

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'B' BENCH, KOLKATA**

**Before Shri Sanjay Garg, Judicial Member  
&  
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 55/KOL/2024  
Assessment Year: 2012-2013**

***M/s. Wisley Real Estate Pvt. Ltd.,.....Appellant  
86C, Viswakarma, 1<sup>st</sup> Floor,  
Topsia Road, Tiljala,  
Kolkata-700046  
[PAN:AAKCS8704L]  
-Vs.-***

***Income Tax Officer,.....Respondent  
Ward-11(3), Kolkata,  
Aayakar Bhawan,  
P-7, Chowringhee Square,  
Kolkata-700069***

**Appearances by:**

*Shri A.K. Tulsyan, FCA, appeared on behalf of the  
assessee*

*Shri P.P. Barman, Addl. CIT, Sr. DR, appeared on behalf of  
the Revenue*

**Date of concluding the hearing : 18<sup>th</sup> March, 2024**

**Date of Pronouncing the Order: June 6<sup>th</sup> , 2024**

**O R D E R**

**Per Dr. Manish Borad, Accountant Member:-**

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals),

National Faceless Appeal Centre (NFAC), Delhi dated 13.11.2023 for the assessment year 2012-13.

2. The assessee has raised the following grounds of appeal:-

*(1) That the Ld. CIT(A) was wrong in confirming the addition of a sum of Rs.1,76,87,500/- as share application money treating the same as unexplained cash credit u/s 68 of the IT Act, 1961. The Ld. CIT(A) wrongly confirmed the addition made by the Ld. A.O completely ignoring all the submissions made by the appellant made before CIT(A) passing the appellate order in arbitrary manner*

*(2) That the Ld. AO as well as Ld. CIT(A) was wrong in charging/confirming interest u/s 234B of the I. Tax Act.*

3. Brief facts of the case are that the assessee is a Private Limited Company engaged in business and e-filed the return for A.Y. 2012-13 on 26.09.2012. declaring 'NIL' income. After the case being selected for scrutiny through CASS, valid notices were issued and served upon the assessee. During the course of assessment proceedings, ld. Assessing Officer observed that the assessee had received share application money of Rs.1,76,57,500/- from few share applicants. Notices under section 133(6) were issued to the alleged share applicants, but no information was received. However, one of the Directors of assessee-company Shri Piyush Bajoria appeared before the ld. Assessing Officer on 03.03.2015 and his statements were recorded under section 131 of the Act and he also brought two shareholders alongwith him for getting the statements recorded. But ld. Assessing Officer was not satisfied with the details as well as statements recorded and observed that the assessee failed to

explain the nature and source of the alleged share application money of Rs.1,76,57,500/- completed the assessment making addition under section 68 of the Act for the alleged sum and assessed the income at Rs.1,76,57,500/-.

4. Aggrieved, the assessee preferred appeal before the Id. CIT(Appeals). It was submitted by the assessee before the Id. CIT(Appeals) that the main object of the assessee-company is Real estate developments in various fields. The promoters of the company are Shyam Group which is having various business activities in various parts of the country and another group concern M/s. Century Group, is a plywood manufacturer. Reference was also made to Infinity Group, which is in the process of developing various projects in Kolkata. It was also submitted that the assessee-company purchased a land during the financial year 2007-08 in South 24-Parganas District and the land was subsequently earmarked for an 'Eco-Tourism Project' and various land owners are also engaged in this project. The Id. CIT(Appeals) was also appraised that during the year, share application money from three companies were received by way of issuing 7,07,400 equity shares of Rs.10/- each at a premium of Rs.15/- per share. Further complete details of each of the share applicants were furnished including share application form, income-tax return, Bank statement, PAN card, audited financial statements and the source of funds, confirmation of accounts, allotment advices etc. to explain the nature and source of the alleged sum and to prove that the equity shares were issued at almost book value and that

too received from group concern. However, ld. CIT(Appeals) was not satisfied with all these details and without specifically pointing out any discrepancy in the details and only asking the assessee to furnish the proof of land purchased in the preceding year, ld. CIT(Appeals) confirmed the action of the ld. Assessing Officer. Aggrieved, the assessee is now in appeal before the Tribunal.

5. The ld. Counsel for the assessee reiterated the submissions made before the ld. CIT(Appeals) referred and gave reference to various details furnished in the Paper Book Index I containing 96 pages, Paper book Index No. II containing 582 pages, Paper Book No. III containing audited financial statements of M/s. Shyam Sel and Power Limited and copy of audited accounts of M/s. Shyam Metalics and Energy Limited and also the case laws paper book. The list of decisions referred by the ld. Counsel for the assessee reads as under:-

Sl. No.	<u>Particulars of documents</u>	<u>Page No.</u>
A	Case Laws pertaining to funds/ share application money received from <u>group entities/ Sister Concerns</u>	from
1	Copy of the order of Hon'ble Calcutta High Court in the case of PCIT -vs.- Anmol Stainless (P.) Ltd. (2022) 138 taxmann.com 535 (Calcutta HC)	01-03
2	Copy of decision of Kolkata ITAT in ACIT -vs.- M/s Anmol Stainless Pvt. Ltd. (ITA No. 1862/Kol/2017 dated 19-07-2019)	04-32
3	Copy of decision of Kolkata ITAT in ITO -vs.- M/s RKB Services Pvt. Ltd. (ITA No. 1530/Kol/2019 dated 22-01-2021)	33-59
4	Copy of decision of Kolkata ITAT in ITO -vs.- Indus Reality Pvt. Ltd. (ITA No. 666/KOI/2023 dated 08-11-2023)	60-71
5	Copy of the Kolkata ITAT decision in the case of JCIT(OSD) -vs.- M/s Shivam Iron & Steel Company Pvt. Ltd. (ITA No. 238/Koi/2020 dated 22- 10-2020)	72-82
6	Copy of the Kolkata ITAT decision in the case of M/s Shah Tracom Pvt. Ltd. -vs.- ITO (MA No. 01/Kol/2021 dated 25-02-2021)	83-91

7	Copy of the Kolkata ITAT decision in the case of ITO -vs.- M/s Sreenath Holdings Pvt. Ltd. (ITA No. 2390/KOL/2019 dated 24-02-2020)	92-99
8	Copy of the Kolkata ITAT decision in the case of M/s BST Infratech Pvt. Ltd. -vs.- DCIT (ITA No. 2655/Kol/2019 dated 30-11-2022)	100-114
9	Copy of the Kolkata ITAT decision in the case of M/s Satyam Smertex Pvt. Ltd. -vs.- DCIT (ITA No. 2445/Kol/2019 dated 29-05-2020)	115-139
10	Copy of order of Hon'ble Gujarat High Court in the case of PCIT -vs.- Gyscoal Alloys Ltd. (R/Tax Appeal No. 1180 of 2018 dated 01-10-2018)	140-142
B	Case law on the issue that addition u/s 68 cannot be made if the assessee has proved <u>the identity, genuineness and creditworthiness of the share applicants</u>	
11	Copy of decision of the Hon'ble Calcutta High Court in the case of PCIT v. Ambition Agencies (P.) Ltd [2022] 134 taxmann.com 5 (Calcutta) dated 15.11.2021	143-146
12	Copy of the decision of Hon'ble Delhi High Court in the case of PCIT vs M/s Agson Global (P.) Ltd in [2022] 134 taxmann.com 256 (Delhi) dated 19.01.2022	147-178
13	Copy of the decision of the Hon'ble Ap*ex Court in the case of PCIT -vs. Adamine Construction (P) Ltd [2019] 107 taxmanh.com 85 (SC) dated 14.09.2018 *	179-181
14	Copy of the decision, of the Hon'ble ITAT, Kolkata in the case of Dharmvir Merchandise (P.) Ltd v. ITO in [2023] 149 taxmann.com 221 (Kolkata - Trib.) dated 13.12.2022	182-193
15	Copy of the decision of the Hon'ble ITAT, Kolkata in the case of Manju Credit Pvt _td v. ITO in ITA No. 351/Kol/2019 dated 13.01.2023	194-207
16	Copy of the decision of the Hon'ble ITAT, Kolkata in the case of DOT vs Jagannath Banwarilal Texofabs Pvt. Ltd. in ITA No. 1762/Kol/2016 dated 26.10.2018	208-244
	<u>C No Addition of Share Capital - When all compliances made</u>	
17	Copy of the Kolkata ITAT decision in the case of M/s Cabcon India Pvt. Ltd. -vs.- DCIT (ITA No. 1129 & 1131/Kol/2019 dated 16-12-2022)	245-292

6. On the other hand, ld. D.R. vehemently argued supporting the order of both the lower authorities and stated that the assessee did not make fair compliance to the notices issued and date of hearing given by the ld. Assessing Officer and also in the statements recorded by the Director, no information was provided and in reply to most of the questions, he just stated “*I cannot*

*speak*”, “*I cannot recollect*” etc. The ld. D.R. also referred to the finding of ld. CIT(Appeals) stating that the assessee failed to furnish the details of capital work-in-progress and the details of sale deed, copy of land deed, fair market value of fixed assets etc. and also could not file the details about business activities of the company and year-wise profit. He further submitted that the assessee had failed to explain the nature and source of the alleged sum and, therefore, the addition has rightly been made under section 68 of the Act.

7. We have heard the rival contentions, perused the material placed before us and also carefully gone through the decisions referred to by the ld. Counsel for the assessee. The only issue for consideration is that whether ld. CIT(Appeals) erred in confirming the addition made by ld. Assessing Officer u/s 68 of the Act at Rs.1,76,57,500/-. We observe that the assessee Company received the alleged sum against issue of 7,07,400 no. of equity shares at Rs.10/- each and charged share premium of Rs.15/- per share from the following companies:-

<i>Name of Shareholders</i>	<i>No. of share</i>	<i>Share capital</i>	<i>Security Premium</i>	<i>Total (Rs)</i>
<i>Infinity Township(P) Ltd</i>	360000	36,00,000/-	54,00,000/-	90,00,000/-
<i>Narantak Dealcomm Ltd</i>	260600	26,06,000/-	39,09,000/-	65,15,000/-
<i>Shubham Buildwell (P) Ltd</i>	86800	8,68,000/-	13,02,000/-	21,70,000/-
<i>Grand Total</i>		70,74,000/-	1,06,11,000/-	1,76,85,000/-

8. We further notice that the impugned addition has been made under section 68 of the Act. As per this section, if any sum is found credited in the books of an assessee maintained in previous year either the assessee is unable to offer any explanation about the nature and source of such sum or if the explanation offered by him is not found to be satisfactory in the opinion of the Id. Assessing Officer, then, such sum so credited can be charged to income tax as the income of the assessee. We on examining the facts of the instant case notice that the alleged sum received from three share applicants was found to be credited. Further the assessee had furnished complete details to explain the nature and source of the alleged sum and the same has been examined by us by perusing the paper books. For the sake of convenience, the details filed by the assessee in the Paper Book Index I, II & III are referred below:-

**Before the Hon'ble ITAT Kolkata 'B' Bench**  
**M/S. Wisley Real Estate Pvt. Ltd.**  
**ASST. YEAR: 2012-13**  
**ITA NO. 55/KOL/2024**

**Paper Book Index- I**

Sl. No.	Particulars of documents	Page No.
1	Copy of Audited Accounts of the assessee for the FY 2011-12 and FY 2022-23	01-43
2	Copy of ITR Acknowledgement for AY 2012-13	44
3	Copy of Form 20B along with annual return for the year ended 31.03.2012	45-70
4	Copy of Form 2 – Return on allotment filed with MCA pursuant to Section 75(1) of the Companies Act, 1956 along with allotment advice	71-80
5	Copy of Valuation Report of Equity Shares as on 31.03.2012	81-87
6	List of Directors as on 31.03.2012 & 31.03.2023 of assessee and its share applicants	88-91
7	List of Shareholders as on 31.03.2012 & 31.03.2023 of assessee and its share applicants	92-96

<u>Before the Hon'ble ITAT Kolkata B Bench</u> <u>M/S. WISLEY REAL ESTATE PVT. LTD.</u> <u>ASST. YEAR: 2012-13</u> <u>ITA NO. 55/KOL/2024</u> <u>Paper Book Index-II</u>		
Sl. No.	Documents Annexed	Page No.
01	Following documents with respect to Narantak Dealcomm Limited (Referred to as one of the "allottee company"): a. Copy of Audited Accounts for AY 2012-13 and AY 2023-24 b. Copy of ITR Acknowledgement for AY 2012-13 and AY 2023-24 c. Copy of reply submitted by allottee company in response to notice u/s 133(6) of I.T. Act d. Copy of Source of funds of allottee company e. Relevant period bank statement of allottee company f. Copy of MCA Master Database as on 09.03.2024 g. Copy of Form 20B along with annual return for the year ended 31.03.2012 h. Copy of Assessment Order from AY 2013-14 to AY 2018-19 u/s 153A dated 23.06.2021 & 24.06.2021	97-155 156-157 158-159 160 161-162 163-165 166-179 180-218
02	Following documents with respect to Subham Buildwell Pvt. Ltd. (Referred to as one of the "allottee company"): a. Copy of Audited Accounts for AY 2012-13 and AY 2023-24. b. Copy of ITR Acknowledgement for AY 2012-13 and AY 2023-24 c. Copy of reply submitted by allottee company in response to notice u/s 133(6) of I.T. Act d. Copy of Source of funds of allottee company e. Relevant period bank statement of allottee company f. Copy of MCA Master Database as on 09.03.2024 g. Copy of Form 20B along with annual return for the year ended 31.03.2012 h. Copy of Assessment Order from AY 2013-14 to AY 2018-19 u/s 153A dated 04.06.2021	219-263 264-265 266-267 268-269 270 271-272 273-291 292-310
03	Following documents with respect to Infinity Township Pvt Ltd (Referred to as one of the "allottee company"): <b>(Merged with Infinity Infotech Parks Ltd. w.e.f. 01.04.2016)</b> a. Copy of Audited Accounts for AY 2012-13 of allottee company b. Copy of Financial statements of Infinity Infotech Parks Ltd. for the year ended 31.03.2023 c. Copy of ITR Acknowledgement for AY 2012-13 d. Copy of reply submitted by allottee company in response to notice u/s 133(6) of I.T. Act	311-329 330-529 530 531-532

Copy of Source letter along with source of funds	533-534
Relevant period bank statement of allottee company	535-536
g. Copy of Form 20B along with annual return as on 31.03.2012	537-551
h. Copy of Assessment Order for AY 2012-13 u/s 143(3) dated 31.03.2015	552-558
i. Copy of Amalgamation Order passed by Hon'ble NCLT, Kolkata Bench dated 12.12.2017	559-582

<b>Before the Hon'ble ITAT Kolkata B Bench</b> <b><u>M/S. WISLEY REAL ESTATE PVT. LTD.</u></b> <b><u>ASST. YEAR: 2012-13</u></b> <b><u>ITA NO. 55/KOL/2024</u></b> <b>Paper Book</b> <b>Index-III</b>		
Sl. No.	Documents Annexed	Page No.
04	Copy of Audited Accounts of M/s Shyam Sel and Power Limited for the year ended 31.03.2023	583-640
05	Copy of Audited Accounts of M/s Shyam Metalics and Energy Limited for the year ended 31.03.2023	641-700

9. From the above details, we notice that all the audited financial statements of the share applicant companies have been furnished along with the income tax returns alongwith details of source of funds with the share applicant companies prior to making the alleged investment. We have also found that all the companies are active companies and are part of the group concern, which are mainly categorized into three, namely Shyam Group, Century Group and Infinity Group. Copy of MCA Master Data has been furnished. We also note that all the companies are regularly assessed to income tax and that M/s. Narantak Dealcomm Limited has been assessed under section 153A from A.Ys. 2013-14 to A.Y. 2018-19 vide order dated 23.06.2021 and 24.06.2021. Another share applicant, namely Subham Buildwell Private Limited has also been assessed from A.Y. 2013-14 to 2018-19 under section 153A of the Act vide order dated 04.06.2021. The third share

applicant, namely M/s. Infinity Townships Private Limited has subsequently merged with Infinity Infotech Parks Limited and has also been assessed under section 143(3) of the Act for A.Y. 2012-13 vide order dated 31.03.2015. It is also an undisputed fact that all the three share applicants have replied to notice issued u/s 133(6) of the Act and the Directors have appeared in person with two of the other share applicants before the ld. Assessing Officer for recording the statement. All these details sufficiently indicate that alleged sum has been received from group concern and no exorbitant share premium has been charged, which normally is one of the reasons for doubting the genuineness of the transactions. We note that the assessee-company holds fixed assets from past many years. As on 31.03.2011, capital work-in-progress was Rs.2,49,08,562/-, which has further risen to Rs.3,87,24,604/-. This fact indicates that the purpose of taking the share application money was for real estate business. We also notice that the book value of the equity share as on 31.03.2011 was around Rs.15/- and the same has been computed by dividing the share capital reserve as on 31.03.2011 by the number of shares issued upto 31.03.2011. Considering the book value, we note that the assessee had not charged heavy share premium and one has to also consider that fair market value of the land/project is normally much higher than the cost appearing in the books as per historical cost method.

10. All the above details and facts discussed above remain uncontroverted by the lower authorities and by the ld. D.R. No

discrepancy has been noticed in these details nor any error has been pointed out. The ld. CIT(Appeals) was required to examine the issue under section 68 of the Act, but called for copy of the land deed, which was acquired in the preceding year, but ld. CIT(Appeals) has not made any adverse comments on the financial information of the alleged share application, the fund having been received from group concern. It thus shows that the assessee had successfully explained the nature and source of the alleged sum and has proved the identity and creditworthiness of the share applicants and genuineness of the transactions. Our view is supported by the decision of this Tribunal in the case of *ITO -vs.- Indus Reality Pvt. Limited in ITA No. 666/KOL/2023 dated 08.11.2023*, wherein Tribunal's finding that the share application money was received from group entities of the sister concern having sufficient creditworthiness and dismissed the Revenue's appeal and confirmed the action of the ld. CIT(Appeals) deleting addition under section 68 of the Act. The relevant finding of this Tribunal reads as under:-

*“6. With the assistance of ld. Representatives, we have gone through the record carefully. A perusal of the record would indicate that four Group Companies, who have sufficient net worth has made the investment with the assessee. The following table will depict the position of all funds possessed by the subscribers, vis-a-vis investment made with the assessee:-*

Sl. No.	Particulars	Amount (Rs.)	Amount Invested (Rs.)
1	Citizen Securities Pvt. Ltd.	3,91,29,175	25,00,000
2	De-Con Projects Pvt. Ltd.	6,89,96,701	50,00,000
3	Software Conglomerate Pvt. Ltd.	9,15,11,941	50,00,000

4	Quickpay Suppliers Pvt. Ltd.	2,77,71,945	1,75,00.000
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7. During the course of hearing, it was pointed out that all these four companies are Group Company of the assessee. They filed positive return income every year though small in number. For instance first group Concern is Citizen Securities Pvt. Ltd., who has net worth of Rs.3.91 crores and this Concern invested only Rs.25 lakhs, i.e. less than 10% of its own net worth. The Directors of this Company appeared before the ld. Assessing Officer and deposed that the Company has made investment with the assessee-company and also paid share premium. Similarly the second company is De-Con Projects Pvt. Limited. It invested Rs.50 lakhs out of its net worth of Rs.6.89 crores. This company has filed a return declaring profit of Rs.3,92,065/-. The next one is Software Conglomerate Pvt. Limited. It has also a net worth of Rs.2.63 crores and made investment of Rs.50 lakhs and the last one is Quickpay Suppliers Pvt. Limited, who has net worth of Rs.2.77 crores and made investment of Rs.1.75 crores. According to the assessee, this company had earned a profit of Rs.3.99 crores during the instant year and had enough funds to make such heavy investment. The assessee has filed all these documents. The only area of difference between the assessee and the ld. Assessing Officer is as to why the subscriber will invest in a Company, who is making losses. To this, ld. CIT(Appeals) has also held that it is for the businessman to decide how it wants to use its funds. The subscribers have not borrowed the money for making investment with the assessee-company. The group concern might have decided to start some activity on substantial basis in the assessee-company, therefore, it could be a support from the group concern. The ld. 1<sup>st</sup> Appellate Authority has also examined whether, this excess premium paid by the subscribers is to be construed as a gift to the assessee within the meaning of section 56(2)(vib) of the Income Tax Act but held that this provision is applicable from A.Y. 2013-14 and not in A.Y. 2012-13.

8. On due consideration of the order of ld. CIT(Appeals), we are of the view that it does not call for any interference at our end. Accordingly, the appeal of the Revenue is dismissed on merit”.

11. We further place reliance on the decision of this Tribunal in the case of *Dharmvir Merchandise (P) Ltd. -vs.- ITO (supra)*, wherein

addition under section 68 was deleted by observing that the assessee has proved the genuineness of the transaction and creditworthiness of share applicants by observing as follows:-

*“9. We have heard rival contentions and perused the records placed before us. Addition u/s 68 of the Act for unexplained share capital and share premium of Rs. 1.40 Cr is in challenge before us. We notice that the assessee company issued fresh share capital during the year of face value of Rs. 10/- and premium of Rs. 240/- per share and received 1.40 Cr from following three companies:*

<i>Sr. No.</i>	<i>Name of the share applicant</i>	<i>Amount received</i>
<i>1.</i>	<i>Everlike Projects Pvt Ltd</i>	<i>50,00,000/-</i>
<i>2.</i>	<i>Mahashakti Vintrade Pvt Ltd</i>	<i>50,00,000/-</i>
<i>3.</i>	<i>Satyam Plywood Merchandise Pvt Ltd</i>	<i>40,00,000/-</i>
	<i>TOTAL</i>	<i>1,40,00,000</i>

*10. After the case being selected for scrutiny, ld. AO asked the assessee to explain the source of above referred sum of share capital and share application money. In response, the assessee submitted the following documents:*

- i. Party Wise details of share capital raised during the year,*
- ii. Form 2, Form 5 filed with ROC,*
- iii. Memorandum and Article of Association,*
- iv. Bank Statement for the year,*
- v. Share Application Form,*
- vi. Form 18 in support of registered office address of the company,*
- vii. Audited accounts for the year,*
- viii. Relevant Bank Statement for the year,*
- ix. Form 18 in support of registered office address of these companies.*

*11. Thereafter, summons were issued to the Directors of the share subscriber companies as well as the Directors of the assessee company which were duly served upon the respective persons and the details as called for were filed which included the following:*

- i. Photo Identity and Address Proof,*
- ii. Narration of all debit and credit entries in relevant Bank statements,*
- iii. Copies of all relevant ROC returns,*
- iv. Sources of funds and utilisation of funds,*
- v. Evidence of creditworthiness along with Income Tax Returns filed and*
- vi. Copies of Audited Accounts and Tax Audit Report for the relevant AY.*

12. We further, notice that ld. AO has not pointed out any defect and not questioned the correctness of any of the documents filed by the assessee company, share subscriber companies as well as the Directors. The only ground for making the addition is that the Directors of the assessee company as well as the investor companies have not appeared personally before ld. AO in compliance to the summons issued u/s 131 of the Act and applying the decision of this Tribunal in the case of *Bisakha Sales Pvt. Ltd.* (supra).

13. So far as reliance placed by ld. AO on the decision of this Tribunal in the case of *Bisakha Sales Pvt. Ltd.* (supra) is concerned, we fail to find any merit as the facts of *Bisakha Sales Pvt. Ltd.* (supra) are distinguishable from the facts of the present case. Firstly for the reason that the case of *Bisakha Sales Pvt. Ltd.* (supra) was in connection of the revisionary order passed by ld. CIT(A) u/s 263 of the Act where it was alleged that ld. AO has not made proper enquiries with regard to the transaction of share application money received by the company, which however, is not the fact of the instant case where the issue relates to assessment proceedings carried out u/s 143(3) of the Act and complete and detailed enquiry has been conducted by ld. AO. In the assessment order, ld. AO has not brought any adverse material which could have remotely suggested that the unaccounted income of the assessee was brought in disguise of the share capital. Therefore, the decision of *Bisakha Sales Pvt. Ltd.* (supra) is not applicable on the present case.

14. So far as merits of the case are concerned, we find that the assessee has successfully discharged its onus by filing complete details of the share subscriber companies including their bank statement, audited financial statements, Form no. 18 in support of registered office address, source and utilization of funds, copies of ITRs, copies of all relevant company returns. Even the photo identity, address proof of the Directors of the assessee company and the subscriber companies have been filed directly by these Directors to ld. AO. On the basis of these facts undoubtedly the assessee has successfully discharged the onus which lay upon it by producing all the evidences for proving the identity and creditworthiness of the investors and the genuineness of the transaction. Merely non-appearance of the Directors cannot be a basis for treating the share application money as unexplained or non-genuine. We find support from the judgment of Hon'ble Gujarat High Court in the case of *Rohini Builders* (supra) relying on the judgment of Hon'ble Apex Court in the case of *Orissa Corporation Pvt. Ltd.* (supra) (relevant extract:

*“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.”*

15. Our view is supported by *Tradelink Carrying (P.) Ltd. (supra)* wherein the Hon'ble jurisdictional ITAT held that:

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

35. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its

*undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore we delete the addition of Rs 5,60,000/- and consequently the appeal of assessee is allowed.*

*36. In the result, the appeal of the assessee is allowed.”*

*16. Similar view also taken in the case of Satyam Smertex (P.) Ltd vs DCIT reported in [2020] 117 taxmann.com (Kolkata - Trib.) pronounced on 29-05-2020 where the Hon'ble jurisdictional ITAT held that:*

*“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 I.T.A. No.: 1938/Kol/2018 Assessment Year: 2012-13 Dharmvir Merchandise Pvt. Ltd. Page 11 of 15 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.”*

17. From the above decision, we note that it has been held again and again by the jurisdictional ITAT, Kolkata that in a case, where the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, the onus shifts on ld. AO to disprove the documents furnished by assessee so as to draw adverse view and in the absence of any investigation, much less gathering of evidence by ld. AO, additions cannot be sustained merely based on inferences drawn by circumstance or made on surmises and conjectures.

18. Therefore, after going through the various details and documents placed before us, we find that assessee has successfully discharged primary onus casted upon it to explain the source of alleged share capital and share premium. Ld. AO did not find any fault or any shortcoming in the compliances made by the appellant company. It is also an evident fact that the only basis for making the alleged addition by ld. AO was non-appearance of the Directors of the share allotted company but as claimed by ld. Counsel for the assessee, the time allowed for compliance was too short and the assessee filed all the confirmations in respect of such I.T.A. No.: 1938/Kol/2018 Assessment Year: 2012-13 Dharmvir Merchandise Pvt. Ltd. Page 12 of 15 share subscribers which were not doubted by ld. AO. Facts are brought to our notice out of the eight shareholders five have been assessed for the same assessment year u/s 143(3) of the Act and complete details of their financials and bank transactions have been examined by ld. AO in the scrutiny proceedings. This is also an admitted fact that each of the shareholders were duly served notice u/s 133(6) of the Act which is sufficient to prove the identity of such shareholders. As far as the genuineness of the transaction is concerned, the same have taken place through banking channel which is traceable from the origin to the destination of such payments and further confirmed from the documents furnished before us. All these transactions are duly recorded in the respective balance sheets of the shareholder companies. Creditworthiness of the transaction is also proved from the fact that all the shareholder companies were having more than sufficient share capital and reserve and surplus fund for giving share application money. Even otherwise ld. AO has not made the addition for charging of higher share premium and has made the addition of unexplained cash credit but still charging of share premium is a commercial decision and the same can be challenged only with sufficient documentary evidence. It thus brings to a conclusion that since the assessee filed complete details of identity and creditworthiness of the share subscribers and genuineness of the transaction before ld. AO, the onus shifted to ld. AO to disprove the material placed before him and without doing so

*the additions made by ld. AO are based on conjectures and surmises and the impugned additions cannot be I.T.A. No.: 1938/Kol/2018 Assessment Year: 2012-13 Dharmvir Merchandise Pvt. Ltd. Page 13 of 15 justified and therefore, the impugned action of ld. AO cannot be held to be justified.*

19. Our view is further supported by following judicial pronouncements:

*“i) CIT vs. Gagandeep Infrastructure (P) Ltd. 80 taxmann.com 272 (Bombay) wherein it was held by High Court 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.*

*ii) PCIT vs. Chain House International (P) Ltd. 98 taxmann.com 47 wherein Madhya Pradesh High Court held that “The question raised by the revenue in regard to issuing the share at a premium is purely a question of fact. It is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe to shares at such a premium or not and moreover the section 68 does not envisages any law on share premium it only requirement is to identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants which same has been discharged by the respondent authority and the HIGH COURT OF M.P. BENCH AT INDORE Pg. No.--58-- (ITA No.112/2018 & Other connected matters) same has been accepted by the appellate authorities thus, the same cannot be reconsidered in these appeals as it is a pure question of fact.” SLP preferred by revenue was dismissed by Hon’ble Supreme Court and the same is reported in 103 taxmann.com 435(SC). I.T.A. No.: 1938/Kol/2018 Assessment Year: 2012-13 Dharmvir Merchandise Pvt. Ltd. Page 14 of 15*

iii) *CIT vs. Kamdhenu Steel & Alloys Limited [ITA No.972 of 2009]* dated 23.12.2011 wherein the Delhi High Court in a batch of 11 appeals was required to adjudicate on the very issue of addition made by the A.O u/s 68 in respect of share application monies received by the assesseees as alleged unexplained cash credit. In all these cases, the Department had alleged that the share application monies were received from persons who were 'entry operators' and the monies received by way of share application was nothing but was routing of unaccounted money of assessee in the form of subscription to share capital. However, in the assessments made the A.Os had not brought on record any material or evidence to substantiate such finding. Accordingly, on appeal the appellate authorities had deleted the additions made u/s 68 of the Act.

iv) *CIT vs. Orissa Corpn (P) Ltd. 159 ITR 78* where the Court held that "In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

20. We, therefore, respectfully following the judgments referred herein above by the Hon'ble Courts and also considering the facts and circumstances of the case, are of the considered view that since the assessee has placed sufficient documents and materials on record to prove the identity and creditworthiness of the shareholders and the genuineness of the transaction of receiving share capital and share premium, invoking the provisions of I.T.A. No.: 1938/Kol/2018 Assessment Year: 2012-13 Dharmvir Merchandise Pvt. Ltd. Page 15 of 15 Section 68 of the Act was not justified in the instant case. We, therefore, reverse the finding of the CIT(A) and delete the addition of Rs. Rs.1.40 Cr made u/s 68 of the Act and allow all the grounds raised by the assessee.

21. In the result, the appeal filed by the assessee is allowed".

12. In the light of the ratio laid down by this Tribunal as well as reliance having been placed on various judgments of Hon'ble Courts in the said decisions and on due consideration of the facts that the alleged sum has been received from group/sister concerns only for the purpose of real estate project for which land was acquired in the preceding years and capital work-in-progress was going on and that the assessee having successfully proved the nature and source of the alleged sum by proving genuineness and creditworthiness of the share applicants and genuineness of the transactions. All the share applicants have duly replied to the notices issued under section 133(6) and majority of them have appeared before the ld. Assessing Officer for recording the statement under section 131 and that all the share applicants are regularly assessed to tax and have also faced scrutiny proceedings and as per MCA Matter Data as on date, all alleged share applicants are active companies and that the shares have been issued at fair market value of the equity shares and that no excess share premium has been charged and in totality these facts are sufficient for us to hold that ld. CIT(Appeals) erred in confirming the action of the ld. Assessing Officer making the addition under section 68 of the Act. We thus reverse the finding of ld. CIT(Appeals) and delete the addition of Rs.1,76,87,500/- made under section 68 of the Act and allow Ground No. 1 raised by the assessee.

13. Ground No. 2 regarding charging of interest under section 234B is consequential in nature, which needs no adjudication.

14. Ground No.3 is general in nature, which does not call for recording of any finding.

**15. In the result, the appeal of the assessee is allowed.**

Order is pronounced in the open court on June 6<sup>th</sup>, 2024.

**Sd/-**  
**(Sanjay Garg)**  
**Judicial Member**

**Sd/-**  
**(Manish Borad)**  
**Accountant Member**

**Kolkata, the 6<sup>th</sup> day of June, 2024**

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National Faceless Appeal Centre (NFAC),  
Delhi;
  - (4) Commissioner of Income Tax-  
Kolkata;
  - (5) The Departmental Representative
  - (6) Guard File

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By order

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata

**Laha/Sr. P.S.**