

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ ए, मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री राजेन्द्र, लेखा सदस्य, के समक्ष ।

**Before Shri Joginder Singh, Judicial Member and
Shri Rajendra, Accountant Member**

**ITA NO.6492/Mum/2016
Assessment Year-2007-08**

Arceli Realty Limited (Formerly known as Ellora Electricals Ltd.) C-30, Vrindavan Ramayand, C.H.S. S.N. Road, Tambe Nagar, Mulund (W), Mumbai-400080	<u>बनाम/</u> Vs.	Income Tax Officer-15(1)(1), Mumbai
PAN No.AAAACE1176E		
(निर्धारिती /Assessee)		(राजस्व /Revenue)

निर्धारिती की ओर से / Assessee by	Shri Nimesh Chotani & Shri Dharan Gandhi
राजस्व की ओर से / Revenue by	Shri R.P. Meena CIT-DR

सुनवाई की तारीख / Date of Hearing :	19/04/2017
आदेश की तारीख / Date of Order:	21/04/2017

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated 19/08/2016 of the Ld. First Appellate Authority, Mumbai. The first ground raised by the assessee pertains to reopening the proceedings u/s 148 of the Income Tax Act, 1961 (hereinafter the Act) by not treating the reassessment proceedings as invalid and bad in law. During hearing, Shri Nimesh Chotani, along with Shri Dharan Gandhi, ld. counsel for the assessee, did not press this ground. The ld. CIT-DR, Shri R.P. Meena, had no objection to the request of the assessee, therefore, this ground is dismissed as not pressed.

2. The only effective ground argued by the ld. counsel pertains to addition of Rs.20 lakh made u/s 68 of the Income Tax Act, 1961 (hereinafter the Act), being the share application money received by the assessee. The crux of argument advanced on behalf of the assessee is that the assessee duly filed the confirmation. It was explained that the addition was made by the Assessing Officer on the plea that no details were filed by the assessee. However, it was claimed that the necessary details were duly filed by the assessee and the whole addition was made on the basis of statements tendered by some person. It was pleaded that in spite of asking by the assessee, cross examination was not provided to the

assessee. Our attention was invited to page-7 containing the reply of the assessee with a request for cross examination. It was claimed that the assessee is a public limited company, annual returns were filed with the registrar (pages 64 to 69 of the paper book). Details of allotted shares were duly filed with the Ministry of Corporate Affairs, as required under the Act (page-71 of the paper book). Our attention was also invited to the page-81 of the paper book containing the names of allottees by submitting that even all the details were duly made available to the Ministry of Corporate Affairs and also before the Assessing Officer, therefore, the onus has been discharged. A strong reliance was placed upon the decision from Hon'ble jurisdictional High Court in the case of CIT vs M/s Gagandeep Infrastructure Pvt. Ltd. (ITA No.1613 of 2014) (Bom.)(HC)(pages 3 to 9 of the paper book). Reliance was also placed upon the decision from Hon'ble Apex Court in CIT vs Lovely Exports Pvt. Ltd. 216 CTR 195 (SC), CIT vs Creative World Telly Films Ltd. (2011) 333 ITR 100 (Bom.) and Vitrag Metals Pvt. Ltd. vs Income Tax Officer (46 ITR (T.) 201)(Bom.)(Pages 12 to 13 of the paper book). The ld. counsel also explained the source of investment, which was also filed before the Ld. Assessing Officer as well as before the Ld. First Appellate Authority.

2.1. On the issue of non-providing cross examination, in spite of repeated request and violation of

principle of natural justice, the ld. counsel placed reliance upon the decision in *Adman Timber Industries vs CCE* (281 CTR 241) (SC), *H.R. Mehta vs ACIT* 387 ITR 561(Bom.) and *G.K.N. Driveshafts (India) Ltd. vs Income Tax Officer* 259 ITR 19 (SC). It was also contended that the Ld. Assessing Officer did not apply his independent mind while reopening the assessment and merely relied upon borrowed satisfaction provided by the investigation wing.

2.2. On the other hand, Shri R.P. Meena, Ld. CIT-DR strongly defended the order of the Ld. Assessing Officer and as well as of the Ld. Commissioner of Income Tax (Appeal) by contending that onus caste upon the assessee was not discharged and the necessary details, sought by the Assessing Officer were not filed by the assessee. Reliance was placed upon the decision in *CIT vs Kundan Investment Ltd.* 263 ITR 626 (Kol.), 11 ITR 951 (Kol.), *ITO vs Janak U. Bhatt* 8 SOT 353 (Bom.) and Para 2.4.16 of the impugned order. The crux of the argument by the Ld. CIT-DR is that the onus caste upon the assessee was never discharged, therefore, the addition was rightly made.

2.3. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee company is engaged in the business of building and developing various projects. As per the Revenue, an information was received from the investigation wing that the assessee company has taken

share application money from M/s Yash V-Jewells Ltd. and M/s Alka Diamond Industries Ltd. totalling Rs.20 lakhs. The assessment was reopened u/s 147 of the Act, therefore, notice u/s 148 of the Act was served upon the assessee. Notice u/s 143(2) dated 21/10/2014 was also served upon the assessee. In response to notice u/s 133(6) of the Act, dated 21/01/2015, M/s Alka Diamond Industries Ltd., vide communication dated 04/02/2015, submitted the details. As per the Revenue, part details were submitted. The stand of the Revenue is that the assessee could not prove the creditworthiness of the investing company as well as genuineness of the transaction of share application money, thus, the Ld. Assessing Officer, treated the amount of Rs.20 lakh, as unexplained cash credit and added the same to the total income of the assessee u/s 68 of the Act.

2.4. On appeal before the Ld. Commissioner of Income Tax (Appeals), the factual matrix was considered and the addition made by the Ld. Assessing Officer was affirmed. Before adverting further, we are expected to reproduce the submissions of the assessee for analysis, which has been summerized in para 2.3.1 of the impugned order for ready reference:-

2.3.1 Ld. AR has, inter alia, submitted the following arguments:

"The Appellant, in furtherance to the Statement of Facts filed before your Honours

along with Grounds of Appeal in Form No. 35, wants to state and submit as under:

1. The Appellant before your Honours is a company engaged in the business of building and developing various projects. The Appellant filed the return for the previous year relevant to the impugned assessment year 2007-08 on 30.10.2007 declaring total income of Rs. 56,589/-. The return filed by the Appellant was processed and accepted under the provisions of section 143(1) of the Act.
2. Subsequently, the Appellant was, thereafter, served with the notice dated 14.03.2014 under section 148 of the Act. The notice under section 148 was issued on the basis of certain information received from the DGIT (Inv.)
3. The Ld. A.O. without providing any reasons for issue of notice u/s 148 issued' notices u/s 143(2) of the Act followed by notices u/s 142(1) of the Act. The appellant replied to the notices issued u/s 142(1) from time to time and furnished the necessary details as required by the Ld. AO. The Ld. AO wanted to verify the details of share application money received by the appellant during the impugned assessment year. The Ld. AO issued a show cause notice to the Appellant as to why Rs. 10,00,000/- received from M/s Yash V Jewels Ltd. and Rs. 10,00,000/- received from M/s Alka Diamond Industries Ltd. as share application money should not be treated as unexplained cash credits and added to the total income of the appellant. The Appellant submitted the necessary details of the parties from whom the appellant had received share application money in the impugned assessment year which discharges the appellant from the primary onus cast upon the appellant of proving the genuineness of the said transaction. The Appellant had also submitted the Bank statement of M/s Yash V Jewels Ltd. along with the confirmation of M/s Yash V Jewels Ltd. And M/s Alka Diamond Industries Ltd. vide letter dated 26.03.2015. Further, relying on the information received from the investigation wing, the Ld. AO issued notice u/s 133(6) to M/s Yash V Jewels Ltd. And M/s Alka Diamond Industries Ltd. for corroboration of the said transaction and in response to the same M/s Alka Diamond Industries ignored the various documentary evidences merely on the basis of surmise; conjecture and suspicion and finalized the assessment order dated 26.03.2015 under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 after making an addition of Rs. 20, 00,000/~ under Section 68 of the Act.
4. The Ld. AO has erred on the following grounds:
 - i. The Ld. A O. issued notices u/s 143(2) and 142(1) without providing reasons to the appellant for issuing notice u/s 148.

ii. The Ld. A.O. issued notice u/s 148 without any application of mind merely relying on the information received from the investigation wing.

iii. The Ld. AO failed to appreciate that the appellant had discharged the primary onus cast upon the appellant of proving the genuineness of the party from whom share application money was received.

iv. The Ld. AO ignored the supporting documentary evidences provided during the course of assessment proceedings and has acted merely on the basis of surmise and conjecture.

v. The Ld. AO erred in passing the assessment order u/s 143(3) r. w.s. 147 of the Act without providing any opportunity to the appellant for cross examination which is against the principles of natural justice.

5. Failed to provide reasons for issue of notice u/s 148.

The Hon'ble Supreme Court in case of GKN Driveshafts - 259 ITR 19 (SC) has held the Assessing Officer is bound to furnish reasons for the purpose of issuing notice u/s 148 and that once the reasons are furnished, then the assessee should be given an opportunity to rebut the reasons so furnished. Post which the Ld. A O should pass an order disposing off the objections so raised by the assessee. Then the Ld. AO has to wait for a period for 4 weeks before proceeding with the assessment.

In the present case, the Ld. A. O. never provided the reasons for issue of notice u/e 148. The Ld. AO has thus violated the basic procedures laid down by the Hon'ble Supreme Court. Hence, the assessment order passed u/s 143(3) r. w.s. 147 is in violation of the basic provisions of law and against the principles of natural. So we therefore request your Honour that the said assessment order should be quashed and set aside.

6. Notice u/s 148 was issued on account of borrowed satisfaction

The Ld. A. O. had not exercised his independent mind and has acted merely on the basis of certain information received from the investigation wing which was accepted without application of mind. Section 68 of the Income Tax Act states as under:

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

It is a settled position of law that the Assessing Officer has to reach to his own satisfaction that some income has escaped assessment. The satisfaction has to be based on some reliable material and judicious application of mind. Further, reliance has been placed on the following decisions which clearly state that no reassessment proceeding is permitted to be initiated on the basis of borrowed satisfaction.

- i) CIT vs. Atul Jain - (2007) 164 Taxman 33 (Delhi)
- ii) CIT vs. Smt. Paramjit Kaur- (2008) 168 Taxman 39 (He - P&H)
- iii) CIT vs. Vignesh Kumar Jewellers (2009) Taxman 18 (HC - Madras)
- iv) CIT vs. Shree Rajasthan Syntex Ltd. (2009) 178 Taxman 33 (HC - Rajasthan)

Further, there must be a material for belief and not suspect. The reasons to believe must be honest and not based on suspicion or conjecture.

7. Addition u/s 68 on account of share application money is unjustified.

The Apex Court in CIT v. Lovely Exports (P) Ltd. (supra), has held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the assessing officer; then the department can always proceed against them and if necessary reopen their individual assessments.

In the present case, the appellant has submitted the details of all the parties from whom Share application money was received during the impugned assessment year. In addition to the same, the appellant has also submitted the bank statement of M/s Yash V Jewels Ltd. along with the confirmation of M/s Yash V Jewels Ltd. And M/s Alka Diamond Industries Ltd. vide letter dated 26.03.2015.

It is a settled position of law that in the matter of cash credit, the initial onus lies on the assessee to prove the genuineness of the transaction along with the identify of the lender/investor and his creditworthiness. Having done so, the appellant in the instant case has discharged the onus cast upon it. Beyond this, for the charge of unexplained cash credit to stick, the onus lies on the AO to disprove the claim of the assessee by establishing that the evidence filed by the assessee was false and by bringing new material on record and failure to do so would vitiate the addition made on this count. Reference in this regard can be made to the decisions in the case of CIT v. Orissa Corporation Pvt. Ltd. 1581TR 78 (Se). Further, it was held in Khandelwal Constructions v CIT (1997) 227 ITR 900 (Gau.) that since the satisfaction of the AO is the basis for invocation of the powers U/S 68, such

satisfaction must be derived from relevant factors on the basis of proper inquiry by the AD and such inquiry must be reasonable and just. In the present case, the Ld. AO has not found any material on record in order to prove that the said amounts received from the M/s Yash V Jewels Ltd. And M/s Alka Diamond Industries Ltd. are mere accommodation entries and the Ld. AO has merely relied on the information received from the Investigation wing

The appellant would further like to rely upon certain case laws in this regard which clearly prove that the action of the Ld. AO is unjustified:

CIT vs. Vrindavan Farms (P) Ltd. (Delhi High Court)

If the identity and other details of the share applicants are available, the share application money cannot be treated as undisclosed income in the hands of the Co. The addition, if at all, should be in the hands of the applicants if their creditworthiness cannot be proved

The Hon'ble Mumbai High Court in the recent Judgement in the case of CIT v Creative World Tele films Ltd. (order dated 12.10.2009 in ITA(L) no. 2182 of 2009) has followed the decision of the Apex Court in CIT v. Lovely Exports (P) Ltd, and has held as under:

"The question sought to be raised in the appeal was also raised before the Tribunal and the Tribunal was pleased to follow the judgement of the Apex Court in the case of CIT vs. Lovely Exports (P) Ltd. reported in (2008) 216 CTR195 (SC) wherein the Apex Court observed that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the assessing Office" then the department can always proceed against them and if necessary reopen their individual assessments. In the case in hand, it is not disputed that the assessee has given the details of name and address of the shareholders, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the assessing officer to make proper investigation and reach the shareholders.

The assessing officer did nothing except issuing summons which was ultimately returned back with an endorsement 'not tenable'. In our considered view, the assessing officer ought to have found out their details through PAN Card, Bank Account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the assessing officer. In the above circumstances, the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal. In the result, the appeal is dismissed in limine with no order as to costs."

8. Failed to appreciate the documentary evidences provided during the course of assessment proceedings

The Ld. AO merely relied on the information received from the investigation wing and overlooked the fact that the appellant had submitted the Confirmation of the parties from whom he has received share application money. The said fact is very evident as the Ld. AO has mentioned at para 5.2 of the assessment order which reads as under:

"The assessee completely failed to submit the copy of confirmation from the parties for credit in assessee's books, which were categorically asked to submit vide questionnaire issued u/s 142 of the Income Tax Act. These facts made it crystal clear that the assessee did not prove that the party has credit worthiness to invest in shares of the assessee company" ,

It is very evident that the Ld. AO has completely ignored the various supporting evidences and explanations submitted during the course of assessment proceedings and has acted merely on the basis of pm conceived notions. Hence, the addition of Rs. 20,00,000;" under Section 68 of the Act is totally unjustified and should be deleted.

9. Without prejudice, it is respectfully submitted that the Ld. AO has relied upon the information of the investigation wing, but has not submitted or furnished any information. documents to the appellant for its rebuttal. Thus, the Ld. AO has flaunted the principles of natural justice by making the addition behind the back of the appellant. Further, no opportunity to cross examine has been given to the appellant. Thus, this lapse on the part of the Ld. AO goes to the root of the matte" shaking the entire foundation and making the order of the. Ld. AO not acceptable in the eyes of law. Thus, the impugned addition, on this count also is liable to be deleted.

Further, the appellant requests your honour to provide an opportunity of cross examination.

The applicant therefore, prays that the assessment order passed under section 143(3) r.w.s. 147 of the Act is against the principles of natural justice and may be quashed and set aside.

10. The appellant craves leave of your Honour to make further submissions as and when required."

2.5. The Ld. Commissioner of Income Tax (Appeals) considered the aforementioned submission of the assessee and considering various decisions like Shri Krishna P. Ltd.

(221 ITR 538), Raymond Woollen Mills vs ITO (236 ITR 34)(Supreme Court), CIT vs Lovely Exports Pvt. Ltd. (2008) 216 CTR 195 (Supreme Court), Kale Khan Mohammed Hanif vs CIT 50 ITR 1 (Supreme Court), CIT vs P. Mohan Kala (291 ITR 278)(Supreme Court), concluded that the ingredients of section 68 were not established by the assessee and therefore, confirmed the addition. The assessee is aggrieved and is in appeal before this Tribunal.

2.6. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsels, if kept in juxtaposition and analyzed, we find that there are various judicial pronouncements, which are in favour and against the assessee. However, we are expected to examine the facts in a objective manner and then to apply the case laws after considering the facts in the present appeal and the cases relied upon by both sides. As per the Revenue, there was information received from the office of the DGIT (Inv.), Mumbai related to Mr. Pravin Jain & Ors. On 12/03/2014. As per the Ld. CIT-DR, there was information from the investigation wing that Mr. Pravin Jain along with his related concerns, was indulged in providing Hawala Entries. The statement of Shri Pravin Jain and Ors was recorded, wherein, they have admitted (as mentioned in para-2 of the assessment order also) that they are engaged in providing accommodation

entries in lieu of cash, which are routed through the companies under his control. Various brokers were also claimed to be covered during the search action conducted at the group companies. Notice u/s 148 of the Act was served upon the assessee. The assessee vide letter dated 16/10/2014, replied to the notice issued u/s 142(1) of the Act and furnished the necessary details. On verification of the balance sheet as on 31/03/2007, it was observed by the Assessing Officer that an amount of Rs.65 lakhs was received as share application money from investing parties. The assessee was asked to produce the details of these investing parties and also directed to furnish the details of share application money, the name of the parties, amount received and confirmation from such party along with copy of bank statement, where the share application money was deposited. The assessee furnished the necessary details. The ld. Assessing Officer, on receipt of such details, issued notices u/s 133(6) dated 21/01/2015 to M/s Yash-V-Jewels Ltd. and M/s Alka Diamond Industries Ltd. to furnish the following details:-

- i) Please confirm that you have subscriber for shares.
- ii) Please give the exact sources of funds for making the share subscription by you with necessary evidences to show the availability of funds as on the date of making the payment by you.
- iii) Please furnish details of present status of the holding of the said shares.

iv) Please state the mode and complete details of the bank through which the said payment was made to purchase the shares i.e. Name of the Bank and Branch, Instrument/ Transaction Number and date.

v) Please furnish copy of I-T return filed for A.Y. 2007-08 showing PAN, full designation of the Assessing Officer and computation of total income.

vi) Please provide copy of your Balance Sheet, statement of Income & expenditure for F.Y.2006-07.

vii) Please furnish copies of bank statements through which the funds were released for making the purchase of shares for the period 01.04.2006 to 31.03.2007 are reflected.

viii) Detailed reasons and justification for application of shares.

ix) Copy of board resolution passed for making investment i.e. purchase of shares.

x) Name and address of the person who introduced you to the above company for purchase of the share.

2.7. As per the Revenue, M/s Alka Diamond Industries Ltd. submitted part details, vide letter dated 04/02/2015, whereas, the notice issued to M/s Yash-V-Jewels Ltd. was returned unserved as 'unclaimed'. Another notice was issued to the assessee on 26/03/2015 to which the assessee submitted the details which are summerized as under:-

- i. Bank statement of the assessee, where the money was deposited,

- ii. Confirmation from M/s Yash-V-Jewels along with number of shares applied and allotted,
- iii. Copy of Board Resolution passed,
- iv. Copy of ROC return filed,
- v. Copy of bank statement of M/s Yash-V-Jewels Ltd. reflecting the payment made for share application money.

2.8. The assessee further claimed that the payments on account of share application money was received through banking channel, board resolution was passed for investing the funds in the assessee company as share application. The Ld. Assessing Officer was of the view that the money received through banking channel is not sacrosanct as it does not prove the creditworthiness of the assessee company and addition was made and confirmed by the ld. Commissioner of Income Tax (Appeals).

2.9. Under the aforementioned circumstances, we are expected to analyze section 68 of the Act, which is reproduced hereunder:-

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

“Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name

called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

- (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
- (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*

Provided further *that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."*

2.10. Now, we shall analyze various case laws on the applicability of section 68 of the Act. We find that Full Bench of Hon'ble Delhi High Court in case of Sophia Finance Ltd. (1993) 113 CTR (Del)(FB) 472 : (1994) 205 ITR 98 (Del)(FB) made an elaborate discussion which still holds good and the provisions of s. 68 are applicable to the credits in respect of share application money/share capital. All that is required to be done is that the assessee is required to prove the existence of the shareholders because as held by the Hon'ble Delhi High Court, if the shareholders exists then, possibly no further enquiry needs to be made. In the present appeal, existence of the shareholders, of course not in doubt. However, the assessee is required to place the primary evidence and discharge the primary burden, for which reliance can be placed upon the decision in CIT vs. Divine Leasing & Financing Ltd. (2007) 207 CTR (Del) 38 : (2007) 158 Taxman 440 (Del) wherein their Lordships have held that a distillation of the precedents yields following

propositions of law in the context of s. 68. The assessee has to prima facie prove –

- (i) the identity of the creditor/subscriber
- (ii) the genuineness of the transaction, viz, whether it has been transmitted through banking or other indisputable channels
- (iii) the creditworthiness or financial strength of the creditor/ subscriber
- (iv) if relevant details of address or PAN Identity are furnished to the Department along with the copies of shareholder register, share application form, share transfer register etc, it would constitute acceptable proof or acceptable explanation by assessee.

2.11. Further, (i) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglect to respond the notices (ii) the onus would not stand discharge if the creditor/subscriber denies or repudiate the transaction set up by assessee nor should the AO take such repudiation on face value and construe it , without more evidence against the assessee (iii) the AO is duty bound to investigate the creditworthiness of the creditor/subscriber, the genuineness of the transaction and veracity of the repudiation. In that case, their Lordships upheld the order of Tribunal holding that the AO had not brought any

positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources. In CIT vs. Dwarkadhish Investment (P) Ltd. (2008) 2 DTR (Del) 7 : 167 Taxman 321 (Del) CIT vs. Dwarkadhish Financial Services (2005) 197 CTR (Del) 202 : (2005) 148 Taxman 54 (Del) wherein, it was held that in view of the evidence to establish that identity of shareholders such as affidavits, copies of the share application forms, confirmation from applicant companies copies of board resolution, details of cheque numbers, branch and address of the branch through which the investments are made along with the fact that shareholders are tax payers, it was held that it could not be presumed that the shareholders, who are assessed to tax, are not in existence. In CIT vs. Gangour Investment Ltd. (2009) 18 DTR (Del) 242 : (2009) 179 Taxman 1 (Del) wherein the High Court held that the assessee had filed subscription form for each of investors. The said subscription Form contained details, which set out not only the identity of subscriber, but also gave information with respect to their addresses as well as PANs. During scrutiny Assessing Officer had also asked for and was supplied with a copy of statement of bank account of the subscriber. The payments were made by cheques. In view of this the Hon'ble Court held that no addition could be made under s. 68 because assessee has discharged the

onus in respect of veracity of the transactions. CIT vs. K.C. Fibers Ltd. (2010) 187 Taxman 53 (Del) wherein it is held that no material is brought by AO to hold that shareholders companies are umbrella company or have any relation with each other and the amount cannot be regarded as undisclosed income of the recipient assessee company. It also held that it is not for the assessee company to probe as to the source. It was for Assessing Officer to enquire into the affairs of the investor company. Their Lordships have applied the ratio of the decision in case of Lovely Exports (P) Ltd. (supra). CIT vs. Dolphine Canpack Ltd. (2006) 204 CTR (Del) 50 : (2006) 283 ITR 190 (Del)—share application money - Tribunal while observing details including confirmation details of bank account, PAN of subscriber and that payments made by cheque - justified in deleting addition under s. 68. Although the Lordships applied decision in Sophia Finance Ltd. (supra) they came to the conclusion that the scope is limited to examining the existence of shareholders and since the assessee has furnished sufficient material to discharge the onus, deletion of addition was correct. CIT vs Down Town Hospitals (P) Ltd. (2004) 267 ITR 439 (Gau) held that the assessee filed details regarding source of funds of the party and their Income-tax File Numbers etc - no addition under s. 68 is permissible where shareholders are identified and it is established that they had invested the money in purchase of shares. (pp. 127 to 131 of

judgment compilation). CIT vs. ILLAC Investment (P) Ltd (2007) 207 CTR (Del) 687 : (2006) 287 ITR 135 (Del) held that assessee satisfactorily established identity of shareholders, the addition under s. 68 rightly deleted - no substantial question of law arises (pp. 146 and 147 of judgment compilation). Dy. CIT vs. Rohini Builders (2003) 182 CTR (Guj) 373 : (2002) 256 ITR 360 (Guj)—assessee furnished addresses of all creditors along with GIR No/PAN as well as confirmations along with copies of assessment orders in case of individual creditors wherever available and copies of returns filed by creditors in other cases. All loans received and repaid by account payee cheques rightly deleted. (pp. No. 116 and 117 of judgment compilation) CIT vs. Shri Barkha Synthetics Ltd. (2003) 182 CTR (Raj) 175 : (2004) 270 ITR 477 (Raj)— assessee discharged its initial burden in respect of six out of seven companies but revenue failed to discharge its burden as it did not hold any enquiry into genuineness, addition rightly deleted. (pp. No. 107 to 115 of judgment compilation) Barkha Synthetic Ltd. vs Asstt. CIT (2005) 197 CTR (Raj) 432 : (2006) 283 ITR 377 (Raj) the principle relating to burden of proof concerning the assessee is that where the matter concerns the money receipts by way of share application from investors through banking channels, the assessee has to prove the existence of the person in whose name share application is received. Once the existence of the investor is proved, it is no further burden of the

assessee to prove whether that person himself invested the money or some other person made investment in the name of that person. The burden then shifts to the Revenue to establish that such investment has come from assessee company itself. [decision in case of CIT vs. shri Barkha Synthetics Ltd. (supra) followed]. Without prejudice to above contention based on Lovely Export's case (supra), an analysis of all the above judgments thus goes to show that even if the principle laid down by the Hon'ble Delhi High Court in Sophia's case (supra) is held as applicable even then the assessee's burden is restricted to establishing the existence of shareholders and once that is established. Since the assessee has submitted various documents, clearly indicates that the primary burden which lay upon the assessee, has been discharged. Even otherwise, we are expected to follow the decision of the higher Forums for which reliance can be placed upon the following decisions:

- i. Kamalakshi Finance Corporation Ltd. 55 ELT 433
- ii. Agrawal Warehousing & Leasing Ltd. vs. CIT (2002) 177 CTR (MP) 15 : (2002) 257 ITR 235 (MP)
- iii. Asstt. CCE vs. Dunlop India Ltd. & Ors. (1985) 154 ITR 172 (SC)

2.12. It is also noted that Hon'ble jurisdictional High Court in the case of CIT vs M/s Gangandeep Infrastructure Pvt. Ltd. (ITA No.1613 of 2014)(Bom.) on identical fact decided the issue in favour of the assessee.

For ready reference and also claimed by the assessee, the facts of the case in M/s Gagandeep Infrastructure Pvt. Ltd. and that of the assessee are summarized hereunder:-

Before the Hon'ble Income Tax Appellate Tribunal 'A' Bench, Mumbai M/s Arceli Realty. Ltd. Assessment Year: 2007-2008 ITA No. 6492/Mum/2016				
Comparison chart between the facts in case of				
Sr No.	CIT vs. M/s Gagandeep Infrastructure P. Ltd [ITA No. 1613 of 2014 (Bom)(HC)]		Case of Assessee	
A	Amount received during the year in respect of share capital and share premium of Rs. 6.69 crores.	Page 2 – para 3 (a)	Amount received during the year in respect of share application money of Rs. 20,00,000/-.	AO order - page 2 and CIT(A) order – page 7 para 2.4.1.
B	Assessee furnished – (a) list of its shareholders, (b) copy of the share application form and share certificate and (c) Form no.2 filed with the Registrar of Companies	Page 2 – para 3 (a)	Assessee furnished – (a) List of allottees (b) Application letter for allotment of shares and share application form (c) Form No. 2 filed with the Registrar of the Companies	PB – page 81 PB – page 1&2 and page 36-37 PB – page 71-82
C	Assessee also furnished the following to establish the identity (a) detailed names, addresses of the shareholders, PAN numbers, bank details and Confirmation letters	Page 4 – para (c)	Assessee also furnished the following to establish the identity (a) detailed names, addresses of the shareholders, PAN numbers, bank details and Confirmation letters of the parties	PB – page 3,38
D	Assessee furnished the following to establish the genuineness and capacity of		Assessee furnished the following to establish the genuineness and capacity of the transaction -	
	the transaction (a) copy of share application form, (b) the form filed with the Registrar of Companies (c) bank details of the shareholders and (d) confirmations	Page 4 – para (c)	(a) Application letter for allotment of shares and share application form (b) Form No. 2 filed with the Registrar of the Companies (c) Source of investment in case of one party and Bank Statement of the other party (d) Bank details and Confirmation letters of the parties Additional details furnished to establish genuineness and capacity (e) Resolution passed by the parties (f) Copy of IT Returns and Financial Statements of the parties	PB – page 1-2, 36-37 PB – page 71-82 PB – page 34-35 and 60 PB – page 3, 38 PB – page 4, 39 PB – page 7-32 and 41-59

Finding of the Hon'ble Bombay High Court

- Proviso to section 68 is prospective in nature and applicable w.e.f. AY 2013-14 - [page 5 – para (e)]
- All three essential elements were satisfied by the assessee - - [page 5 and 6 – para (e)]
- The Revenue can proceed to reopen the assessment of such shareholders and can make addition in their hand in accordance with the judgment of the Hon'ble Supreme Court in case of Lovely Exports (P) Ltd (216 CTR 195). [page 6 – para (e)]

2.13. We find that in the aforesaid case, the Hon'ble jurisdictional High Court vide order dated 20/03/2017 held/observed as under:-

"1. This Appeal under section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 23' April, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. Mr. Suresh Kumar, the learned counsel appearing for the Revenue urges the following re-framed questions of law for our consideration:-

"(1) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.7,53,50,000/- under Section 68 of the Act being share capital/share premium received during the year when the Assessing Officer held the same as unexplained cash credit?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restricting the disallowance under Section 14A of the Act only to the amount of expenditure claimed by the assessee in the absence of any such restriction under Section 14A and/or Rule SD?"

3. Regarding question no.(i):-

(a) During the previous relevant to the subject Assessment Year the respondent-assessee had increased its share capital from Rs.2,50,000/- to Rs.83.75 lakhs. During the assessment proceedings, the Assessing Officer noticed that the respondent had collected share premium to the extent of Rs.6.69 crores. Consequently he called upon the respondent to justify the charging of share premium at Rs.190/- per share. The respondent furnished the list of its shareholders, copy of the share application form, copy of share certificate and Form no.2 filed with the Registrar of Companies. The justification for charging share premium was on the basis of the future prospects of the business of the respondent-assessee. The Assessing Officer did not accept the explanation/justification of the respondent and invoked Section 68 of the Act to treat

the amount of Rs.7.53 crores i.e. the aggregate of the issue price and the premium on the shares issued as unexplained cash credit within the meaning of Section 68 of the Act.

(b) Being aggrieved, the respondent carried the issue in appeal. By an order dated ^{24th} May, 2011 the Commissioner of Income Tax (Appeals) (CIT(A)) deleted the addition of Rs.7.53 crores made by the Assessing Officer by holding that the Assessing Officer had given no reason to conclude that the investment made (inclusive of premium) was not genuine. This inspite of evidence being furnished by the respondent in support of the genuineness of the transactions. Further he held that the appropriate valuation of the shares is for the subscriber/investor to decide and not a subject of enquiry by the Revenue. Finally he relied upon the decision of the Apex Court in *CIT v/s. Lovely Exports (P)Ltd.* 317 ITR 218 to hold that if the amounts have been subscribed by bogus shareholders it is for the Revenue to proceed against such shareholders. Therefore it held the Assessing Officer was not justified in adding the amount of share capital subscription including the share premium as unexplained credit under Section 68 of the Act.

(c) Being aggrieved, the Revenue carried the issue in the appeal to the Tribunal. The impugned order of the Tribunal holds that the respondent-assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names, addresses of the shareholders, PAN numbers, bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the Registrar of Companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon, would be on capital receipt and not in the revenue field. Further reliance was also placed upon the decision of

Apex Court in *Lovely Exports (P) Ltd.* (supra) to uphold the finding of the CIT(A) and dismissing the Revenue's appeal.

(d) Mr. Suresh Kumar, the learned counsel appearing for the Revenue contends that proviso to Section 68 of the Act which was introduced with effect from 1st April, 2013 would apply in the facts of the present case even for A.Y. 2008-09. The basis of the above submission is that the *de hors* the proviso also the requirements as set out therein would have to be satisfied.

(e) 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 F' 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.

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2.14. In another case, Hon'ble jurisdictional High Court in CIT vs Creative World Telefilms Ltd. (2011) 333 ITR 100 (Bom.) duly considered the decision in the case of Lovely Export Pvt. Ltd. (Supra) and it was found that the assessee had given the details like name and addresses of share holders, their PAN/GIR No., Cheque No., Name of the Bank, and thus the order of the Tribunal was upheld. Identically, in Vitrag Metals pvt. Ltd. vs Income Tax Officer (2016) 46 ITR (Trib.) 201 (Mum.) decided the issue in favour of the assessee.

2.15. It is well established principle of law that once the transaction has taken place through banking channels, the genuineness of transaction cannot be disputed, as the assessee is not required to prove source of a source. We are adding here that it is always not sacrosanct because the assessee has to satisfy the ingredients of section 68 of the Act. However, the facts clearly indicates that the assessee has discharged its primary burden because the identity of the share subscribers, their capacity and genuineness of the transaction is not in doubt. Reliance can be placed upon the ratio laid down in following decisions:-

- i. Sarogi Credit Corporation vs CIT 1975 CTR (Pat) 1 : (1976) 103 ITR 344 (Pat).
- ii. Addl. CIT vs. Bahari Brothers (P) Ltd. (1984) 42 CTR (Pat) 66 : (1985) 154 ITR 244 (Pat).
- iii. Ashok Lal Daga vs CIT (1996) 136 CTR (MP) 235 : (1996) 220 ITR 452 (MP).
- iv. CIT vs Real Time Marketing (P) Ltd. (2008) 10 DTR (Del) 191 : (2009) 221 CTR (Del) 716 : (2008) 306 ITR 35 (Del).
- v. CIT vs. Metachem Industries (2000) 161 CTR (MP) 444 : (2000) 245 ITR 160 (MP).
- vi. Nemichand Kothari vs. CIT & Anr. (2003) 185 CTR (Gau) 635 : (2003) 264 ITR 254 (Gau).
- vii. P.K. Sethi vs. CIT (2006) 206 CTR (Gau) 445 : (2006) 286 ITR 318 (Gau).
- viii. CIT vs. Barjatiya Children Trust (1997) 225 ITR 640 (MP).
- ix. CIT vs Laul Transport Corporation (2009) 180 Taxman 185 (P&H).
- x. Aravalii Trading Co. vs. ITO (2008) 8 DTR (Raj) 199 : (2010) 187 Taxman 338 (Raj).

2.16. The ld. counsel for the assessee, before us, claimed that the Assessing Officer has made no efforts and no independent enquiry was made by him and merely

made the addition on the basis of alleged information received from the investigation wing. As claimed by the assessee, returns were filed in the office of registrar of companies under the Companies Act, 1956 and the registrar of companies is a statutory authority possessing details of companies.

2.17. We are also expected to analyze the arguments advanced by learned CIT Departmental Representative wherein, reliance was placed upon the decision in *Kale Khan Mohd. Hanif vs. CIT* (1963) 50 ITR 1 (SC). He contended that the source of money remained unexplained. Reliance was placed upon the decision of *Sumati Dayal vs. CIT* (1995) 125 CTR (SC) 124 : (1995) 214 ITR 801 (SC). A plea was also raised that the onus/burden still remained fastened to the assessee. We find that there are following decisions, which are in favour of the Revenue but based upon the facts of each case.

- i. *CIT vs. Nivendan Vanijya Niyojay Ltd.* (2003) 182 CTR (Cal) 605
- ii. *Hindustan Tea Trading Co. vs. CIT* (2003) 182 CTR (Cal) 585.
- iii. *CIT vs. Rathi Finlease Ltd.* (2008) 215 CTR (MP) 429 : (2008) 2 DTR (MP) 31
- iv. *CIT vs. Precision Finance (P) Ltd.* (1994) 121 CTR (Cal) 20 : (1994) 208 ITR 465 (Cal)

- v. Stellar Investment Ltd. (2000) 164 CTR (SC) 287 :
(2001) 251 ITR 263 (SC).

2.18. We are aware that many High Courts have distinguished/analyzed/considered the decision in Lovely Exports (P) Ltd. because it was merely dismissal of SLP. The ratio laid down in following cases can be placed reliance:-

- i. CIT vs. Oasis Hospitalities (P) Ltd. (2011) 238 CTR (Del) 402 : (2011) 51 DTR (Del) 74 : (2011) 333 ITR 119 (Del).
- ii. CIT vs. STL Extrusion (P) Ltd. (2011) 53 DTR (MP) 97 : (2011) 333 ITR 269 (MP).
- iii. Geoffrey Manners & Co. Ltd. (1996) 136 CTR (Bom) 169 : (1996) 221 ITR 695 (Bom);
- iv. Taylor Instrument Co. Ltd. vs. CIT (1999) 153 CTR (Del) 295 : (1998) 232 ITR 771 (Del);
- v. CIT vs. Mohanlal Kansal (1978) 114 ITR 583 (P&H);
- vi. Jorhant Group Ltd. vs. Asstt. CIT (2007) 289 ITR 422 (Gau)
- vii. CIT vs. Vrajilal Manilal & Co. (1980) 19 CTR (MP) 182 : (1981) 127 ITR 512 (MP).

2.19. Now, we shall analyze certain case laws, in CIT vs Lovely Export Pvt. Ltd. (2008) 216 CTR 195, the Hon'ble Apex Court observed as under:-

"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 undisclosed income of assessee company.

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

2.20. In the case of CIT vs Creative World Telefilms Ltd. (2011) 333 ITR 100(Bom.), the Hon'ble jurisdictional High Court held as under:-

"Heard learned counsel for the Revenue. Office objections are overruled. Registry is directed to register the appeal. At the instance of the Revenue, the appeal is taken up for admission.

2. The question sought to be raised in the appeal was also raised before the Tribunal and the Tribunal was pleased to follow the judgment of the apex Court in the case of CIT vs. Lovely Exports (P) Ltd. (2008) **216 CTR** (SC) 195 : (2008) 6 DTR (SC) 308 : (2009) 319 ITR 5 (St.) wherein the apex Court 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 can always proceed against them and if necessary reopen their individual assessments. In the case in hand, it is not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the AO to make proper investigation and reach the shareholders. The AO did nothing except issuing summons which were ultimately returned back with an endorsement "not traceable". In our considered view, the AO ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the AO. In the above circumstances, the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal. In the result, the appeal is dismissed in limine with no order as to costs."

2.21. So far as, non-providing opportunity to cross examine, in spite of repeated request made by the

assessee, is concerned, the Hon'ble Apex Court in Andaman Timber Industries vs CCE 281 CTR 241 (SC), the Hon'ble Apex Court held as under:-

"Not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority.

(para 6)

Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above.

(para 7)

If the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.

(para 8)

Conclusion :

Not allowing Assessee to cross-examine witnesses by Adjudicating Authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which make impugned order nullity as it amounted to violation of principles of natural justice."

Likewise, Hon'ble jurisdictional High Court in HR Mehta vs ACIT 387 ITR 561 (Bom.) held as under:-

"Held, that the Revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross-examine the deponent on the statements relied upon by the Assistant Commissioner. Quite apart from denial of an opportunity of cross examination, the Revenue did not even provide the material on the basis of which th' Department sought to conclude that the loan was a bogus transaction. In Me light of the fact that the monies were advanced apparently by account payee cheque and were repaid by account payee cheque the least that the Revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against the assessee before passing the order of reassessment. This not having been done, the denial of such opportunity went to the root of the matter. The order of reassessment was not valid.

Cases referred to:

Andaman Timber Industries v. CCE [2016] 38 GSTR 117 (SC)

(para

CIT v. Ashwani Gupta [2010] 322 ITR 396 (Delhi) (para 9)

CIT (Addl.) v. Bahri Bros P. Ltd. [1985] 154 ITR 244 (Patna) (para

9) CIT (Deputy) v. Rohini Builders [2002] 256 ITR 360 (Guj) (para

9) Hastimal (S.) v. CIT [1963] 49 ITR 273 (Mad) (para 9)

Kishinchand Chellaram v. CTT [1980] 125 ITR 713 (SC) (para 9)

Mather and Platt (India) Ltd. v. CIT [1987] 168 ITR 493 (Cal) (para

9)

Nemi Chand Kothari v. CIT [2003] 264 ITR 254 (Gauhati) (para 9)

Ranchi Handloom Emporium v. CIT [1999] 235 ITR 604 (Patna) (para 9)

2.22. If the totality of facts and the judicial pronouncements, discussed hereinabove, are analyzed, we are of the considered opinion that the onus cast upon the assessee, as provided u/s 68 of the Act, has been duly discharged by the assessee as the identity of the share subscribers, creditworthiness and genuineness of the

transaction is not in doubt or it can be said that the same has been proved/explained by the assessee. Now, The onus has reverted back upon the Revenue to prove otherwise. The Ld. Assessing Officer merely relied upon the information received from the investigation wing and did not made any independent enquiry. The Assessing Officer was expected to disprove the claim of the assessee with the help of evidence, if any, received from the investigation wing, as has been claimed by the Revenue. The Revenue has nowhere proved that any malafide is done by the assessee. Failure to do so, vitiate the addition made under the set of facts. Reference can be made to the decision in CIT vs Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC) and the ratio laid down in Khandelwal Construction vs CIT 227 ITR 900(Guw.). The satisfaction has to be derived from the relevant facts and that to on the basis of proper enquiry by the Assessing Officer and such enquiry must be reasonable and just. In the present case, the Assessing Officer has not brought any evidence on record that the amounts received from M/s Alka Diamond Industries Ltd. and M/s Yash-V-Jewels Ltd. are merely accommodation entries. As mentioned earlier, the Ld. Assessing Officer has acted merely on the basis of information received from the Investigation wing. The ratio laid down by Hon'ble Delhi High Court in CIT vs Vrindaban Farms Pvt. Ltd. squarely gives shelter to the assessee, wherein, it was held that if the identity and

other details of share applicant are available, the share application money cannot be treated as undisclosed income in the hands of the company. In the present case, the assessee even has proved the source of source, therefore, the creditworthiness was also proved, consequently, no addition made u/s 68 of the Act can be said to be justified. The ratio laid down in Creative World Telefilms Ltd. (supra) by Hon'ble jurisdictional High Court squarely comes to the rescue of the assessee. The assessee duly furnished the proof of identity like PAN, bank account details from the bank, other relevant material, genuineness of the transaction, payment through banking channel and even the source of source, therefore, the assessee has proved the conditions laid down u/s 68 of the Act. It is also noted that in spite of repeated request, the Ld. Assessing Officer did not provide opportunity to cross examine the concerned persons and even the relevant information and allegation, if any, made therein, which has been used against the assessee, was not provided to the assessee. At this stage, we add here that mere information is not enough rather it has to be substantiated with facts. The information may and may not be correct. For fastening the liability upon anybody, the Department has to provide the authenticity of the information to the person against whom such information is used. The principle of natural justice, demands that without confronting the assessee of such evidence, if any,

or the information, no addition can be made. Even otherwise, as per Article-265 of the Constitution of India, only legitimate taxes has to be levied and collected. In our humble opinion, the assessee has duly discharged the onus caste upon it, therefore, respectfully following the decisions from Hon'ble Apex Court, Hon'ble High Courts and Hon'ble jurisdictional High Court, we reverse the order of the Ld. Commissioner of Income Tax (Appeal), resultantly, this ground of the assessee is allowed.

Finally, the appeal of the assessee is partly allowed.

This order was pronounced in the open in the presence of ld. representatives from both sides at the conclusion of the hearing on 19/04/2017.

**Sd/-
 (Rajendra)**

लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-
 (Joginder Singh)**

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 21/04/2017

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai

6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**