000</b>

The ld AO issued notice u/s 133(6) of the Act to the aforesaid share applicant companies asking them to submit bank statements, ledger account, copy of returns and other documents in respect of investments made with assessee company. All the share applicant companies complied with the same. The ld AO later issued summons u/s 131 of the Act to the Director of the assessee company which were also duly complied with. The Directors of the share subscriber companies appeared before the ld AO and they were examined by the ld AO. These facts are recorded in para 1 page 1 of the assessment order itself. The ld AO came to a conclusion that on examination of the Directors of share subscribing companies, the said applicants did not have creditworthiness to make investments in the assessee company and accordingly proceeded to treat the entire share capital and share premium received during the year to the tune of Rs 2,04,00,000/- as unexplained cash credit and added the same to the total income of the assessee.

4. Before the ld CIT(A), the assessee contended that all the requisite documents that were relevant to prove the veracity of the share capital and share premium received by the assessee company were duly filed with supporting documents and evidences and that the ld AO without any basis concluded that the share applicants did not possess any creditworthiness which was contrary to the facts and evidences available on record. The ld CITA however proceeded on the wrong assumption of facts by stating that summons issued u/s 131 of the Act to the share subscribing companies remain uncomplied and that the contention of the ld AO was that no compliance was made by the assessee to prove the veracity of the share capital and share premium received during the year. This finding given by the ld CITA is factually incorrect and contrary to the facts recorded by the ld AO in his assessment order. Based on these incorrect factual observations, the ld CITA upheld the action of the ld AO in making addition u/s 68 of the Act.

5. Aggrieved, the assessee is in appeal before us.

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

- a) Names and addresses of share subscribing companies.
- b) PAN of share subscribing companies
- c) ITR acknowledgements of share subscribing companies for Asst Year 2012-13
- d) Audited Balance Sheets for Asst Year 2012-13
- e) Computation of total income for Asst Year 2012-13
- f) Copy of relevant page of bank statements of share subscribing companies indicating the amount invested in assessee company together with the details of immediate source of credit thereon.
- g) Confirmation from share subscribing companies confirming the fact of making investment in shares of assessee company together with their respective sources of funds.
- h) Memorandum & Articles of Association of assessee company
- i) Bank statements of assessee company evidencing the receipt of share capital and share premium from various shareholders by account payee cheques.

6.1. We find that notices issued u/s 133(6) of the Act were duly complied with by all the share subscribing companies. Summons issued u/s 131 of the Act to certain

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

Sl. No.	Name of share applicants	Share capital	Reserves & surplus	Misc. Expenditures	Accumulative loss	Net worth	Amount invested in 'a' company investment (6) to Net Worth (5)	Investment (6) to Net worth (5)
						(1+2+3+4)		(%)
		1	2	3	4	5	6	7
<b>ALLOTMENT ON 01.11.2011</b>								
01	Anubhav Infrastructure Limited	19,468,080	658,018,267	-	-	677,486,347	800,000	0.118
02	Balasria Holdings Private Limited	24,828,500	639,804,990	-	-	664,633,490	800,000	0.120
03	Bluemoon Commotrade Private Limited	300,000	31,415,278	7,500	-	31,707,778	800,000	2.523
04	Calvin Vanijya Private Limited	200,000	49,906,025	8,000	-	50,098,025	800,000	1.597
05	Highlife Commotrade Private Limited	300,000	50,311,293	7,500	-	50,603,793	800,000	1.581
06	Imperial Retails Private Limited	200,000	49,912,660	8,000	-	50,104,660	800,000	1.597
07	Jatadhari Commodeal Private Limited	300,000	58,614,547	7,500	-	58,907,047	800,000	1.358
08	Neelkanth Conclave Private Limited	3,177,000	80,610,479	26,648	-	83,760,831	800,000	0.955
09	Panchmukhi Commotrade Private Limited	199,480	49,654,265	8,000	-	49,845,745	800,000	1.605
10	Primerose Commosales Private Limited	200,000	49,913,201	8,000	-	50,105,201	800,000	1.597
11	Rockwell Vincom Private Limited	300,000	36,812,172	7,500	-	37,104,672	800,000	2.156

12	Trustworthy Viniyog Private Limited	10,160,400	178,632,730	-	-	188,793,130	800,000	0.424
13	Zigma Steels Private Limited	3,267,000	83,647,309	27,080	-	86,887,229	800,000	0.921
<b>ALLOTMENT ON 30.03.2012</b>								
14	Capricon Iron & steel Traders Pvt. Ltd.	116,800	16,660,790	7,440		16,770,140	1,000,000	5.963
15	Dhanlabh Techno Solutions Advisors Pvt. Ltd.	428,750	328,328,919			328,757,669	1,000,000	0.304
16	Dharmik Khad Suppliers Pvt. Ltd.	154,700	54,522,541	8,400		54,668,841	1,000,000	1.829
17	Diksha Stationery Merchants Pvt. Ltd.	155,300	55,143,977	8,400		55,290,977	1,000,000	1.809
18	Exclusive Ad consultants Pvt. Ltd.	195,200	95,003,377	9,360		95,199,277	1,000,000	1.051
19	Green Valley Financial Consultants Pvt. Ltd.	256,530	156,275,933	10,800		156,521,663	1,000,000	0.639
20	Greenview land & building Advisors Pvt. Ltd.	172,000	71,819,207	8,880		71,982,327	1,000,000	1.389
21	Green Valley land Advisors Pvt. Ltd.	175,400	75,224,307	8,880		75,390,927	1,000,000	1.326
22	Limelight Real Estate Consultants Pvt. Ltd.	115,600	15,460,709	7,440		15,568,969	1,000,000	6.423
23	Virgo Iron & Steel Traders Pvt. Ltd.	150,300	50,126,606	8,400		50,268,506	1,000,000	1.989
	<b>TOTAL</b>						20,400,000	

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

- a) The share application form and allotment letters are available.
- b) The share applicants are income tax assesseees and had filed their income tax returns regularly.
- c) The investment in share application money were made out by account payee cheques.
- d) The bank accounts of the share applicants reveal that there were no deposits of cash before issue of cheques to the assessee company.

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

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

response to notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques. Summons issued u/s 131 of the act to the share applicants were also duly complied with by them by their personal appearance before the ld AO.

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

*"4. Mode of proof of entries in bankers' books Subject to the provisions of this Act, a certified copy of any entry in a bankers' book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every cases where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."*

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

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

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

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

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

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

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

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

8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).

9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of *Udhavdas Kewalram v. CIT* [1967] 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.

10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:

*"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law.*  
"

*11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.*

*12. Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.*

*13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed."*

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

6.7. It is not in dispute that all the share applicant companies in the instant case before us are assessed to income tax. We find that the assessee had duly proved the source of source of source in the instant case. Even if the creditworthiness of the share applicants are to be doubted, then it would be the duty of the 1d AO of the assessee to make enquiries through the 1d AO of the concerned share applicants. Once the relevant details are filed by the assessee before the 1d AO to

prove the creditworthiness of share applicants, then the same cannot be questioned / disputed by the Id AO of the assessee as the same would be travelling beyond his jurisdiction. In other words, the creditworthiness of the share applicant companies would have to be examined by the Assessing Officer of those companies and not by the Assessing Officer of the assessee herein. However, it would be incumbent on the part of the Id AO of the assessee herein , to trigger the said verification process on the side of the department. It would be interesting to note in this regard that the *Hon'ble Jurisdictional High Court in the case of CIT Kolkata III vs M/s Dataware Private Limited in ITAT No. 263 of 2011 dated 21.9.2011* had held as under:-

*"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.*

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

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

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

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

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

*On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.*

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

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

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

*"The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the*

*Assessing Officer on account of share capital, share application money and investment in HTCCL respectively.*

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

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

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

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

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

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

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

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

*“We have heard the rival submissions. We find that the ld DR argued that the assessee had not proved the source of source of share applicants who had invested share application monies in the assessee company and accordingly prayed that the addition has been rightly made u/s 68 of the Act. He also placed reliance on the decision of this tribunal in the case of Subhlakshmi Vanijya (P) Ltd vs CIT reported in (2015) 60 taxmann.com 60 (Kolkata – Trib.) dated 30.7.2015. In response to this, the ld AR argued that there is no mandate in law that the assessee has to prove the source of source of share applicants. He argued that in the instant case, the assessee had duly discharged its complete onus by furnishing the requisite details. In case if the ld AO has got some doubts, he should have verified the same from the AO of those share applicants. We find from the plain reading of section 68 of the Act, the duty cast on the assessee is to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share application money from five share applicants. The nature of receipt towards share application money is well established from the entries passed in the respective balance sheets of the companies as investments. Hence the nature of receipt is proved by the assessee beyond doubt. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e identity of share applicants, genuineness of transactions and creditworthiness of share applicants. In the instant case, we find that the identity of share applicants is proved beyond doubt by the assessee by furnishing the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns . With regard to the creditworthiness of share applicants, the ld AO himself states that the five share applicants had invested in assessee company’s shares by taking money from some other companies. Hence the source of the share applicants for making investment in share application monies of assessee company is also proved. By this, the creditworthiness of the share applicants is also proved beyond doubt. Third ingredient is genuineness of the transactions. We find that the five share applicants had paid the monies to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts, which are quite evident from the bank statements enclosed in the paper book. We agree with the arguments of the ld AR that the source of source of share applicants need not be proved by the assessee herein. We hold that the decision rendered by this tribunal in Subhalakshmi Vanijya relied upon by the ld DR was rendered in the context of validity of revision proceedings u/s 263 of the Act and not on the merits of the case. This tribunal in that case decided the validity of invoking revisionary jurisdiction u/s 263 of the Act by the ld CIT and whether adequate enquiries were made by the ld AO in the facts and circumstances of that case. This tribunal in Subhalakshmi Vanijya case supra never had an occasion to look into the merits of the addition*

*proposed to be made towards share capital in the facts and circumstances of that case and no decision was rendered thereon on merits of the issue. Hence the reliance placed thereon by the ld DR does not advance the case of the revenue. In the instant case, we find that the share applicants have not denied the fact of making investment in share application monies in assessee company, which is evident from the fact that they had confirmed in writing in response to notice issued u/s 133(6) of the Act which was admittedly done behind the back of the assessee. There is no whisper in the entire assessment order to doubt the veracity of the transactions and genuineness of share applicants and the transactions herein. In the instant case, the assessee had indeed proved the identity of the share applicants, creditworthiness of share applicants and genuineness of transactions beyond doubt. We find that the entire addition has been made by the ld AO based upon suspicion, surmises and conjectures and not upon proper evaluation and appraisal of the evidences and documents filed before him. We place reliance on the decision of the Hon'ble Apex Court in this regard in the case of Dhakeshwari Cotton Mills Ltd vs CIT reported in 26 ITR 775 (SC) wherein it has been held that no addition can be made without material and on mere suspicion.*

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

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

28. *From the details as aforesaid which emerges from the paper book filed before us as well as before the lower authorities, it is vivid that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income, (iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements, (vi) in none of the transactions the AO found deposit in cash before issuing cheques to the assessee company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above.*

29. *As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books. In the instant case, the credit is in the form of receipt of share capital with premium from share applicants. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and*

*investments. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. For proving the identity of share applicants, the assessee furnished the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, as we noted supra, these Companies are having capital in several crores of rupees and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants, so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application. Hence the source of source is proved by the assessee in the instant case though the same is not required to be done by the assessee as per law as it stood/ applicable in this assessment year. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.*

30. \*\*\*\*\*

31. \*\*\*\*\*

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

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

"Investigation made by the Investigation Wing of the department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs.1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs.55,50,000/- and not Rs.1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs.55,50,000/-. The assessee has further tries to explain the source of this amount of Rs.55,50,000/- by furnishing copies of share application money, balance sheet etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the department. As such entries of Rs.55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income/ penalty proceedings under Section 271(1)(c) are being initiated separately.

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

33. *The case on hand clearly falls in the category where there is lack of enquiry on the part of the A. O. as in the case of Ganjeshwari Metals (supra). b) In the case of Finlease Pvt Ltd. 342 ITR 169 (supra) in ITA 232/2012 judgement dt. 22.11.2012 at para 6 to 8/ it was held as follows.*

*"6. This Court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income Tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the ROC in relation to the share application affidavits of the directors, form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing Officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the*

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

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

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

35. *To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to*

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

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

ORDER

*Delay condoned.*

*Leave granted.*

*Heard learned counsel on both sides.*

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

*The appeal is allowed accordingly.*

*No order as to costs.*

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

the case of M/s Earthmetal Electricals P Ltd supra would be squarely applicable to the facts of the instant case.

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

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

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

*"In this case, assessee claimed to have received Rs.2.40 crore as share capital from 23 share applicants shares having face value of Rs.10 was issued on a premium of Rs.190/-.*

*Neither the assessee nor the share applicants ever justified as to how the share premium demanded by the assessee company is appropriate and reasonable .*

*Neither the assessee nor the share applicants have any visible business activity , hardly any earning capacity , no future prospect of business or dividend paying capacity . Still, assessee received share capital with huge premium for them for some unexplainable reason .These are beyond the scope human logic and probability, and same may happen only in the case of an arranged transaction in order to bring back unaccounted money in the guise of share capital .*

*The following facts are worth mentioning :*

*# Returned income for the assessee for the relevant year was only Rs. 80,704/- and the share applicants income are just zero or in few hundreds*

*# Assessee co. has its address at Mumbai but both of its initial share holders are from Howrah , West Bangal and one of them is a house wife (P B Pg-2 & 3)*

*# Assessee claims itself to be in share broking activity having no visible business prospect but still gets share capital on high premium (PB pg.3)*

*# Most of the share applicants are from same or adjacent address mostly paid money in cash ( PB pg-7 & 8 ).*

*# There is no mention in the minutes of the Board's meeting as to how share premium was fixed (PB pg.5 )*

*Directors of share applicants were examined by the AO during the assessment proceedings u/s 131 but they failed to justify their sources of fund and their creditworthy regarding payment of share application money ( A.O Pg.-*

*1). Their bank statement analysis showed that they just provided accommodation entry to the assessee .*

*In view of the fact of the case and findings of the AO during the course of assessment the so called receipt of share capital was considered by the AO as unexplained credit . Ld CIT (A) upheld the observation of the Assessing Officer.*

*For accepting the share applicant as genuine it is necessary to prove the capacity and creditworthiness of the share applicants along with the genuineness of these transactions. Share capital with high Premium being the issue and considering the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company and in view with the observation of the judiciaries on that issue AO was within his jurisdiction in treating such share capital and share premium as unaccounted cash credit of the assessee company and adding the same u/s 68 of the Act.*

*The fact and circumstances of this case should be judged in the light of preponderance of probability and normal human behaviour it may easily be inferred that the entire transactions lack substance and nothing but an arranged transactions.*

*A company without any proven business track record and earning capacity does not in any way justify such hefty premium. And there is no explanation as to how assessee could demand such premium and as to why the applicants paid the same.*

*If the share applicants ,who are closely held companied and expected to be known to each other, being an investor in a privately held company are unable to furnish relevant details regarding issue of share capital and its sources to the satisfaction of the AO , the transaction cannot be considered as genuine. It is not clear as to whether any due diligence was done by the subscribing companies while issuing share capital with such premium. Whether any peculiar or personal reasons are involved for such investment. Whether any arrangements were made for protection of the fund of the applicants. How the share premium was determined and as what satisfied the applicants accepting such premium as reasonable. Whether share application was really an investment decision or a case of money laundering in the guise of share application, specially when the transactions are doubted as suspicious.*

*If all the questions remained unanswered, it can only be inferred that share capital with high premium. in fact, is only a facade for conversion of unaccounted money.”*

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

6.17. Finally the Id DR placed reliance on the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd reported in 103 taxmann.com 48 (SC) wherein the decision on addition made towards cash credit was rendered in favour of the revenue. We have gone through the said judgement and we find in that case, the Id AO had made extensive enquiries and from that he had found that some of the investor companies were non-existent which is not the case before us. Certain investor companies did not produce their bank statements proving the source for making investments in assessee company,

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

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

6.19. To sum up, section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its income of the previous year in which the same was received. In the facts of the present case, both the nature & source of the share capital received with premium were fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed before the Id AO.

Accordingly, all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction were placed before the Id AO and the onus shifted to the Id AO to disprove the materials placed before him. Without doing so, the addition made by the Id AO is based on conjectures and surmises cannot be justified. At the cost of repetition, the addition was confirmed by the Id CITA by making factually incorrect observations which are contrary to the facts recorded by the Id AO in the assessment order. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we direct the Id AO to delete the addition made u/s 68 of the Act and consequently the grounds raised by the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

5.1. We find that the decision rendered hereinabove apply mutatis mutandis to the facts of the instant case also and respectfully following the same, we direct the Id AO to grant exemption u/s 10(38) of the Act in respect of sale of shares in the sum of Rs 18,88,141/- as claimed by the assessee. Accordingly, the grounds raised by the assessee are allowed.

6. In the result, the appeal of the assessee is allowed.

**Order pronounced in the Court on 05.04.2019.**

**Sd/-**  
**[A. T. Varkey]**  
Judicial Member

**Sd/-**  
**[M. Balaganesh]**  
Accountant Member

**Dated : 05.04.2019**  
[RS, Sr.PS]

*I.T.A. No.1494/Kol/2017  
Assessment year 2012-13  
M/s Baba Bhootnath Trade & Commerce Ltd.*

Copy of the order forwarded to:

1. Appellant –M/s Baba Bhootnath Trade & Commerce Limited, 30, Jambhulwadi, Ro No.B404/405, (4<sup>th</sup> Floor), Near Edward Cinema, Kalbadevi Road, Mumbai-400 002.
2. Revenue – ITO, Ward-9(2), Kolkata.
3. CIT(A)-           Kolkata.
4. CIT –           , Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy//

By Order

Assistant Registrar, Kolkata.