

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI****BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)****ITA No.714/MUM/2020
(Assessment Year: 2011-12)**

Dy. Commissioner of Income-tax Central Circle -1 (4), Room No. 902, 9 th Floor, Pratishtha Bhavan, Old CGO Bldg, (Annexe), M.K. Road, Mumbai – 400 020	Vs. M/s Hemadari Machine Tools Pvt. Ltd., Podar Centre, 85 Parel Post Office Lane, off Dr. Ambedkar Road, Parel, Mumbai – 400 012
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PAN No. AACCH3946B**(Revenue)****(Assessee)**

Assessee by	: Ms. Ritu Kamal Kishore, A.R
Revenue by	: Shri Gurbinder Singh, D.R

Date of Hearing	: 24/06/2021
Date of pronouncement	: 09/08/2021

ORDER**PER RAVISH SOOD, J.M:**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-47, Mumbai, dated 18.11.2019, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act') dated 28.12.2018. The revenue has assailed the impugned order on the following grounds before us:

1. Whether On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in deleting the addition of Rs. 2,25,00,000/- u/s 68 of the Income Tax Act on account of receipt of share premium without appreciating that the assessee had failed to discharge the onus cast upon it u/s 68 of the Income Tax Act, 1961 of establishing the true identity, genuineness of creditworthiness of the share applicant.
2. Whether On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in appreciating that the modus operandi detected during

Search/Survey clearly established colourable transaction by the assessee under the garb of share premium.

Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in applying the ratio of the decision of Vodafone India Services(P) Ltd. and Appeal Infotech [2017] 88 taxmann.com 695(Bombay) in the case of assessee who entered into accommodation entries in the name of share premium.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in placing extensive reliance on the retraction affidavit of Shri Kiritkumar Suba, Shri Navin Nishar and Shri Naresh Sodhani without appreciating that the affidavits were not reliable & had no evidentiary value.
4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in not appreciating that the statement recorded u/s 131 had evidentiary value and contents thereof were presumed to be true.
5. Whether on the facts and in the circumstances of the case and in law, Ld.CIT(A) was justified in not upholding the additions made by AO in view of the judgement by the Apex Court in the case of Principal Commissioner of Income Tax (Central - 1) Vs NRA Iron & Steel Pvt. Ltd. (arising out of SLP(civil) No.29855 of 2018) upholding the addition made by the assessing officer where it is held by the Apex Court that the practice of conversion of unaccounted money must be subjected to careful scrutiny.
6. The appellant prays that the order passed by Ld. CIT(A) be set aside & that addition be restored.
7. The appellant craves leave to add, to amend and/ or to alter any of the grounds of appeal, if need be."

2. Briefly stated, the assessee company which is engaged in the business of manufacturing of machines had filed its return of income for A.Y 2011-12 on 05.08.2011, declaring a loss of Rs.(-) 6,280/-. Thereafter, a revised return of income was filed on 10.08.2010 disclosing a loss of Rs.(-) 12,280/-. The return of income filed by the assessee company was processed as such u/s 143(1) of the Act.

3. Search and seizure action u/s 132 and survey proceedings u/s 133A of the Act were carried out on Podar Education Group on 09.01.2018. As is discernible from the records, the search and post search investigations and enquiries revealed that the trusts/charitable institutions of Podar Group were involved in siphoning of the donations received by them by making bogus donations to other charitable/educational institutions, which thereafter would be received back in cash and ploughed in the garb of share application money, share premium, loans etc. into companies and other entities controlled

by the said group. Fact that Podar group was involved in the aforesaid nefarious activities was supported by the statements recorded during the course of the survey proceedings under Sec. 133A of certain persons who were stated to have facilitated the aforesaid arrangements, viz. (i). statement of Shri. Kirit Kumar Dharishbhai Suba, a key person of the group who was working as a consultant chartered accountant and retainer for financial advisory and statutory compliances with Podar group of Educational Institutes since the year 1982, recorded u/s 131 of the Act on 11.01.2018 and 12.01.2018 during the course of the survey proceedings carried out u/s 133A in the case of M/s Suba & Company at 102, Olive Apartment, Devidas Lane Corner, Link Road, Borivali (West), Mumbai – 400103; (ii). statement of Shri. Navin Nishar, chartered accountant, who was associated with Shri. Kirit Kumar Dharishbhai Suba for last 8 years and was stated to have arranged four high net worth companies for him to facilitate the aforesaid arrangement recorded u/s 131 of the Act on 11.01.2018 during the course of the survey proceedings carried out u/s 133A in the case of M/s Suba & Company at 102, Olive Apartment, Devidas Lane Corner, Link Road, Borivali (West), Mumbai 400103; and (iii). statement of Shri. Naresh Kumar Sodani, chartered accountant who is stated to have played a pivotal role for facilitating the aforesaid arrangement of siphoning the receipts of trusts/charitable institutions of Podar Group by way of bogus donations to such other trusts/charitable institutions that would be identified by him alongwith Shri. Kirit Kumar Dharishbhai Suba, which thereafter would be received back in cash from the said trusts/charitable institutions through angadias/money handlers, recorded u/s 131 of the Act on 11.01.2018 during the course of the survey proceedings carried out u/s 133A at 245-246, Vardhman Sunrise Plaza, Vasundhara Enclave, New Delhi – 110 096.

4. On the basis of the aforesaid search and post-search investigations carried out by the department, the A.O was in receipt of information from the DGIT(Inv.), Mumbai, that the assessee company under the aforesaid scheme of arrangement that was unearthed during the course of the search and

survey action conducted by the Investigation wing in the case of Podar group was found to have received share premium of Rs. 2.25 crore from the following non-existent persons/entities :

Sr. No.	Name of the concern from whom share Premium is received	Amount in Rs.	Date of transaction
1.	Gyaneshwar Trading & Finance Co. Ltd.	9,00,000	25.05.2010
2.	Oshin Investment and Finance Pvt. Ltd.	9,00,000	25.05.2010
3.	Sidh Housing Development Co. Ltd.	9,00,000	25.05.2010
4.	Albatross Share Registry Pvt. Ltd.	13,50,000	26.05.2010
5.	Artilegence Bio Innovation Ltd.	6,75,000	26.05.2010
6.	One2E Solution India Pvt. Ltd.	13,50,000	26.05.2010
7.	Aaram Tradin Pvt. Ltd.	13,50,000	09.10.2010
8.	Onspec Infotech Ltd.	13,50,000	09.10.2010
9.	Preet Mercantile Pvt. Ltd.	13,50,000	09.10.2010
10.	Maheshwari Knit Export Ltd.	13,50,000	09.10.2010
11.	Tinta Mercantile Pvt. Ltd.	13,50,000	09.10.2010
12.	Prabal Mercantile Pvt. Ltd.	13,50,000	09.10.2010
13.	Ronit Mercantile Pvt. Ltd.	13,50,000	09.10.2010
14.	Mansi Exprot Pvt. Ltd.	13,50,000	09.10.2010
15.	Shreerajnakoda Jewels Pvt. Ltd.	13,50,000	09.10.2010
16.	Better Buidcon Pvt. Ltd.	13,50,000	09.10.2010
17.	Suhana Complex Pvt. Ltd.	13,50,000	09.10.2010
18.	Artilegence Bio Innovation Ltd.	2,25,000	13.10.2010
19.	Terry Towel Industries Ltd.	13,50,000	22.10.2010
	Total	2,25,00,000	

Backed by the aforesaid information, the A.O carried out further verifications and perused the financials of the assessee company for A.Y 2011-12 to 2016-17, which revealed that it had not shown any business whatsoever in its profit & loss account for any of the said year. On the basis of his aforesaid observations the A.O held a conviction that the assessee company, viz. M/s Hemadri Machine Tools Pvt. Ltd. in the garb of share premium had merely received accommodation entries. Accordingly, in the backdrop of the fact that neither the assessee had carried out any activities nor shown any sign which would suggest that its shares could command such high premium during the year under consideration, i.e the first year of the company, the A.O reopened its case u/s 147 of the Act. Notice under Sec. 148 of the Act was issued to the assessee company on 27.03.2018. In compliance, the assessee company filed its return of income on 30.08.2018. On request by the assessee a copy of the 'reasons to believe' on the basis of which the case was reopened were made available by the A.O on 17.11.2018. Objections filed by the assessee company to the validity of the jurisdiction assumed by the A.O for reopening

its case u/s 147 of the Act were thereafter disposed off by the A.O vide his letter dated 12.12.2018. Subsequently, the A.O issued notices under Sec. 143(2) and 142(1) of the Act.

4. During the course of the assessment proceedings, the assessee in order to substantiate the authenticity of the share premium received during the year under consideration from the aforementioned 19 companies, therein placed on record supporting documentary evidence as were called for by the A.O vide his notice under Sec. 142(1), dated 19.12.2018, viz. Copies of the Board's resolution, Application form for Shares, Copy of Form No. 2, Share Valuation certificate dated 22.04.2010, Copies of Bank Account statements, Memorandum of association/Articles of association of the entities etc. It was the claim of the assessee that the share capital along with premium was received from the aforementioned share applicants through regular banking channels. On being confronted with the statement of Shri Kirit kumar Darshibhai Suba (supra) recorded u/s 131 of the Act, dated 11.01.2018, wherein he had admitted that in collusion with certain other persons he had facilitated the siphoning of donations received by Podar Group of charitable/educational institutions and ploughed the same in the garb of share application money, share premium, loans etc into the companies that were controlled by the said group, the assessee at the threshold submitted that as the said statement was recorded in the course of the survey proceedings u/s 133A, therefore, it had no evidentiary value. It was further submitted by him that the aforesaid statement that was relied upon by the A.O had thereafter been retracted by Shri Kirit kumar Darshibhai Suba on the basis of an 'affidavit', dated 03.04.2018. Accordingly, in the backdrop of the aforesaid facts, it was submitted by the assessee that as the statement relied upon by the department had no evidentiary value, thus, no credence could be placed on the same. Alternatively, it was submitted by the assessee that as no cross-examination of the aforementioned person was allowed to him, therefore, his statement could not be acted upon for drawing of adverse inferences. It was further submitted by the assessee that the 'proviso' to Sec. 68 that was made

available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013 though contemplated that any explanation of an assessee regarding amount received by way of share capital including share premium shall be deemed to be not satisfactory unless the shareholder also offers an explanation about the nature and source of the amount received, however, the same was applicable prospectively w.e.f 01.04.2013, and thus, was not applicable to the case of the assessee for the year under consideration i.e A.Y. 2011-12. In support of his aforesaid contention the assessee relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Gagandeep Infrastructure Pvt. Ltd., ITA No. 1613 of 2014, dated 23.03.2017. It was further submitted by the assessee that the allegation of the department that the donations given by charitable institutions/trusts of Podar group to other charitable institution/trusts were bogus and the donee trusts had thereafter withdrawn cash from their bank accounts and given it back to Podar Group, which thereafter was ploughed into the companies of the said group through a maze of bogus companies, was an incorrect and a baseless allegation. The assessee further placed on the assessment record the complete details of the 19 shares subscribers who were existing tax payers alongwith their complete addresses and income tax credentials. It was, thus, in the backdrop of the aforesaid facts submitted by the assessee that now when the complete details of the share subscribers along with their income tax credentials had been furnished with the department, the share application money received from them could not be regarded as its undisclosed income within the meaning of Sec. 68 of the Act. In support of his aforesaid contention the assessee had relied on the judgments of the Hon'ble Supreme Court in the case of CIT vs. Lovely Exports Pvt. Ltd. (2008) 216 CTR 195 (SC) and CIT Vs. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (SC) and that of the Hon'ble High Court of Bombay in the case of CIT Vs. M/s Gagandeep Infrastructure Pvt. Ltd. (2017) 394 ITR 680 (Bom). As regards the statement of Shri Navin Nishar, Chartered accountant that was recorded u/s 131 of the Act on 11.01.2018 in the course of the survey proceeding, wherein he had stated to have arranged four companies for Shri

Kirit kumar Dharshibhai Suba (supra) for facilitating the aforesaid arrangement of siphoning of funds; AND that of Shri Naresh Kumar Sodani, Chartered accountant, recorded u/s 131 of the Act, dated 12.01.2018 in the course of the survey proceedings, wherein he had stated to have played a key role in identifying the charitable/educational institutions to whom bogus donations were to be given, and ploughing back of the said amounts as share application money, share premium, loans etc into the companies that were controlled by Podar group; it was stated by the assessee that the said persons too had retracted from their respective statements. Also, it was submitted by the assessee that no cross-examination of either of the aforesaid persons was allowed to him, as a result whereof no adverse inferences on the basis of the allegations raised by them, if any, could be drawn in its hands.

5. However, the aforesaid explanation of the assessee did not find favour with the A.O. It was observed by the A.O that the candid confessions of the aforementioned persons, viz. Shri Kirit kumar Dharshibhai Suba, Shri Navin Nishar and Shri Naresh Kumar Sodani, alongwith demonstration of the modus operandi that was adopted by them to facilitate the siphoning of the receipts of the charitable/educational institutions of Podar group via bogus donations to other charitable/educational institutions, and ploughing of the said amounts as share application money, share premium, loans etc. into the companies that were controlled by the said group left nothing to doubt. Also, it was observed by the A.O that S/sh. Pavan G. Podar and Ajay G. Podar i.e the trustees of Podar charitable/educational institutions on being confronted with the confessions of the aforementioned persons had given evasive answers and refrained from commenting on the same. Rebutting the claim of the assessee that the material substantiating the donations given by the charitable/educational institutions of Podar group to other charitable /educational institutions, viz. mode of donations i.e cheques, name of the recipient trusts/institutions alongwith the correspondence to the said effect with them, coupled with the fact that neither any cash was seized nor any money trail had therein surfaced in the course of the search proceedings

supported the authenticity of the said transactions, it was observed by the A.O that the modus operandi adopted i.e cheque for cash and layered transactions to cover the money trail that was brought back in the form of share application money, loan, share premium etc. was an age old practice adopted to camouflage the true nature of transactions and to give them a colour of genuine transactions. It was rather observed by the A.O that the confessions of the aforementioned persons, viz. Shri Kirit kumar Dharshibhai Suba, Shri Navin Nishar and Shri Naresh Kumar Sodani formed the cardinal circumstantial evidence qua the nefarious activities carried out by Podar group. Observing that such nefarious activities are always carried out in the darkness of secrecy and it is always not possible to have clinching evidence to establish such surreptitious activities, the A.O relied on the principles of the preponderance of human probability as was emphasised by the Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC). As regards the retraction of Shri Kirit kumar Dharshibhai Suba of his averments that were earlier made in his statement recorded u/s 131 of the Act, dated 11.01.2018 and 12.01.2018, wherein he had so retracted by filing an 'affidavit', dated 03.04.2018, and had stated that as his statement in the course of the survey proceedings was recorded by the Income-tax officials by using pressure tactics and mentally torturing him, therefore, he had neither remained in a proper frame of mind to state what was true nor could correctly interpret the transactions relating to the concerns of Podar group, therefore, his statement that was obtained under pressure be not relied upon. However, the A.O referring to the contents of his statement that was recorded on 11.01.2018 and 12.01.2018 rebutted the claim that was made by him in his 'affidavit' retracting his earlier statement that was recorded in the course of the survey proceedings. Accordingly, the A.O held that the share premium of Rs. 2.25 crore received by the assessee company were sourced out of the funds siphoned from the charitable/educational institutions of Podar group. As regards the Share Valuation Report, dated 16.09.2010 prepared by D.N Shetty & Co. that was filed by the assessee, it was observed by the A.O that

the valuer had adopted the DCF method and valued the shares at Rs. 113.18 per share. It was observed by the A.O, that though the valuer had shown a discounted cash flow of Rs. 19,50,963/- in the F.Y 2015-16, however, no such sign of growth could be noticed from the return of income filed by the assessee. It was, thus, observed by the A.O that the valuation of shares was just an eye wash and the same did not command such huge premium. It was observed by the A.O that as the assessee had failed to explain and justify the source and receipt of share premium of Rs. 2.25 crore, therefore, the same was to be held as an unexplained cash credit under Sec. 68 of the Act. Backed by his aforesaid deliberations, the A.O vide his order passed under Sec. 143(3) r.w.s 147, dated 28.12.2018 assessed the income of the assessee company at Rs. 2,25,00,000/-.

6. Aggrieved, the assessee assailed the assessment order passed by the A.O before the CIT(A). As is discernible from the order passed by the CIT(A), we find, that he had after deliberating at length on the different facets forming the basis and/or having a bearing qua the addition of Rs. 2.25 crores made by the A.O under Sec. 68 of the Act, deleted the same. It was observed by the CIT(A) that the view taken by the A.O that the trusts/charitable institutions of Podar Group were involved in siphoning of their receipts by making bogus donations to other charitable/educational institutions, which thereafter was received back in cash and ploughed in the garb of share application money, share premium, loans etc. into companies and other entities controlled by the said group was primarily based on the statements recorded during the course of the survey proceedings under Sec. 133A of certain persons who were stated to have facilitated the aforesaid arrangement, viz. (i). Statement of Shri. Kirit Kumar Dharishbhai Suba, a key person of the group who was working as a consultant chartered accountant and retainer for financial advisory and statutory compliances with Podar group of Educational Institutes since the year 1982 that was recorded u/s 131 of the Act on 11.01.2018; (ii). Statement of Shri. Navin Nishar, chartered accountant, who was associated with Shri. Kirit Kumar Dharishbhai Suba for last 8 years and had arranged four high net

worth companies for him to facilitate the aforesaid arrangement; recorded u/s 131 of the Act on 11.01.2018; (iii). Statement of Shri. Naresh Kumar Sodani, Chartered accountant who is stated to have played a pivotal role for facilitating the aforesaid arrangement of siphoning the receipts of trusts/charitable institutions of Podar Group by way of bogus donations to such other trusts/charitable institutions which would be identified by him alongwith Shri. Kirit Kumar Dharishbhai Suba, and would thereafter be received back in cash from the said trusts/charitable institutions through angadias; recorded u/s 131 of the Act on 11.01.2018. It was observed by the CIT(A) that the aforementioned persons had not only admitted their participation in facilitating the aforesaid nefarious activities of laundering the ill-gotten money of Podar group which through a maze of bogus companies was finally routed as share application money, share premium, loans etc into the companies that were controlled by said group, but had even demonstrated at length the modus operandi that was adopted by them for facilitating the said arrangement. In fact, it was observed by the CIT(A) that Shri. Kirit Kumar Dharishbhai Suba (supra) in his statement recorded in the course of the survey proceedings had in reply to Question No. 34 specifically stated that unaccounted cash amounting to Rs. 2.25 crore was introduced as share premium in the books of the assessee company, viz. Hemardi Machine Tools Pvt. Ltd. After taking cognizance of the relevant excerpts of the statements of the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani, it was observed by the CIT(A) that all of the said persons had subsequently retracted their respective statements.

7. As the facts involve in the present appeal of the assessee company remained more or less the same as were involved in the case of M/s Goodluck Apparels Pvt. Ltd for A.Y 2011-12 in Appeal No. CIT(A)-47, Mumbai/10126 /2018-19 for A.Y 2011-12, therefore, the CIT(A) referred to his observations that were recorded while disposing off the said appeal. As the assessee had in the course of the proceedings before the CIT(A) sought admission of the 'affidavits' that were filed by the aforementioned persons, viz. Shri. Kirit Kumar

Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani, wherein they had retracted from their respective statements recorded in the course of the survey proceedings conducted u/s 133A on 11.01.2018, as additional evidence U/rule 46A of the Income-tax Rules, 1962, and had also sought their cross-examination, therefore, the CIT(A) called for a remand report from the A.O. Also, the CIT(A) taking cognizance of the assessee's claim that no incriminating material was found during the course of the search proceedings which would evidence that it had received funds out of those which were allegedly stated to have been siphoned from the charitable/educational trusts of Podar group, therefore, he directed the A.O to provide copies of the relevant incriminating material, if any, that were found during the course of the search proceedings evidencing the said fact. After lots of persuasion, the A.O filed his 'remand report', dated 06.11.2019 with the CIT(A), wherein he objected to the admission of the 'affidavits' of the aforementioned persons as an additional evidence. Although, the A.O had in the course of the remand proceedings facilitated a cross-examination of the aforementioned persons to the assessee, however, as all three of them had retracted from their earlier statements, therefore, it was submitted by him in his remand report that the statements of the aforesaid persons recorded in the course of their cross-examination may not be relied upon as the same were based on the retraction affidavits and a well planned after thought. As regards the objections that were raised by the A.O qua admission of the retraction affidavits of the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani as additional evidence, the same did not find favour with the CIT(A). It was observed by the CIT(A) that as the additional evidence filed by the assessee was pivotal in deciding the various issues agitated in the appeal before him, thus, the same had a direct bearing on determining of the correct taxable income of the assessee. Also, the CIT(A) was of the view that as it was only after the receipt of the assessment order that it had come to the knowledge of the assessee company that the A.O had relied upon the statements of Shri. Navin Nishar

and Shri. N.K Sodani for making the additions u/s 68 of the Act, therefore, the retraction affidavits of the said persons were clearly admissible under Rule 46A(1)(c) and Rule 46A(1)(d) of the Income-tax Rules, 1962.

7. On merits, it was observed by the CIT(A) that the A.O had held the share premium of Rs. 2.25 crore received by the assessee as an unexplained cash credit under Sec. 68 of the Act by primarily relying on the statements of Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani that were recorded in the course of the survey proceedings on 11/12.01.2018. It was observed by the CIT(A) that though the aforementioned persons had resiled from their earlier statements on the ground that they were obtained by the officials under undue influence, severe pressure, stress and coercion, however, the said retractions were rejected by the A.O by treating the same as an afterthought. Also, it was observed by the CIT(A) that the A.O had also taken exception to the aforesaid retractions, for the reason, that they were filed after substantial delay, viz. delay of 81 days in case of Shri. Kirit Kumar Dharishbhai Suba; delay of 5 months in case of Shri. Navin Nishar; and delay of 8 months in case of Shri. Naresh Kumar Sodani. However, the CIT(A) did not find favour with the summarily brushing aside of the retraction affidavits of the aforementioned persons by the A.O i.e without carrying out any independent enquiries and investigations of his own. It was observed by the CIT(A) that though all the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani had clearly stated in their respective statements recorded in the course of their cross-examination that they have retracted from their earlier statements that were recorded u/s 131 of the Act in the course of the survey proceedings on 11/12.01.2018, however, the A.O had failed to re-examine the said witnesses on the said crucial issue. As regards the merits of the addition qua treating of the share premium as an unexplained cash credit u/s 68 of the Act by the A.O, it was observed by the CIT(A) that the assessee had furnished sufficient documentary evidence to substantiate the authenticity of the share capital/share premium that was received by it from all the 19 share

subscribers, viz. (i). statement showing the details of share capital and share premium received during the F.Y 2010-11 stating the names, address, PAN of the applicant of shares, amount of share capital, date of application for subscribing the shares, number of shares allotted, amount of share capital, amount of premium on the total amount received, details of share capital and share premium, copy of board resolution for allotment of 5,00,000 shares, copies of letters of the applicant companies seeking allotment of equity shares, copies of the letters confirming the allotment of equity shares to the applicant companies, copy of share valuation report issued by registered valuer, viz. D.N Shetty & Co, dated 22.04.2010 under DCF method, copy of bank statement evidencing that the application money was received from the share applicants through banking channel, copy of certificate of incorporation, certificate of commencement of business, copy of PAN card, memorandum of association, articles of association, resolution passed by applicants of shares in the board meeting, application for shares and confirmations from all the 19 share applicants. In the backdrop of the aforesaid facts, it was submitted by the assessee that as it had placed on record substantial material evidencing the identity and creditworthiness of the share applicants, as well the genuineness of the transactions in question, therefore, the onus that was cast upon it stood duly discharged and was shifted upon the revenue. Also, it was submitted by the assessee that though the A.O had accepted the receipt of share capital of Rs. 25 lac by the assessee company from the aforementioned share applicants, however, it had made an addition as regards the other part of the transaction i.e share premium of Rs. 2.25 crore and had added the same as an unexplained cash credit u/s 68 of the Act in the hands of the assessee. Observing, that the assessee by placing on record substantial documentary evidence, viz. name, PAN, address, copies of share application forms, board resolution, acknowledgement of income-tax returns, Form No. 2 for allotment of equity shares, financial statements, form of allotment of shares etc. had duly discharged the onus that was cast upon it and proved the identity, genuineness and creditworthiness of the share applicants, which had

not been dislodged or disproved by the A.O by carrying out any independent enquiries, the CIT(A) was of the view that the addition made by the A.O under Sec. 68 of the Act was not sustainable in the eyes of law. Referring to the view taken by him while disposing off the appeal in the case of M/s Goodluck Apparels Pvt. Ltd for A.Y 2011-12 in Appeal No. CIT(A)-47, Mumbai/10126/2018-19 for A.Y 2011-12, the CIT(A) after relying on a host of judicial pronouncements observed, that when the transactions are duly supported and evidenced by documentary evidence, the same, thus, could not be treated as bogus simply on the basis of the report of the Investigation wing or the statement of third parties. Apart from that, it was observed by the CIT(A) that qua the genuineness of the donations given by the charitable/educational trusts of Podar group to other charitable/educational trusts or institutions, the A.O had received replies from all the donee trusts to whom notices were issued u/s 133(6) of the Act and there were no shortcomings in the documents submitted by them. Also, it was observed by the CIT(A) that the A.O had failed to bring on record any such case where the exemption certificate of any of the donee trust was cancelled on the ground of it having allegedly acted as a facilitator for siphoning off the receipts of charitable/educational institutions of Podar group. On the contrary, it was observed by the CIT(A) that on the issue of siphoning of funds by the donee trusts there was no adverse observation by the A.O in his remand report. Further, the CIT(A) was of the view that the A.O had failed to establish that the donations made by the charitable/educational institutions of Podar group were, inter alia, routed to the assessee company as share premium. It was further observed by the CIT(A) that the A.O had not issued any summons u/s 131 of the Act or notices u/s 133(6) of the Act to the various shareholders. In the backdrop of the aforesaid facts, the CIT(A) was of the view that the A.O had not even conducted basic verification and examination of the shareholders who had subscribed to the shares of the assessee company at a premium. To sum up, it was observed by the CIT(A) that the A.O had failed to bring on record any such material which would link the flow of funds from

the donee trusts to the share premium that was introduced in the books of the assessee company. Accordingly, drawing support from the doctrine of common law, viz. “incumbit probation qui dicit non qui negat”, i.e burden lies upon one who alleges and not upon one who deny the existence of the fact, the CIT(A) was of the view that the A.O had failed to carry out his doubts to a logical conclusion by converting them into hard facts on the basis of evidences during assessment proceedings. It was further observed by the CIT(A) that the additions made by the A.O were based only on assumptions, conjectures and surmises, and it was not a case of sufficiency of adverse material but complete absence of any incriminating material being brought on record by the A.O. Referring to the record, it was observed by the CIT(A) that there was no iota of evidence to substantiate the alleged *modus operandi* i.e the bogus donations made to the donee trusts which thereafter were withdrawn in cash and ploughed back into the books of accounts of the companies and entities under the control of Podar group in the garb of share application money, share capital, share premium, loans etc. It was, thus, observed by the CIT(A) that unless specific evidence was brought on record to controvert the validity and correctness of the documentary evidence produced by the assessee company, no liability could be validly fastened on it merely on the basis of assumptions and presumptions of the A.O. In support of his observation that no addition could be made merely on the basis of presumptions the CIT(A) had relied on a host of judicial pronouncements. Further, it was observed by the CIT(A) that all the statements relied upon by the A.O were recorded u/s 131 of the Act during the course of the survey operation conducted under Sec. 133A of the Act, viz. (i). statement of Shri. Kirit Kumar Dharishbhai Suba that was recorded on 11.01.2018 and 12.01.2018 during the course of the survey proceedings carried out u/s 133A in the case of M/s Suba & Company at 102, Olive Apartment, Devidas Lane Corner, Link Road, Borivali (West), Mumbai – 400 103; (ii). statement of Shri. Navin Nishar that was recorded on 11.01.2018 during the course of the survey proceedings carried out u/s 133A in the case of M/s Suba & Company at 102, Olive Apartment, Devidas Lane

Corner, Link Road, Borivali (West), Mumbai 400103; and (iii). statement of Shri. Naresh Kumar Sodani that was recorded on 12.01.2018 during the course of the survey proceedings carried out u/s 133A at 245-246, Vardhman Sunrise Plaza, Vasundhra Enclave, New Delhi – 110 096. Relying on the judgments of the Hon'ble High Court of Kerala in the case of Paul Mathews & Sons Vs. CIT (2003) 263 ITR 101 (Ker) and that of the Hon'ble Supreme Court in the case of CIT Vs. M/s S. Khader Khan and sons (2012) 25 taxmann.com 413 (SC) and a host of other judicial pronouncements, it was observed by the CIT(A) that as a statement recorded u/s 133A of the Act does not have any evidentiary value and the A.O is not authorised to administer oath and record a sworn statement u/s 133A of the Act, thus, the statements recorded u/s 133A of the Act are not conclusive piece of evidences in themselves. It was further observed by the CIT(A) that as the stand of the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodhani had been vacillating during the course of the proceedings, therefore, their statements could not be held to be trustworthy and carried very little evidentiary value. It was observed by the CIT(A) that in the Examination in chief, the revenue had recorded their statements and they gave a statement in favour of the revenue, however, during cross-examination, they on being questioned gave a statement in favour of the assessee. Relying on certain judicial pronouncements, it was observed by the CIT(A) that no reliance can be placed on the testimony of a person indulging in double speaking and taking contradictory stands on different occasions. It was further observed by the CIT(A) that the A.O had merely acted upon the report of the Investigation Wing and had not carried out any relevant investigation to take the case to its logical conclusion, despite having been given another opportunity in remand proceedings. In sum and substance, it was observed by the CIT(A) that there was no evidence on record to prove that the transactions carried out by the assessee company were collusive transactions. As such, the CIT(A) was of the view that additions made on the basis of a statement alone will not suffice without supportive,

independent evidence; as they have no probative value in the absence of corroborative evidence. It was further observed by the CIT(A) that it was trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences which would lead adequate assurance to the court that it may seek to rely thereupon. In support of his aforesaid observation reliance was placed by the CIT(A) on the CBDT Instruction F.No. 286/2/20003-IT(Inv-II), dated 10th March, 2003. It was observed by the CIT(A) that in its aforesaid Instruction the CBDT had emphasised that during the course of search and survey proceedings no attempt should be made by the tax officials to obtain confessions regarding the undisclosed income and the focus should be on collection of credible evidence. Again, the aforesaid directions were reiterated by the CBDT in its Circular No. F.No. 286/98/2013-IT, dated 18.12.2014. It was further noticed by the CIT(A) that though the A.O in the course of the remand proceedings was specifically directed to provide copies of the incriminating material, if any, found during the course of the search operation in relation to the additions made in the assessment order i.e incriminating material which would evidence siphoning off the trust funds and introduction of the same as share premium in the books of account of the assessee company, however, the A.O in his remand report had only placed reliance on the assessment order and no incriminating documents whatsoever were furnished by him. It was observed by the CIT(A) that the A.O while passing the assessment order as well as in his remand report had relied upon a so called digital evidence i.e a text message dated 29th & 30th June, 2016 between Shri. Navin Nishar and Shri. Kirit Kumar Dharishbhai Suba, which was clarified by Shri. Navin Nishar in his statement recorded u/s 131 on 11.01.2018 as a communication qua certain cash transactions between Shri. Sirish Shah's Angadia/cash handler and Angdia /cash handler of Shri. Kirit Kumar Dharishbhai Suba. Referring to the said so called digital evidence, it was observed by the CIT(A) that the same was not only by any means found to be related to the assessee company, but even otherwise the date borne on the same i.e 29th & 30th June,

2016 was relevant to A.Y 2017-18 and not the year under consideration. Accordingly, it was observed by the CIT(A) that there was no material available on record which would evidence that the donations of Podar trusts were routed to the assessee company in the garb of share premium. Adverting to the presumptions provided in Sec. 132(4A)/292C of the Act, it was observed by the CIT(A), that even otherwise as the aforesaid text messages were found from the possession of a third party, viz. Shri. Navin Nishar, therefore, no adverse inferences qua the contents thereof could have been drawn in the hands of the assessee company. In the totality of the facts attending to the case of the assessee, it was observed by the CIT(A) that as the confessions/statements of Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodhani had thereafter been retracted by them, and the additions made by the A.O was not supported by any corroborative or primary/direct material evidence, therefore, now when the assessee had duly discharged the onus that was cast upon him as regards proving the identity and creditworthiness of the share applicants and the genuineness of the transactions, the burden to prove to the contrary was shifted on the A.O. Accordingly, the CIT(A) was of the view that the addition of the share premium as an unexplained cash credit u/s 68 of the Act was made by the A.O only on the basis of the statements of the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodhani without bringing on record any corroborative evidence. It was further observed by the CIT(A), that as the A.O had neither placed on record any incriminating material supporting the aforesaid addition nor brought on record any material which would establish that the assessee was in collusion with the donee trusts, therefore, there was no justification in holding the share premium as an unexplained cash credit within the meaning of Sec. 68 of the Act. Apart from that, it was observed by the CIT(A) that now when the A.O had held the share capital received by the assessee company from the share applicants as genuine, therefore, it could safely be concluded that the identity, creditworthiness and genuineness of the share subscribers qua the

transactions in question had been accepted by him. It was, thus, observed by the CIT(A) that after holding the share capital received by the assessee from the share applicants as genuine, it was incorrect on the part of the A.O to adopt an inconsistent approach and treat the share premium received from the same shareholders as bogus. Qua the share premium charged by the assessee company, it was observed by the CIT(A) that the same was duly supported by the valuation report of the registered valuer, viz. D.N Shetty & Co. As regards the 'proviso' to Sec. 68 of the Act which was made available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013, making it obligatory that in a case where any sum credited in the books of account of a assessee company consists of share application money, share capital, share premium or any such amount by whatever name called, it is obligatory for the person, being a resident in whose name such credit is recorded to offer an explanation to the satisfaction of the A.O about the nature and source of such sum so credited, it was observed by the CIT(A) that the same was applicable prospectively i.e w.e.f A.Y 2013-14, and thus, would not be applicable to the case of the present assessee for A.Y 2011-12. In support of his aforesaid observation the CIT(A) had relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Gagandeep Infrastructure (P) Ltd. (2017) 80 taxmann.com 272 (Bom). Rather, the CIT(A) relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Lovely Export Pvt. Ltd. (2008) 216 CTR 195 (SC), wherein, the Hon'ble Apex Court had observed 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, but it cannot be regarded as the undisclosed income of assessee company. Accordingly, it was observed by the CIT(A) that now when the assessee had furnished the complete details of the share applicants, then, in case the A.O was of the view that the share premium was received by the assessee from bogus shareholders, it was open for him to proceed against the said share subscribers and could not assess the amounts so received as the

unexplained cash credit in the hands of the assessee. Also, support was drawn by the CIT(A) on a host of other judicial pronouncements wherein a similar view was taken. Also, the CIT(A) relied on the judgment of the Hon'ble High Court of Bombay in the case of Pr. CIT Vs. Apeak Infotech (2017) 88 taxmann.com 695 (Bom) and observed, that as the amount received on issue of share capital as premium are on capital account, therefore, the same cannot be considered to be income. The Hon'ble High Court while concluding as hereinabove had relied on its earlier order passed in the case of Vodafone India Services (P) Ltd. Accordingly, the CIT(A) on the basis of his aforesaid observations vacated the addition of Rs. 2.25 crores that was made by the A.O by treating the share premium received by the assessee as an unexplained cash credit u/s 68 of the Act.

8. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We have heard the Id. Authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. As observed by us hereinabove, the Id. CIT(A) had on the basis of an exhaustive order vacated the stamping of the share premium of Rs. 2.25 crore as an unexplained cash credit u/s 68 of the Act by the A.O. We shall, thus, deal with the sustainability of the multiple observations of the CIT(A) qua the issue in question i.e treating of the share premium of Rs. 2.25 crore as an unexplained cash credit by the A.O. On a perusal of the assessment order, we find that information was received by the A.O from the Investigation Wing, Mumbai that that the trusts/charitable institutions of Podar Group were involved in siphoning off the donations received by them by making bogus donations to other charitable/educational institutions, which thereafter were received back in cash and ploughed in the garb of share application money, share premium, loans etc. into companies and other entities controlled by the said group. As per the information, it was conveyed to the A.O that the aforesaid nefarious activities of Podar group

were supported by the statements recorded during the course of survey proceedings under Sec. 133A of certain persons viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani who had admitted of their participation in facilitating the aforesaid nefarious arrangement of Podar group. On a perusal of the statement of Shri. Kirit Kumar Dharishbhai Suba, we find, that he had in reply to Question No. 34 categorically stated that unaccounted cash amounting to Rs. 2.25 crore was introduced as share premium in the books of the assessee company, viz. Hemadari Machine Tools Pvt. Ltd. On the basis of the aforesaid information, it was further conveyed to the A.O that the assessee company under the aforesaid scheme of arrangement had received share premium of Rs. 2.25 crore from the following non-existent persons/entities :

Sr. No.	Name of the concern from whom share Premium is received	Amount in Rs.	Date of transaction
1.	Gyaneshwar Trading & Finance Co. Ltd.	9,00,000	25.05.2010
2.	Oshin Investment and Finance Pvt. Ltd.	9,00,000	25.05.2010
3.	Sidh Housing Development Co. Ltd.	9,00,000	25.05.2010
4.	Albatross Share Registry Pvt. Ltd.	13,50,000	26.05.2010
5.	Artilegence Bio Innovation Ltd.	6,75,000	26.05.2010
6.	One2E Solution India Pvt. Ltd.	13,50,000	26.05.2010
7.	Aaram Tradin Pvt. Ltd.	13,50,000	09.10.2010
8.	Onspec Infotech Ltd.	13,50,000	09.10.2010
9.	Preet Mercantile Pvt. Ltd.	13,50,000	09.10.2010
10.	Maheshwari Knit Export Ltd.	13,50,000	09.10.2010
11.	Tinta Mercantile Pvt. Ltd.	13,50,000	09.10.2010
12.	Prabal Mercantile Pvt. Ltd.	13,50,000	09.10.2010
13.	Ronit Mercantile Pvt. Ltd.	13,50,000	09.10.2010
14.	Mansi Exprot Pvt. Ltd.	13,50,000	09.10.2010
15.	Shreerajnakoda Jewels Pvt. Ltd.	13,50,000	09.10.2010
16.	Better Buidcon Pvt. Ltd.	13,50,000	09.10.2010
17.	Suhana Complex Pvt. Ltd.	13,50,000	09.10.2010
18.	Artilegence Bio Innovation Ltd.	2,25,000	13.10.2010
19.	Terry Towel Industries Ltd.	13,50,000	22.10.2010
	Total	2,25,00,000	

Backed by the aforesaid information, the A.O carried out further verifications and perused the financials of the assessee company for A.Y 2011-12 to 2016-17, which revealed that it had not shown any business whatsoever in its profit & loss account for any of the said year. On the basis of his aforesaid observations, the A.O held a conviction that the assessee company, viz. M/s Hemadri Machine Tools Pvt. Ltd. in the garb of share premium had merely received accommodation entries. Holding a conviction that as the assessee

had neither carried out any activities nor there was any justifiable reason which would go to suggest that its shares could command such high premium during the year under consideration, i.e the first year of the company, the A.O reopened the case of the assessee company u/s 147 of the Act.

9. As observed by us hereinabove, the primary reason that had weighed with the A.O for holding that the Share premium of Rs. 2.25 crore received by the assessee company was sourced out of the siphoned receipts of the charitable/educational institutions of Podar group, were the statements of certain persons viz. Shri. Kirit Kumar Dharishbhai Suba, Shri. Navin Nishar and Shri. Naresh Kumar Sodani who as observed by us at length hereinabove had in their respective statements recorded during the course of survey proceedings under Sec. 133A initially admitted that they had participated and facilitated the aforesaid nefarious arrangement of laundering of the funds of the aforesaid group. Our aforesaid conviction is all the more fortified from the fact that Shri. Kirit Kumar Dharishbhai Suba (supra) had in his statement recorded during the course of survey action conducted u/s 133A had categorically stated that unaccounted cash amounting to Rs. 2.25 crore was introduced as share premium in the books of the assessee company, viz. Hemadari Machine Tools Pvt. Ltd. However, we find that it remains as a matter of fact borne from the record all the aforementioned persons had thereafter on the basis of their respective 'affidavits' retracted from their earlier statements, viz. Shri. Kirit Kumar Dharishbhai Suba had retracted from the averments made in his statement recorded u/s 131 on 11.01.2018 and 12.01.2018 by filing an 'affidavit', dated 03.04.2018 on a non-judicial stamp paper duly affirmed before a notary; Shri. Navin Nishar retracted from his statement recorded u/s 131 on 11.01.2018 by filing an 'affidavit', dated 04.06.2018; and Shri. Naresh Kumar Sodani had retracted from his statement recorded u/s 131 on 11.01.2018 by filing an 'affidavit', dated 30.08.2018. Apart from that, all the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai, Shri. Navin Nishar and Shri. Naresh Kumar Sodani had in the course of their cross-examination that was facilitated to the assessee by the A.O at the

behest of the CIT(A) in the course of the remand proceedings, had once gain filed their duly notarized retraction affidavits dated 26.09.2019, 27.09.2019 & 27.09.2019, respectively, and had clearly stated that their earlier statements recorded u/s 131 of the Act during the course of the survey proceedings should not be relied upon. Although, the A.O had in his remand report, dated 06.11.2019 requested the CIT(A) not to admit the retraction 'affidavits' of the aforementioned persons as additional evidence U/rule 46A, however, we find that the CIT(A) being of the view that the aforesaid 'affidavits' had a material bearing on the adjudication of the issues before him, as well as in all fairness taking cognizance of the fact that as it was only after the receipt of the assessment order that it had came to the knowledge of the assessee company that the A.O had relied upon the statements of Shri. Navin Nishar and Shri. N.K Sodani for making the additions u/s 68 of the Act, had rightly concluded that the retraction affidavits of the said persons were clearly admissible under Rule 46A(1)(c) and Rule 46A(1)(d) of the Income-tax Rules, 1962. Accordingly, we find that the aforementioned persons had clearly by way of their retraction 'affidavits' resiled from their averments made in their respective statements that were recorded u/s 131 of the Act in the course of the survey proceedings. Apart from that, the fact that the aforementioned persons had in the course of their cross-examination relied on their retraction 'affidavits' and had further supplemented the same by filing fresh 'affidavits' dated 26.09.2019, 27.09.2019 & 27.09.2019, proves to the hilt that their earlier averments made in their respective statements recorded u/s 131 of the Act did no more hold the ground any more and could not be acted upon in the absence of any corroborative evidence. At this stage, we may herein observe that the CIT(A) had rightly concluded that despite the retraction and the contradictory statements given by the aforementioned persons in the course of their cross-examination during the remand proceedings, the A.O except for harping on the fact that the said retraction and the contradictory statements of the said persons were a result of an afterthought, had however, neither re-examined the said persons qua their contradictory statements nor placed on

record any material which would instill confidence as regards the incorrectness of the facts therein stated, as claimed by the A.O, on the basis of which such retractions were not to be considered. Be that as it may, we concur with the view taken by the CIT(A) that now when the statements of the aforementioned persons had been retracted, therefore, it was all the more onerous on the part of the A.O to substantiate on the basis of supporting/corroborative material that the averments made by the said persons in their respective statements recorded u/s 131 of the Act on 11/12.01.2018 revealed the correct state of affairs. We, thus, in the backdrop of our aforesaid observations are of the considered view that pursuant to the retraction of their respective statements by the aforementioned persons, it was obligatory on the part of the A.O to substantially corroborate the same by other independent and cogent evidence in support of the facts so claimed by him. Our aforesaid view is fortified by the following judicial pronouncements :

- (i). Vinod Solanki Vs. Union of India (2008) (16) Scale 31
- (ii). Kailashben Manharlal Chokshi Vs. CIT (2008) 174 Taxman 466 (Gujarat)
- (iii). CIT, Ranchi Vs. Ravindra Kr. Jain (2011) 12 taxmann.com 257
- (iv). M. Narayanan & Bros. Vs. ACIT (2011) 13 taxmann.com 49 (Mad)
- (v). ACIT Vs. Jorawar Singh M. Rathod (2005) 148 taxman 35 (Ahd)(Mag)
- (vi). Shree Chand Soni Vs. DCIT (2006) 101 TTJ (Jd) 1028
- (vii). Basant Bansal Vs. ACIT, Jaipur [63 Taxmann.com 199]
- (viii). ACIT Vs. Shri. Johari Lal Sodhani [ITA 145/Jp/2013]
- (ix). First Global Stockbroking Pvt. Ltd. [115 TTJ 173](Mum)

In fact, we find that the CBDT in its Instruction F. No. 286/2/2003-IT (Inv-II), dated 10th March, 2003, had itself stated that during the course of search and survey proceedings the officials should abstain from laying undue emphasis on recording statements or obtaining confessions regarding undisclosed income, but focus should be on collection of evidence of undisclosed income. Further, the aforesaid directions were once again reiterated by the CBDT in its

Circular F.No. 286/98/2013-IT, dated 18.12.2014. We, thus, in terms our aforesaid observations concur with the view taken by the CIT(A) that as the A.O pursuant to the retraction of their respective statements by the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai, Shri. Navin Nishar and Shri. Naresh Kumar Sodani, had failed to place on record any corroborative material which would substantiate that the averments made by them in their original statements recorded u/s 131 of the Act on 11/12.01.2018 i.e during the course of the survey proceedings revealed the correct facts, therefore, his hollow claim that the retraction of the aforementioned persons being a result of an afterthought be not admitted, does not merit acceptance. Alternatively, we also concur with the view taken by the CIT(A) that as the statements of the aforementioned persons, viz. Shri. Kirit Kumar Dharishbhai, Shri. Navin Nishar and Shri. Naresh Kumar Sodani were recorded in the course of the survey action conducted against them u/s 133A of the Act on 11/12.01.2018, therefore, as the A.O is not authorised to administer oath and record a sworn statement u/s 133A of the Act, hence, the said statements did not carry any evidentiary value. Our aforesaid views is fortified by the judgment of the Hon'ble High Court of Kerala in the case of Paul Mathews & Sons Vs. CIT (2003) 263 ITR 101 (Ker) and that of the Hon'ble Supreme Court in the case of CIT Vs. S. Khader Khan Son (2012) 25 taxmann.com 413 (SC).

9. Apart from that, we also find ourselves in agreement with the view taken by the CIT(A) that no incriminating material had been placed on record by the department which would evidence that the funds of the charitable/educational institutions of Podar group were, inter alia, routed as Share premium in the books of accounts of the assessee company before us. As observed by us hereinabove, the CIT(A) while calling for a remand report from the A.O had specifically directed him to provide copies of the incriminating material, if any, found during the course of the search operation in relation to the additions made in the assessment order i.e incriminating material which would evidence

siphoning off the trust funds and introduction of the same as share premium in the books of account of the assessee company., However, the A.O in his remand report had only placed reliance on the assessment order and no incriminating documents whatsoever were furnished by him. It was observed by the CIT(A) that the A.O while passing the assessment order as well as in his remand report had merely relied upon a so called digital evidence i.e a text message dated 29th & 30th June, 2016 between Shri. Navin Nishar and Shri. Kirit Kumar Dharishbhai Suba, which was clarified by Shri. Navin Nishar in his statement recorded u/s 131 on 11.01.2018 as a communication qua certain cash transactions between Shri. Sirish Shah's Angadia/cash handler and Angdia/cash handler of Shri. Kirit Kumar Dharishbhai Suba. Referring to the said so called digital evidence, it was observed by the CIT(A) that the same was not only by any means found to be related to the assessee company, but even otherwise the date borne on the same i.e 29th & 30th June, 2016 was relevant to A.Y 2017-18 and not the year under consideration. In the backdrop of the aforesaid facts, we concur with the observation of the CIT(A) that no incriminating material was found in the course of the search proceedings which would evidence that the receipts of Podar trusts were routed to the assessee company in the garb of share premium during the year under consideration. Although it is a matter of fact that no incriminating material had surfaced in the course of the search proceedings which would irrefutably evidence that the Share premium of Rs. 2.25 crore received by the assessee company during the year under consideration was sourced out of the receipts of charitable/educational institutions of Podar group, however, even otherwise as the so called 'digital evidence' i.e text message retrieved from the mobile phone of Shri. Navin Nishar dated 29th & 30th June, 2016, was not found from the possession of the assessee, therefore the presumption contemplated in Sec. 132(4A) and Sec. 292C could also by no means be invoked and used against the assessee for drawing of adverse inferences qua the transaction of receipt of share premium of Rs. 2.25 crore by the assessee from duly identified 19 share subscribers. We find that the CIT(A) had observed that the

A.O while verifying the genuineness of the donations given by the charitable/educational trusts of Podar group to other charitable/educational trusts or institutions had received replies from all the donee trusts to whom notices were issued u/s 133(6) of the Act and there were no shortcomings in the documents submitted by them. Also, we find that it was observed by the CIT(A) that the A.O had failed to bring on record any such case where the exemption certificate of any of the donee trust was cancelled on the ground that it had acted as a facilitator for siphoning off the receipts of charitable/educational institutions of Podar group. On the contrary, we find that as observed by the CIT(A) that on the issue of siphoning of funds by the donee trusts there was no adverse observation by the A.O in his remand report. In the backdrop of the aforesaid facts, we are of a strong conviction, that now when the genesis of the controversy leading to the adverse inferences qua the genuineness of the share premium received by the assessee company i.e genuineness of the donations received by the donee trusts/institutions/trusts have not been disproved by the department, therefore, the very story of siphoning of funds of charitable/educational institutions of Podar trusts falls to ground, and thus, no adverse inferences on the said ground could have validly been drawn on the said basis in the hands of the assessee company.

10. We shall now advert to the observation of the CIT(A) that the assessee had duly discharged the onus that was cast upon it as regards proving the identity and creditworthiness of the shareholders and the genuineness of the transactions of receipt of share premium. As is discernible from the records, we find that the assessee had in the course of the proceedings before the lower authorities furnished documentary evidence to substantiate the authenticity of receipt of share premium from the 19 share subscribers, viz (i). statement showing the details of share capital and share premium received during the F.Y 2010-11 stating the names, address, PAN of the applicant of shares, amount of share capital, date of application for subscribing the shares,

number of shares allotted, amount of share capital, amount of premium on the total amount received, details of share capital and share premium, copy of board resolution for allotment of 5,00,000 shares, copies of letters of the applicant companies seeking allotment of equity shares, copies of the letters confirming the allotment of equity shares to the applicant companies, copy of share valuation report issued by registered valuer, viz. D.N Shetty & Co, dated 22.04.2010 under DCF method, copy of bank statement evidencing that the application money was received from the share applicants through banking channel, copy of certificate of incorporation, certificate of commencement of business, copy of PAN card, memorandum of association, articles of association, resolution passed by applicants of shares in the board meeting, application for shares and confirmations from all the 19 share applicants. In the backdrop of the aforesaid facts, we concur with the view taken by the CIT(A) that as the assessee had placed on record substantial material evidencing the identity and creditworthiness of the share applicants, as well the genuineness of the transactions in question, therefore, the primary onus that was cast upon it was duly discharged and stood shifted upon the revenue. On a perusal of the records, we find that the A.O had at no stage doubted or dislodged the authenticity and veracity of the aforesaid documentary evidence that was filed by the assessee to substantiate the authenticity of the transaction of having received share capital and share premium from the aforementioned 19 parties. We find that though the A.O had accepted the receipt of share capital of Rs. 25 lac by the assessee company from the aforementioned share subscribers, however, he had without giving any justifiable reason drawn adverse inferences as regards the other part of the transaction i.e share premium of Rs. 2.25 crore and had added the same as an unexplained cash credit u/s 68 of the Act in the hands of the assessee. In our considered view, as observed by the CIT(A), and rightly so, there was no justification on the part of the A.O to hold the share capital received by the assessee from the 19 share applicants as genuine, while for at the same time adopt an inconsistent approach and treat the share premium received from

the same shareholders as bogus. Qua the share premium charged by the assessee company, we are in agreement with the observation of the CIT(A) that as the same was duly supported by the valuation report of a registered valuer, viz. D.N Shetty & Co., therefore, it could not have been summarily scrapped or discarded by the A.O. As observed by us hereinabove, not only the assessee had by placing on record clinching documentary evidence substantiated the identity and creditworthiness of the share subscribers and the genuineness of the transactions in question, the same as observed by us hereinabove had not been disproved or dislodged by the A.O. As a matter of fact, we find that the A.O had at no stage i.e in the course of the assessment proceedings or in the remand proceedings ever issued notices under Sec. 133(6) or summons u/s 131 of the Act to the share subscribers, despite the fact that their complete details were available with him. We, thus, are of the considered view, that not only the assessee had on the basis of irrefutable documentary evidences substantiated to the hilt the authenticity of the transaction of receipt of share premium, rather, the A.O by not carrying out any verifications can safely be held to have not carried any doubts as regards the genuineness and veracity of the documents filed by the assessee before him. Accordingly, in the backdrop of the aforesaid facts, we are of a strong conviction that as the assessee by placing on record substantial documentary evidence, viz. name, PAN, address, copies of share application forms, board resolution, acknowledgement of income-tax returns, Form No. 2 for allotment of equity shares, financial statements, form of allotment of shares etc. had duly discharged the onus that was cast upon it and proved the identity, genuineness and creditworthiness of the share applicants, which had not been dislodged or disproved by the A.O by carrying out any independent enquiries, therefore, the CIT(A) had rightly concluded that the A.O bypassing such clinching documentary evidences filed by the assessee could not have held the share premium of Rs. 2.25 crore as an unexplained cash credit within the meaning of Sec. 68 of the Act.

11. We shall now deal with the observation of the CIT(A) that as the 'Proviso' to Sec. 68 had been made available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013, which therein provides that in a case where any sum credited in the books of account of an assessee company consists of share application money, share capital, share premium or any such amount by whatever name called, it is obligatory for the person, being a resident in whose name such credit is recorded to offer an explanation to the satisfaction of the A.O about the nature and source of such sum so credited; is applicable prospectively i.e w.e.f A.Y 2013-14, therefore, it would not be applicable to the case of the present assessee for A.Y 2011-12. As observed by the Id. CIT(A), and rightly so, the 'Proviso' to Sec. 68 is applicable prospectively i.e w.e.f 01.04.2013, and thus, the same would not be applicable to the case of the assessee before us. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Gagandeep Infrastructure (P) Ltd. (2017) 394 ITR 680 (Bom), wherein it was observed as under :

"We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing

them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit."

Further, we concur with the view taken by the CIT(A) that now when the assessee had filed with the A.O the complete details of the 19 share subscribers, viz. names, address, PAN nos., confirmations etc., and still if the A.O was of the view that the share premium was received by the assessee from bogus shareholders, then, it was open for him to proceed against such share subscribers and could not have assessed the said amount as an unexplained cash credit in the hands of the assessee company. Our aforesaid view is supported by the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Lovely Export Pvt. Ltd. (2008) 216 CTR 195 (SC). Also a similar view qua the pre-amended Sec. 68 of the Act i.e the assessee can be asked to prove the source of credit in books, but cannot be asked to prove the source of the source has been taken in the following judicial pronouncements :

- (i). Murlidhar Lahorimal Vs. CIT (2006) 280 ITR 512 (Guj)
- (ii). Labh Chand Bohra Vs. ITO (2008) 219 CTR 571 (Raj)
- (iii). CIT Vs. Dwarkadish Investment Pvt. Ltd. (2011) 330 ITR 298 (Del)
- (iv). Sarogi Credit Corporation Vs. CIT (1976) 103 ITR 344 (Pat)
- (v). Aravali Trading Co. Vs. ITO (2008) 220 CTR 622 (Raj)
- (vi). Nemi Chand Kothari Vs. CIT (2004) 3264 ITR 254 (Gau)
- (vii). CIT Vs. Vacmet Packaging (India) Pvt. Ltd. (2014) 367 ITR 217 (All)
- (viii). CIT Vs. Orissa Corporation P. Ltd. (1986) 159 ITR 78 (SC)
- (ix). CIT Vs. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Del)
- (x). CIT Vs. Creative World Telefilm Ltd. (2011) 333 ITR 100 (Bom)
- (xi). CIT Vs. Value Capital Services Ltd. (2008) 307 ITR 334 (Del)
- (xii). DCIT Vs. Rohini Builders (2002) 256 ITR 360 (Guj)
- (xiii). CIT Vs. Apex Therm Packaging Pvt. Ltd. (2014) 222 Taxman 125 (Guj)
- (xiv). Orient Trading Co. Ltd. Vs. CIT (1963) 49 ITR 723 (Bom)
- (xv). CIT Vs. Ranchhod Jivabhai Nakhava (2012) 208 Taxman 35 (Guj)
- (xvi). PCIT Vs. Paradise Inland Shipping Pvt. Ltd. 84 taxmann.com 58 (Bom)
- (xvii). CIT Vs. Sahibganj Electric Cables Pvt. Ltd. (1978) 115 ITR 0408 (Cal)

Accordingly, in the backdrop of the facts of the case r.w the settled position of law, we are of the considered view that as the assessee had beyond doubt on the basis of substantial material filed with the A.O proved the identity, creditworthiness and genuineness of the transactions in question, therefore, the share premium of Rs. 2.25 crore received by it from the aforementioned

19 share subscribers could not have held as an unexplained cash credit within the meaning of Sec. 68 of the Act. We, thus, finding no infirmity in the view taken by the CIT(A) who had rightly held that as the assessee had duly discharged the onus that was cast upon it as regards proving the identity, creditworthiness and genuineness of transactions in question, therefore, the share premium of Rs. 2.25 crore received from the 19 share subscribers could not have been assessed as an unexplained cash credit u/s 68 of the Act, uphold his view.

12. We, thus, in the backdrop of our aforesaid deliberations, finding no infirmity in the very well reasoned order of the CIT(A), uphold the view taken by him that the share premium of Rs. 2.25 crore received by the assessee during the year under consideration could not be held as an unexplained cash credit within the meaning of Sec. 68 of the Act. Accordingly, finding no merit in the appeal of the revenue we dismiss the same.

13. Resultantly, the appeal of the revenue being devoid and bereft of any merit is dismissed.

Order pronounced in the open court on 09.08.2021

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai;

Dated: 09.08.2021

PS: Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai