

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
(समक्ष) Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 2445/Kol/2019
Assessment Year: 2012-13

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| M/s. Satyam Smertex pvt. Ltd. (PAN: AAICS3549K) | Vs. | Deputy Commissioner of Income-tax, Circle-3(1), Kolkata. |
| Appellant | | Respondent |

| | |
|-----------------------|-----------------------------|
| Date of Hearing | 16.01.2020 |
| Date of Pronouncement | 29.05.2020 |
| For the Appellant | Shri A. K. Tulsyan, FCA |
| For the Respondent | Shri Vijay Shankar, CIT, DR |

ORDER

Per Shri A.T.Varkey, JM

This is an appeal filed by the assessee against the order of Ld. CIT(A)-5, Kolkata dated 23.09.2019 for AY 2012-13.

2. The only ground of appeal of the assessee is against the action of the Ld. CIT(A) in confirming the addition of Rs.16 cr. u/s. 68 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) being the share capital and share premium received during the year. Ground no. 1 of the assessee is as under:

“1. That the Ld. CIT(A) was wrong in confirming the addition of a sum of Rs.16,00,00,000/- u/s. 68 of the Act being the share capital and share premium money received during the year from the share applicants without appreciating the fact that the details and documents provided to him were fully examined and none of the share applicants were found to be bogus. Further, all the share applicants are assessed to income tax and the entire share application money was received through proper banking channels. Thus, addition made by Ld. AO and confirmed by Ld. CIT(A) is unjustified and needs to be deleted.”

3. Facts in brief is that the assessee vide its return of income for the AY 2012-13 on 07.09.2012 showing an income of Rs.2,18,95,330/-. Later the case was selected for scrutiny and after issue of statutory notice, the AO notes that the assessee had

introduced Rs 16 crores as share application money into the company from two (2) Private Limited companies (i) M/s. Set Square Holding Pvt. Ltd. (M/s. SSHPL) total amount received Rs. 5 cr. and (ii) M/s. Highlight Goods Pvt. Ltd. (M/s. Highlight) Rs.11 cr.[Total Rs.16 cr] The AO was of the opinion that the assessee had introduced its undisclosed income in the guise of share application money into its own company. So, he issued notice to the assessee and conveyed to them that he wants to meet the directors of the share applicant companies and also wanted to examine/cross examine (in order to find out the genuineness of the transaction). However, the AO notes that in response the assessee company submitted some documents relating to the investment, however, did not produce any of the investors before him. So according to him, assessee failed to prove the authenticity, genuinity and creditworthiness of the investors. Therefore, he was of the opinion that the assessee company has entered into sham transaction with the investors and introduced unaccounted money in the form of share application/allotment. The AO also was of the opinion that the assessee was unable to prove with proper evidence that investor companies are their own group companies. Therefore, he was pleased to add the entire share application money received by the assessee u/s. 68 of the Act as undisclosed cash credit. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the action of the Ld. CIT(A) and dismissed the assessee's appeal. Aggrieved, the assessee is before us.

4. The Ld. AR assailing the decision of the Ld. CIT(A) contended that the assessee company is a genuine company which has returned an income of more than Rs.2.18 cr. in its return of income. According to Ld. AR, turnover of the assessee company is more than Rs. 73 cr. and it is into the manufacturing and sale of iron and steel. According to Ld. AR, investments in the shares of assessee are made by group concerns only wherein the directors of the assessee company and relatives are the directors. According to Ld. AR, M/s. Highlight which had invested Rs. 11 cr. has undergone scrutiny assessment u/s 143(3) of the Act for AY 2012-13 and AY 2017-18 and drew our attention to the assessment orders passed for AY 2012-13 dated 15.12.20-19 placed at pages 6 and 7 of the paper book and copy of the assessment order u/s.

143(3) for AY 2017-18 found placed at pages 8 and 9 of the paper book. According to ld. AR, M/s. SSHPL which had invested Rs.5 cr. in the assessee company has also undergone scrutiny assessment u/s. 143(3) of the Act for AY 2011-12 and drew our attention to pages 1 and 2 of the paper book and also for AY 2017-18 the assessment order u/s. 143(3) of the Act is found placed at pages 3 to 5 of the paper book. Thus, according to ld. AR, when the two investing companies assessments have undergone scrutiny proceedings under section 143(3) of the Act, then the question of identity of the investor companies cannot be doubted. According to the Ld. Counsel, both the investor group companies have enough creditworthiness to invest in the assessee company and drew our attention to the fact that M/s. SSHPL has capital with free reserve and surplus of Rs.48,89,59,014/- as on 31.03.2012 and M/s. Highlight has paid up capital with free reserve and surplus of Rs.16,69,60,353/- as on 31.03.2012. And according to Ld. AR, the entire payment has been made through banking channel and, therefore, the transactions are genuine. It was also brought to our notice that no cash was deposited before the transfer of the amounts to the assessee companies and drew our attention to the balance sheet to show that the free reserve and capital are coming from the earlier years onwards. According to the Ld. AR, M/s. SSHPL has been incorporated on 09.02.1987 [AY 1987-88] and M/s. Highlight on 21.07.2008 [AY 2009-10] and both of them have CIN and separate PAN and are regular income tax assessees and M/s. SSHPL is under the jurisdiction of ITO, Ward-5(4), Kolkata and M/s. Highlight is under the jurisdiction of ITO, Ward-1(1), Kolkata. Therefore, in the light of the aforesaid facts and since the investor company's directors are also the assessee company's directors and since these directors of M/s. SSHPL and M/s. Highlight were earlier directors of the assessee company goes on to show that they are group companies; and, according to Ld. AR, since the assessee company is doing good business and taking note of the growth of the company and consequent future prospect they in their wisdom have decided to invest/infuse share capital with the consent of the assessee company's director should not be looked with suspicion as done in the case of jamakharchi companies. According to ld. AR, the whole problem in this case was that the AO from the inception itself looked at the assessee with suspicion, as if the assessee

is a bogus company and unfortunately, the Ld. CIT(A) also towed the same line. According to Ld. AR, the Ld. CIT(A) has termed the assessee company to be not having any business without looking into the balance sheet and P&L Account of the assessee. According to the Ld. AR if the Ld. CIT(A) would have looked into the balance sheet and P&L Account of assessee, then it would have revealed that assessee company is a full-fledged company which had turnover of more than Rs. 73 cr. and profit of more than Rs. 2 cr. which enabled the assessee to return an income of Rs.2.18 cr. The share subscribers, according to Ld. AR., were investment companies and, therefore, investments are made with an intention to recap long term return and their profit and loss in the initial years cannot be the yardstick to cast negative aspersions on its credibility. Therefore, according to Ld. AR, since the assessee company is a genuine manufacturing company, the decision of the group companies to invest in the assessee company for boosting further growth of the assessee company should be allowed and addition made should be deleted.

5. Per contra, the Ld. CIT, DR contended that the AO had directed the assessee to produce the directors of the investor companies before him. However, the assessee did not do so and the assessee also failed to produce the documents to show that the investors were group concerns. According to Ld. DR, a perusal of the P&L Account of the investing companies would reveal that they were having very meager income and, therefore, the AO drew adverse inference against the introduction of share capital along with premium of Rs. 40/-. According to Ld. DR, since the assessee company failed to produce the directors as well as the documents to prove their creditworthiness, the AO made the addition which has been rightly confirmed by the Ld. CIT(A) which decision should not be interfered with by this Tribunal.

6. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has taken note that the assessee company had filed the return of income showing an income of Rs.2.18 cr. for the AY under consideration i.e. AY 2012-13. We note that the assessee company was incorporated on 19.08.2004 (AY 2005-06) for manufacture of iron and steel. The audited financials of the assessee

company are found placed in the paper book from pages 72 to 94. On perusal of the balance sheet of the assessee company it reveals that as on 31.03.2011 (earlier AY 2011-12) the assessee had a share capital of Rs.6,72,20,000/- and reserve and surplus of Rs.30,45,14,918/- thus a total shareholders' fund comes to Rs.37,17,34,918/-; and this year the share capital and reserve and surplus as on 31.03.2012 has raised to Rs.55,45,48,441/-. The assessee company's receipt from operations less excise duty as on 31.03.2011 (earlier year) is Rs.81,17,45,076/- and revenue from operations net is Rs.74,42,85,645/- and it is noted that in the year under consideration as on 31.03.2012, the gross revenue from operations comes to Rs.80,05,04,567/- and net revenue from operations is Rs.73,05,69,628/-. In this year the other income comes to Rs.63,45,436/- and thus the total revenue in this assessment year is Rs.73,69,15,164/- and in the earlier year it was Rs.74,75,10,565/-. We also note from the expenses, the cost of material consumed, manufacturing and operating cost charges in inventory and finished goods and stock-in-trade, employees' benefit expenses, finance cost, depreciation and amortization expenses and other expenses total comes to Rs.70,30,38,654/- this year as on 31.03.2012 and in last year it was Rs.71,96,83,183/- and the profit before taxation as on 31.03.2012 with the assessee company is Rs.33,38,76,510/- from earlier year it is Rs.2,78,27,382/-.

7. We note that the assessee company in this year under consideration has taken share capital of Rs.16 cr. from the following two companies:

| Sl. | Name | PAN | Address | No. of shares | Amount (Rs.) |
|-----|------------------------------------|------------|---|---------------|----------------|
| 1. | M/s. Set Square Holdings Pvt. Ltd. | AADCS4693P | 20B, Abdul Hamid Street, 7 th floor, Block 7A, Kol-700 069 | 10,00,000 | 5,00,00,000/- |
| 2. | M/s. Highlight Goods Pvt. Ltd. | AACCH1378M | 20B, Abdul Hamid Street, 7 th floor, Block 7A, Kol-700069 | 22,00,000 | 11,00,00,000/- |

8. The main plea of the assessee is that both the share applicants are group companies and the directors of both the Private Limited companies are close relatives of the directors of the assessee company. The following chart will give a bird's eye

view and reveal the relationship between the directors of the assessee company and the share applicant companies which is as under:

| Assessee company | Name of Directors |
|---------------------------|--|
| Satyam Smelters Pvt. Ltd. | Rajiv Dalmia Rahul Agarwal Indu Dalmia |

| Name of the share applicant | Name of director | Relation |
|-------------------------------|--------------------|---|
| Set Square Holdings Pvt. Ltd. | Alok Kumar Agarwal | Uncle of Rahul Agarwal (Director of assessee) |
| | Raj Kumar Agarwal | Uncle of Rahul Agarwal (Director of assessee) |
| Highlight Goods Pvt. Ltd. | Manish Dalmia | Cousin brother of Rajiv Dalmia (Director of assessee) |

9. It was also brought to our notice that the shareholders of the share applicant companies are also the shareholder of the assessee company and all are related to the shareholders or directors of the assessee company and the nature of the relationship can be seen/explained by the chart infra which is as under:

| Name of the share applicant | Name of director | Relation |
|-------------------------------|---|---|
| Set Square Holdings Pvt. Ltd. | a) Pawapuri Mercantiles Pvt. Ltd. (page No. 42 of paper book) | Shareholder of the assessee company (page no. 81 of paper book) |
| | b) Liska Trading Pvt. Ltd. | Shareholder of the assessee company (page no. 81 of paper book) Rahul Agarwal is a common director |
| | c) Almal Financiers & Consultants Pvt. Ltd. | Shareholder of the assessee company (page no. 81 of paper book) |
| | d) Benzmark Credit Capital Pvt. Ltd. | Gopal Kumar Agarwal (Father of Rahul Agarwal) is a Director |
| Highlight Goods Pvt. Ltd. | e) Energy Marketing Pvt. Ltd. | Manish Dalmia (cousin brother of Rajiv Dalmia) is a director |
| | f) Indu Dalmia | Wife of Rajiv Dalmia (director of assessee company) |

10. With the aid of the aforesaid charts, the Ld. AR of the assessee pointed out to us that all the share applicants/directors belong to the same family and also they function

as a group concerns and, therefore, the entire money received by the assessee company is from its own group companies and individuals who are relatives only.

11. In order to show the creditworthiness of the share applicant companies, we note that M/s. Set Square Holdings Pvt. Ltd. had net own fund of Rs.48,89,51,014/- and had invested Rs.5 cr. in the assessee company and M/s. Highlight Goods Pvt. Ltd. had net owned fund of Rs.16,69,60,353/- and invested Rs. 11 cr. in the assessee company.

12. In order to prove the identity of the share applicants the assessee company had filed the copy of the audited accounts, Income Tax Acknowledgment, computation of income for AY 2011-12 to 2013-14 of both the companies and also drew our attention to the fact that both the company's assessments have been scrutinized u/s. 143(3) of the Act by their respective AOs. We note that M/s. Set Square Holdings Pvt. Ltd. [CIN-U01134WB1987PTCO 41856, PAN – AADCS4639P] has been incorporated on 09.02.1987 and had its own CIN and PAN. Likewise, M/s. Highlight Goods Pvt. Ltd. [CIN-U51101WB2008PTC127695, PAN- AACCH1378M] had been incorporated on 21.07.2008 and was having CIN and PAN, the details of which are given below:

| Name of company | CIN | PAN |
|------------------------------------|-------------------------------|------------|
| M/s. Set Square Holdings Pvt. Ltd. | [CIN- U01134WB1987PTCo 41856, | AADCS4639P |
| M/s. Highlight Goods Pvt. Ltd. | CIN- U51101WB2008PTC127695 | AACCH1378M |

13. We note that in order to prove their bona fide the assessee company had filed an affidavit notarized on 12.03.2015 (found placed at page nos. 32 to 35 and 61 to 62 of paper book) relating to share application money given by its shareholders along with the source of funds thereof to confirm the share transaction with the assessee company. Moreover, to prove the genuineness of the transaction on the assessee had also filed the directors and the shareholders companies, copy of their respective Income Tax Return Acknowledgment, Computation of total income and balance sheet and P&L Account for AYs 2011-12 to 2013-14 before the AO and Ld. CIT(A).

14. After perusal of the documents produced before us in the paper book, we note that in respect of share holder M/s. Set Square Holding Pvt. Ltd. the following facts. The relevant documents are placed at pages 36-62A of the paper book wherein it can be seen that this company invested a sum of Rs.5,00,00,000/- in the assessee company. The share application was made by account payee cheque. This company was incorporated on 09.02.1987 and was having company identification number UO 1134WB1987PTCQ41856. This company duly has filed its return of income before ITO Ward 5(4), Kolkata and was having PAN AADCS4693P. This company was having a paid up capital with free reserves and surplus of Rs. 48,89,51,014/- as on 31/03/2012. The copy of the bank statement of the Company is duly available in the paper book. The details of source of funds from which this company had made the share application are also shown in documents filed in the paper book.

15. In respect of the shareholder M/s. Highlight Goods Pvt. Ltd., we find that the relevant documents are placed at pages 1- 35A of the paper book wherein it can be seen that this company invested a sum of Rs. 11,00,00,000/- in the assessee company. The share application was made by account payee cheque. This company was incorporated on 21.07.2008 and was having company identification number U51101WB2008PTC127695. This company duly filed its return of income before ITO Ward 1(1), Kolkata and was having PAN AACCH1378M. This company was having a paid up capital with free reserves and surplus of Rs.16,69,60,353/- as on 31/03/2012. The copy of the bank statement of the Company is duly available in the paper book. The details of source of funds from which this company had made the share application are also shown in documents filed in the paper book.

16. Moreover we note that the AO after issuing one notice has made the adverse inference against the assessee wherein the assessee had replied that it is ready to

produce the directors of the share applicant companies before the AO which is evident from the letter dated 26.02.2015 found placed at page 23 of the paper book. In order to justify the premium of Rs.40/- per share the Ld. AR submitted that the assessee has issued 32,00,000 shares at Rs. 50/- per share with Face value of Rs. 10 and premium of Rs.40/- per share. The company was incorporated on 19.08.2004 with a vision to become a leading manufacturer of Iron & Steel and has raised funds time and again as per the growing requirement of the company. Further, the turnover of the company is around Rs. 80 crores in the relevant year. Hence, considering overall factual background including the turnover as well as future prospects of the assessee company, premium demanded by the company should be considered in a practical/commercial sense by the A.O. Further, in this regard it is noted that prior to issuance of shares i.e. on F.Y 2010-11 the Net Assets Value (NAV) of the company was around Rs.55/- per share and therefore issuance of shares at a premium of Rs. 40/- per share is very much justified. The profits of the company have risen from Rs.1,96,32,168/- to Rs.2,28,13,523/- as compared to the immediately preceding financial year. Taking the future prospects and growth rate of the company, investment in the company cannot be faulted and in the light of facts discussed cannot be termed unreasonable.

17. Taking note of the aforesaid facts and documents we are of the opinion that assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share subscribers and the AO was unjustified to make the addition u/s. 68 of the Act and the Ld CIT(A) erred in confirming the addition without appreciating the facts in the correct perspective. Let us look at section 68 of the Act and the judicial precedents on the issue at hand.

18. Section 68 under which the addition has been made by the Assessing Officer reads as under:

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. "

The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570. We note that against the said decision of Hon'ble Gujarat High Court the special leave petition filed by the Revenue has also been dismissed by the Hon'ble Apex Court.

19. The main plank on which the AO made the addition was because the directors of the share subscribers did not turn up before him. In such a case the Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd. (supra) 159 ITR 78 and the Hon'ble Gujarat High Court, in the case of Dy. CIT v. Rohini Builders [2002] 256 ITR 360 / [2003] 127 Taxman 523 , has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the

alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by' treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.

20. Our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner Of Income Tax vs M/s. Nishan Indo Commerce Ltd dated 2 December, 2013 in INCOME TAX APPEAL NO.52 OF 2001 wherein the Court held as follows:

“The Assessing Officer was of the view that the increase in share capital by RS.52,03,500/- was nothing but the introduction of the assessee's own undisclosed funds/income into the books of accounts of the assessee company. The Assessing Officer accordingly treated the investment as unexplained credit under Section 68 of the Income Tax Act and added the same to the income of the assessee.

Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) being the First Appellate Authority and contended that the Assessing Officer had no material to show that the share capital was the income of the assessee company and as such the addition made by the Assessing Officer under Section 68 of the Act was wrong.

The learned Commissioner of Income Tax (Appeals) after hearing the department and the Assessee Company deleted the addition of Rs. 52, 03,500/- to the income of the assessee company during the Assessment Year in question. The learned Commissioner of Income Tax Appeals found that there were as many as 2155 allottees, whose names, addresses and respective shares allocation had been disclosed.

The Commissioner of Income Tax Appeals, further found that the Assessee Company received the applications through bankers to the issue, who had been appointed under the guidelines of the Stock Exchange and the Assessee Company had been allotted shares on the basis of allotment approved by the Stock Exchange. The Assessee Company had duly filed the return of allotment with the Registrar of Companies, giving complete particulars of the allottees.

The Commissioner of Income Tax (Appeals) found that inquires had confirmed the existence of most of the shareholders at the addresses intimated to the Assessing Officer, but the Assessing Officer took the view that their investment in the Assessee Company was not genuine, on the basis of some extraneous reasons. The Commissioner of Income Tax (Appeals) took note of the observation of the Assessing Officer that enquiry conducted by the Income Tax Inspector had revealed that nine persons making applications for 900 shares were not available at the given address and rightly concluded that the total share capital issued by the Assessee Company could not be added as unexplained cash credit under 'Section 68 of the Income Tax Act. Moreover, if the nature and source of investment by any shareholder, in shares of the Assessee

Company remained unexplained, liability could not be foisted on the company. The concerned shareholders would have to explain the source of their fund.

The learned Commissioner on considering the submissions of the, respective parties and considering the materials, found that the Assessing Officer had applied the provisions of Section 68 of the Income Tax Act arbitrarily and illegally and in any case without giving the assessee adequate opportunity of representation and/or hearing.

Learned Tribunal agreed with the factual findings of the learned Commissioner and accordingly the learned Tribunal dismissed the appeal of the Revenue and affirmed the decision of the learned Commissioner.

Mr. Dutta appearing on behalf of the petitioners cited judgment of the Division Bench of this Court in Commissioner of Income Tax Vs. Ruby Traders and Exporters Limited reported in 236 (2003) ITR 3000 where a Division Bench of this Court held that when Section 68 is resorted to, it is incumbent on the assessee company to prove and establish the identity of the subscribers, their credit worthiness and the genuineness of the transaction.

The aforesaid judgment was rendered in the context of the factual background of the aforesaid case where, despite several opportunities being given to the assessee, nothing was disclosed about the identity of the shareholders. In the instant case, the assessee disclosed the identity and address and particulars of share allocation of the shareholders. It was also found on the facts that all the shareholders were in existence. Only nine shareholders subscribing to about 900 shares out of 6, 12,000 shares were not found available at their addresses, and that too, in course of assessment proceedings in the year 1994, i.e., almost 3 years after the allotment.

By an order dated 2nd May, 2001, this Court admitted the appeal on three questions which essentially centre around the question of whether the Appellate Commissioner erred in law in deleting the addition of Rs. 52, 03, 500/- to the income of the assessee as made by the Assessing Officer. We are of the view that there is no question of law involved in this appeal far less any substantial question of law.

The learned Tribunal has concurred with the learned Commissioner on facts and found that there were materials to show that the assessee had disclosed the particulars of the shareholders. The factual findings cannot be interfered with, in appeal. We are of the view that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds.”

21. Further, our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner of Income Tax vs M/s. Leonard Commercial (P) Ltd on 13 June, 2011 in ITAT NO 114 of 2011 wherein the Court held as follows:

“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 HTCCCL 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.

22. Our attention was also drawn to the decision of the Hon'ble Supreme Court while dismissing SLP in the case of Lovely Exports as has been reported as judgment delivered by the CTR at 216 CTR 295:

"Can the amount of share money be regarded as undisclosed income under section 68 of the Income tax Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee- company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.

23. Our attention was also drawn to the decision of the Hon'ble Calcutta High Court while relying on the case of Lovely Exports, in the appeal of COMMISSIONER OF

INCOME TAX, KOLKATA-IV Vs ROSEBERRY MERCANTILE (P) LTD., ITAT
No. 241 of 2010 dated 10- 01-2011 has 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.

24. In the light of the aforesaid decisions of the Hon'ble Apex and jurisdictional High court, let us examine the present case in hand. We will examine each share subscribers totalling two (2). The Ld. AR took pains to bring out the relevant facts in respect of each share subscribers which will throw light as to the identity, creditworthiness and genuineness of the share subscribers. We note from pages 36 to 62A of the paper book wherein the details of **M/s. Set Square Holding Pvt. Ltd.** are furnished. This company invested a sum of Rs.5,00,00,000/- in the assessee company. The share application was made by account payee cheque. This company was incorporated on 09.02.1987 and was having company identification number UO 1134WB1987PTCQ41856. This company duly has

filed its return of income before ITO Ward 5(4), Kolkata and was having PAN AADCS4693P. This company which had invested Rs.5 cr. in the assessee company has also undergone scrutiny assessment u/s. 143(3) of the Act for AY 2011-12 and which fact is discernable from a perusal of pages 1 and 2 of the paper book and also for AY 2017-18 the assessment order u/s. 143(3) of the Act is found placed at pages 3 to 5 of the paper book. Thus, this investing company's assessments have undergone scrutiny proceedings under section 143(3) of the Act, and then the question of identity of this investor company cannot be doubted. This company was having a paid up capital with free reserves and surplus of Rs. 48,89,51,014/- as on 31/03/2012. The copy of the bank statement of the Company is duly available in the paper book. The details of source of funds from which this company had made the share application are also shown in documents filed in the paper book. And it is a group entity with common share holders who all are income tax assessee's and their details are with the department and discussed in detail supra.

25. In respect of the shareholder **M/s. Highlight Goods Pvt. Ltd.**, we find that the relevant documents are placed at pages 1- 35A of the paper book wherein it can be seen that this company invested a sum of Rs. 16,00,00,000/- in the assessee company. The share application was made by account payee cheque. This company was incorporated on 21.07.2008 and was having company identification number U51101WB2008PTC127695. This company duly filed its return of income before ITO Ward 1(1), Kolkata and was having PAN AACCH1378M. This company which had invested Rs. 11 cr. has undergone scrutiny assessment u/s 143(3) of the Act for AY 2012-13 and AY 2017-18 which fact is discernable from a perusal of the assessment orders passed for AY 2012-13 dated 15.12.20-19 placed at pages 6 and 7 of the paper book and copy of the assessment order u/s. 143(3) for AY 2017-18 found placed at pages 8 and 9 of the paper book. Thus, this investing company's assessments have undergone scrutiny proceedings under section 143(3) of the Act, and then the question of identity of this investor

company cannot be doubted. This company was having a paid up capital with free reserves and surplus of Rs.16,69,60,353/- as on 31/03/2012. The copy of the bank statement of the Company is duly available in the paper book. The details of source of funds from which this company had made the share application are also shown in documents filed in the paper book. And it is a group entity with common share holders who all are income tax assessee's and their details are with the department and discussed in detail supra.

26. 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.(viii) And all the directors and share holders are relatives and regular income tax assessee's (ix) Both companies are group entities having common relatives are share holders. (x) Cannot be termed as jamma karchi companies

27. 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. Both the share applicant companies assessment had undergone scrutiny assessment u/s 143(3) of the Act and therefore their identity cannot be doubted. With regard to the creditworthiness of share applicants, as we noted supra, both Companies are having capital in several crores of rupees and the investment made in the appellant company is only a part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants, so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. It will be evident from the paper book that the appellant has even demonstrated the source of money deposited into their bank accounts which in turn has been used by them to subscribe to the assessee company as share application. Hence the source of source of source is proved by the assessee in the instant case though the same is not required to be done by the assessee as per law as it stood/ applicable in this assessment year. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques.

28. We also note that recently the ITAT Kolkata in several cases has deleted the addition on account of share application in similar circumstances. The relevant portion of the decisions are as follows:

(a) The Ld ITAT Kolkata. in DC IT Vs Global Mercantiles Pvt.Ltd in ITA No. 1669/Kol/2009 dated 13-01-2016. In this the decision the Ld. Tribunal held as follows:

“3.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. The facts stated hereinabove remain undisputed are not reiterated herein for the sake of brevity. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness

of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned Ld. CIT(1) on the decision of the Hon'ble Apex Court in the case of CIT vs Lovely Exports (P) Ud reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.

3.4. 1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT vs Roseberry Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the questions raised before their lordships and decision rendered thereon is as under:-

"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 A No. 1669/Kol/2009-C-AM M/s. Global Mercantiles Pvt. Ltd 11 Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT vs M/s Lovely Exports Pvt Ltd, 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.

3.4.2. In view of the aforesaid findings and respectfully following the decision of the apex court (supra) and Jurisdictional High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the ground no.2 raised by the Revenue is dismissed.

4. The last ground to be decided in this appeal of the Revenue is as to whether the Learned CIT(A) is justified in deleting the addition u/s 68 of the Act made in respect of allotment of shares to 20 individuals for an amount of Rs.57,00,000/- in the facts and circumstances of the case.

4. 1. The brief fact of this issue is that the assessee had received share application monies from 20 individuals in the earlier year which were kept in share application money account. During the asst year under appeal, the assessee allotted shares to these 20 individuals out of transferring the monies from share application money account to share capital account. The details of 20 individuals are reflected in page 6 & 7 of the Learned CIT(A) order. The Learned AO asked the assessee to produce the shareholders before him. He found that the assessee did not do so but furnished copies of pay orders used for payments to the assessee company and also furnished income tax particulars and balance sheets of all the shareholders. The Learned AO on analyzing all the balance sheets observed that the shareholders have paltry income and small savings and none of them have any bank account and huge cash balances were shown in their hands out of which Pay orders were obtained. Based on this, the

Learned AO concluded that these shareholders do not have creditworthiness to invest in the assessee company and brought the entire sum of Rs. 57,00,000/- to tax as unexplained cash credit u/s 68 of the Act.

4.2. On first appeal, the Learned CIT(A) observed that entire share application monies of Rs. 57,00,000/- were received during the previous year 2004-05 relevant to Asst Year 2005-06 from 20 persons and the shares were allotted to them during the asst year under appeal. He observed that the assessee had furnished details of the share applicants giving the date wise receipts, mode of payment, amount, name, address, income tax returns, PA No. of share applicants along with their balance sheet. The Learned CITA also observed that the assessee in its reply to show cause notice before the Learned AO had requested him to use his power and authority for the physical appearance of the shareholders which was not exercised by the Learned AO. Instead the Learned AO continued to insist on the assessee to produce the shareholders before him. He ultimately concluded that the assessee had duly discharged its onus of providing complete details of the shareholders and in any case, no addition could be made u/s 68 of the Act in the asst year under appeal as no share application monies were received during the asst year under appeal. Aggrieved, the Revenue is in appeal before us by filing the following ground:-

"That in the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made u/s 68 in respect of the allotment of shares to 20 numbers of individual investors for an amount of Rs. 57 lakhs, where genuineness of the transactions and creditworthiness of the investors were not established."

4.3. The Learned DR prayed for admission of the additional ground raised before us and vehemently supported the order of the Learned AO. In response to this, the Learned AR fairly conceded to admission of this additional ground and vehemently supported the order of the Learned CIT(A).

4.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the additional ground raised by the assessee separately before us vide its covering letter dated 9. 12.2011 is admitted as it appears to be a genuine and bonafide error of omission on the part of the Revenue from not raising this ground in the original grounds of appeal filed along with the memorandum of appeal. Moreover, it does not require any fresh examination of facts. Hence the same is admitted herein for the sake of adjudication.

4.4. 1. We find from the details available on record that the share application monies from 20 individuals in the sum of Rs.57,00,000/- has been received by the assessee during the financial year 2004-05 relevant to Asst Year 2005-06 and only the shares were allotted to them during the asst year under appeal. Admittedly no monies were received during the asst year under appeal and hence there is no scope for invoking the provisions of section 68 of the Act. Hence we hold that the order passed by the Learned CITA in this regard does not require any interference. Accordingly the ground no. 3 raised by the Revenue is dismissed.

(b) The ITAT Kolkata in R.B Horticulture & Animal Projects Co. Ltd, ITA No. 632/Koll2011 dated 13-01-2016. In this the decision the Ld. Tribunal held as follows:

“6. We have heard the Learned DR and when the case was called on for hearing , none was present on behalf of the assessee. However, we find from the file that the assessee had filed a detailed paper book and written submissions. Hence the case is disposed off based on the arguments of the Learned DR and written submissions and paper book already available on record. The facts stated in the Learned CIT(A) were not controverted by the Learned DR before us. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned CITA on the decision of the Hon'ble Apex Court in the case of CIT vs Lovelv Exports (p) Ltd reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.

6. 1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT vs Roseberrv Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the questions raised before their lordships and decision rendered thereon is as under:- -

“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.” Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT vs M/s Lovely Exports Pvt Ltd, 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.”

6.2. We find that the issue is also covered by the decision of Hon'ble Delhi High Court in the case of CIT vs Value Capital Services P Ltd reported in (2008) 307 ITR 334 (Del) , wherein it was held that:

"In respect of amounts shown as received by the assessee towards share application money from 33 persons, the Assessing Officer required the assessee to produce all these persons. While accepting the explanation and ITA No. 632/Kol12011--C-AM M/s. R.B Horticulture 6 & Animal Proj. Co. Ltd the statements given by three persons the Assessing Officer found that the response from the others was either not available or was inadequate and added an amount of Rs. 46 lakhs pertaining to 30 persons to the income of the assessee.

The Commissioner (Appeals) upheld the decision of the Assessing Officer. On appeal, the Tribunal set aside the order of the Commissioner (Appeals) and deleted the additions. On further appeal:

Held, dismissing the appeal, that the additional burden was on the department to show that even if the share applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of

the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose. "

6.3. We find that the argument of the Learned DR to set aside this issue to the file of the Learned AO for verification of share subscribers would not serve any purpose as the ratio decided in the above cases is that in any case, no addition could be made in the hands of the recipient assessee. In view of the aforesaid findings and respectfully following the decision of the apex court (supra), Jurisdictional High Court (supra) and Delhi High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the grounds raised by the Revenue are dismissed."

(c) The Ld. ITAT Kolkata in ITA No.1061/Ko1/2012 in the case of ITO Wd.3(2) Kol, vs. M/s. Steel Emporium Ltd dated 05-02-2016. In this the decision the Ld. Tribunal held as follows:

"10. We have heard both the rival parties and perused the materials available on record. The Ld. DR vehemently supported the order of the AO. Before us the Ld. AR submitted that the assessee raised share application money during the year from 25 applicants. The AO was furnished with the copy of Form 2 of Allotment of Shares to the Applicants as filed with the Registrar of Companies, West Bengal. On the date of receipt of Share applications from the Applicants, they furnished their addresses, which were recorded in the Register of Members. The AO observed that as per ROC records the addresses of the nine companies were different from the address as per Form filed with him. The AO issued notices u/s.133(6) to all the companies at the addresses furnished in Form 2 as filed with him, which were duly served at the given addresses. The AO argued that the letters should not have been served at the given address by the assessee. He served a show a cause notice dated 09.12.2011 asking for the explanation from the assessee as to how the notices u/s. 133(6) could be served to these nine companies who had different address as per ROC records. The AO was explained vide letter dated 20.12.2011 of the assessee that those companies had changed their addresses since filing of Form 2 with the Registrar. Further, it was none of the business of the assessee to question the addresses of the applicants as long as they affirm the address. The applicants were duly incorporated bodies under the Companies Act. 1956 since long. They have been regularly filing their returns of income under the Income Tax Act and are being assessed by the Revenue since long. Some of them are even registered as Non-Banking Financial Companies with Reserve bank of India. They have been filing returns regularly with Registrar of Companies and RBI since long. The letters might have been received at their old addresses because in case of change in the address, people instruct the incumbents at old addresses not to refuse the receipt of letters and receive the same. Just because, a letter was received at the old address instead of present address, it cannot be said that the identity of the applicant has not been verified. All of these companies had duly replied to notice u/s. 133(6) and confirmed the transaction with all the evidences. The AO has not raised any objection on any of the information furnished before him. The AO has not asked the respective Company applicants also to explain the alleged discrepancy in the address. The AO has not brought any material on account of record to disbelief the evidences furnished with him and treat the transaction as not genuine. The assessee submitted the following material at the time of assessment.

a) Copy of share applications from the share applicants (copies enclosed)

b) Copy of Form 2 filed with Registrar of Companies, West Bengal (copy enclosed)

c) Copy of Form 18 about the Registered Office of the applicants for change of address subsequent to the date of allotment, i.e. 31.03.2009 (copies enclosed)

d) Members register

e) Share application & Allotment Register

f) Copy of board resolution.

g) Replies from Share applicants to the notice u/s. 133(6) issued to them by the AO seeking information and documents about the sources and to examine their identity, genuineness of the transaction and their creditworthiness. (copy enclosed).

h) Copy of audited accounts.

i) Copy of bank statements.

j) Copy of Income tax acknowledgment of return filed for AY 2009-

k) Copy of PAN Card.

l) Details of sources of funds.

m) Copy of covering letter for delivery of shares.

n) Copy of master data as per ministry of Company Affairs records.

o) Copy of Annual return.

p) Copy of Memorandum and articles of Association.

Finally the Ld. AR relied on the order of the Ld. CIT(A) 10. 1 From the aforesaid discussion we find that the AO has made the addition of the share application money because all the nine companies were having the common address and the notice sent under section 133(6) was received by the single person. Accordingly the AO opined that the assessee has used its unaccounted money in the share application transactions. However we find that all the money received in the form of share capital is duly supported with the requisite document as discussed above. To our mind the basis on which the addition was made by the AO is not tenable. The Ld. DR also could not brought anything on record to controvert the findings of the Ld. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Accordingly the ground raised by Revenue is dismissed."

(d) The Ld ITAT Kolkata in ITO vs Cygnus Developers (I) P Ltd in ITA No. 282/Kol/2012 dated 2.3.2016. In this the decision the Ld. Tribunal held as follows:

"6. On appeal by the assessee the CIT(A) deleted the addition made by the AO observing as follows

"6) I have considered the submission of the appellant and perused the assessment order. I have also gone through the details and documents filed by the appellant company in the course of assessment: proceedings vide letter dt. 3-10-2007. On careful consideration of the facts and in law I am of the opinion that the AO was not justified in

making, the addition aggregating to Rs.54,00,000/- u/s.68 of the Act being the amount of share application money by holding that the appellant company has failed to prove the identity, and creditworthiness of The creditors as well as the genuineness of transactions. It is observed that all the three share applicant companies i.e. M/s. Shree Shyam Trexim Pvt. Ltd., M/s Navalco Commodities Pvt. Ltd. and M/s. Jewellock Trexim Pvt. Ltd. had filed their confirmations wherein each of them confirmed that they had applied for shares of the appellant -company. All the three companies provided- the cheque number, copy of bank statements and their PAN. It is observed that these companies also filed, copies of their return of income and financial statements for as well as copy of their assessment order u/s. 143(3) of the I. T Act for AY 2005-06. In the case of M/s. Jewellock Trexim Pvt. Ltd. the assessment for AY 2005-06 was completed by the ITO Ward 9(3), Kolkata and the assessments in the case of M/s. Navalco Commodities Pvt. Ltd. and M/s. Shree Shyam Trexim Pvt. Ltd. for A. Y.2005-06 and AY.2004-05 respectively were completed by the I TO, Ward 9(4), Kolkata. Under the circumstances, I am of the opinion that the AO was not justified in holding that the share applicant companies were not in existence. The assessment orders were completed on the address as provided by the appellant company in the course of assessment proceedings. It is not known as to how the AO's inspector had reported that the aforesaid companies were not in existence at the given address. Since the appellant company had provided sufficient documentary evidences in support of its claim of receipt of share application money, I am of the opinion that the no addition u/s.68 could be made in the hands of appellant company. On going through the various judicial pronouncements relied upon by the appellant, it is observed that the view taken as above is also supported by them. In view of above the AO is directed to delete the addition of Rs.54,00,000/- . The ground Nos. 2 and 3 are allowed, "

7. Aggrieved by the order of CIT(A) the Revenue is in appeal before the Tribunal.

8. We have heard the submissions of the learned DR, who relied on the order of AO. The learned counsel for the assessee relied on the order of CIT(A) and further drew our attention to the decision of Hon'ble Allahabad High Court in the case of CIT vs Raj Kumar Agarwal vide ITA No. 179/2008, dated 17. 11.2009 wherein the Hon 'ble Allahabad High Court took a view that non production of the director of a Public Limited company which is regularly assessed to Income tax having PAN, on the ground that the identity of the investor is not proved cannot be sustained. Attention was also to the similar ruling of the ITAT Kolkata bench in the case of ITO vs Devinder Singh Shant in IT A No.20BIKo112009 vide order dated 17.04.2009.

9. We have considered the rival submissions., We are of the view that order of CIT(A) does not call for any interference. It may be seen from the grounds of appeal raised by the Revenue that the Revenue disputed only the proof of identity of the shareholder. In this regard it is seen that for A Y.2004-05 Shree Shyam Trexim Pvt. Ltd., was assessed by ITO, Ward- 9(4), Kolkata and the order of assessment u/s/143(3) dated 25.01.2006 is placed in the paper book. Similarly Navalco Commodities Pvt. Ltd., was assessed to tax u/s 143(3) for A Y.2005-06 by I TO, Ward- 9(4), Kolkata by order dated 20.03.2007. Similarly Jewellock Trexim Pvt. Ltd was assessed to tax for A Y.2005-06 by the very same ITO- Ward- 9(3), Kolkata assessing the Assessee. In the light of the above factual position which is not disputed by the Revenue, it cannot be said that the identity of the share applicants remained not proved by the assessee. The decision of the Hon'ble Allahabad High Court as well as ITA T Kolkata Bench on which reliance was placed by the learned counsel for the assessee also supports the view that for non production of directors of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been established. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal of the Revenue. "

29. 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 and the documents produced by the assessee cannot be brushed aside by the AO to draw adverse view, which action of AO cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we are of the considered view that addition cannot be sustained merely based on inferences drawn by circumstance. Applying the law laid down in these case laws to the facts of this case, we are inclined to interfere with the order of the Ld. Commissioner of Income Tax (Appeals) and give relief to the assessee.

30. 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, it 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, including that of the directors and share holders of share subscribing entities as discussed supra. 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 and confirmed by Ld CIT(A) are based on conjectures and surmises, so their impugned action 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 allow the appeal of assessee and direct deletion of addition of Rs 16 cr under section 68 of the Act.

31. Before parting, it is noted that the order is being pronounced after ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded.

For coming to such a conclusion, we rely upon the decision of the Co-ordinate Bench of the Mumbai Tribunal in the case of DCIT vs. JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018, Assessment Year 2013-14, order dt. 14th May, 2020. In the light of the above discussion, the appeal of assessee is allowed.

In the result, appeal of assessee is allowed.

Order is pronounced in the open court on 29th May, 2020

Sd/-
(J. Sudhakar Reddy)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 29th May, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Satyam Smelters Pvt. Ltd., Block-7A, 7th floor, 20B, Abdul Hamid Street, Kolkata-700 069.
2. Respondent – DCIT, Circle-3(1), Kolkata.,
3. The CIT(A)-5, Kolkata (sent through e-mail)
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Asstt. Registrar.