REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2019
(Arising out of SLP (Civil) No. 29855 of 2018)

Principal Commissioner of
Income Tax (Central) - 1 ...Appellant

Versus

NRA Iron & Steel Pvt. Ltd. ...Respondent

J U D G M E N T

INDU MALHOTRA, J.

Leave granted.

1. The present appeal arises out of the Judgment and Order dated 26.02.2018 passed by a division bench of the Delhi High Court in Income Tax Appeal No. 244 of 2018. The Revenue has challenged the judgment of the High Court by way of the present Appeal.

2. The issue which arises for consideration is that in a case where Share Capital/Premium is credited in the books of account of the Assessee company, the onus of proof is on the

assessee to establish by cogent and reliable evidence of the identity of the investor companies, the credit-worthiness of the investors, and genuineness of the transaction, to the satisfaction of the Assessing Officer.

3. The facts of the case, briefly stated are as under :

3.1. The instant case pertains to the Assessment Year of 2009–10, for which the Respondent Company – Assessee had filed the original Return of Income on 29.9.2009 declaring a total income of Rs.7,01,870.

A Notice was issued u/S. 148 of the Act to re-open the assessment on 13.04.2012 for the reasons recorded therein.

3.2. The Assessee filed submissions on 23.04.2012 to the Notice u/S. 148, and objections on 30.04.2012. The objections were rejected on 13.08.2012. A Show Cause Notice was issued on 13.01.2014. The Assessee filed detailed Written Submissions on 22.01.2014.

3.3. The Assessee Company in its Return showed that money aggregating to Rs. 17,60,00,000/- had been received through Share Capital/Premium during the Financial Year 2009-10 from the following companies situated at Mumbai, Kolkatta, and Guwahati:

S. No.	Name of the shareholder	Amount
(A)Mumbai Based Companies		
1.	Clifton Securities Pvt. Ltd.	95,00,000
2.	Lexus Infotech Ltd.	95,00,000
3.	Nicco Securities Pvt. Ltd.	95,00,000
4.	Real Gold Trading Company Pvt. Ltd.	90,00,000
5.	Hema Trading Company Pvt. Ltd.	95,00,000
6.	Eternity Multi-trade Pvt. Ltd.	90,00,000
(B)Kolkata Based Companies		
1.	Neha Cassettes Pvt. Ltd.	90,00,000
2.	Warner Multimedia Ltd.	95,00,000
3.	Gopikar Supply Pvt. Ltd.	90,00,000
4.	Ganga Builders Ltd.	90,00,000
5.	Gromore Fund Management Co. Ltd.	95,00,000
6.	Bayanwala Brothers Pvt. Ltd.	95,00,000
7.	Super Finance Ltd.	90,00,000
8.	Shivalaxmi Export Ltd.	95,00,000
9.	Natraj Vinimay Pvt. Ltd.	95,00,000
10.	Neelkanth Commodities Pvt. Ltd.	95,00,000
11.	Prominent Vyapaar Pvt. Ltd.	95,00,000
(C) Guwahati based companies		
1.	Ispat Sheets Ltd.	90,00,000
2.	Novelty Traders Ltd.	90,00,000
Total Amount		**17,60,00,000**

It is pertinent to mention that the shares had a face value of Rs. 10 per share, were subscribed by the investor companies at Rs. 190 per share.

3.4. The issue before the Assessing Officer (hereinafter referred to as "AO") was whether the amount of Rs. 17,60,00,000/-allegedly raised by the Respondent through share capital/premium were genuine transactions or not.

3.5. The Respondent Company – Assessee was called upon to furnish details of the amounts received, and provide evidence to establish the identity of the investor companies,

credit-worthiness of the creditors, and genuineness of the transaction.

The AO issued a detailed questionnaire to the Assessee to provide information with respect to the amount of Rs. 17,60,00,000 shown to have been received as Share Capital/Premium from various legal entities.

The AO gave various opportunities to the A.R. of the Assessee to attend the proceedings, and file necessary clarification on the queries raised.

3.6. The Assessee inter alia submitted that the entire Share Capital had been received by the Assessee through normal banking channels by account payee cheques/demand drafts, and produced documents such as income tax return acknowledgments to establish the identity and genuineness of the transaction. It was submitted that, there was no cause to take recourse to Section 68 of the Act, and that the onus on the Assessee Company stood fully discharged.

3.7. The AO had issued summons to the representatives of the investor companies. Despite the summons having been served, nobody appeared on behalf of any of the investor companies. The Department only received submissions

through dak, which created a doubt about the identity of the investor companies.

3.8. The AO independently got field enquiries conducted with respect to the identity and credit-worthiness of the investor companies, and to examine the genuineness of the transaction. Enquiries were made at Mumbai, Kolkatta, and Guwahati where these Companies were stated to be situated.

The result of the enquiry is summarised by the A.O. in his Order as under :

S. No.	**Name of Investor Company**	**AO's Enquiries**	**Amounts invested & Tax returns filed**
1.	Clifton Securities Pvt. Ltd.- Mumbai	Notice Served on 29.11.2011 at the given address but no reply received till date.	95,00,000
2.	Lexus Infotech Ltd.- Mumbai	Notice Served on 19.11.2011 at the given address but no reply received till date.	95,00,000
3.	Nicco Securities Pvt. Ltd. – Mumbai	Notice Served on 29.11.2011 at the given address but no reply received till date.	95,00,000
4	Real Gold Trading Co. Pvt. Ltd.- Mumbai	Address incorrect. The correct address is 2ndflorr, Big Three Building where office found closed bearing the name Hema Trading Co.	90,00,000
5.	Hema Trading Co. Pvt. Ltd.- Mumbai	Notice could not be served as Respondent-Assessee not available at the address given. The premises is owned by some	95,00,000

		other person.	
6.	Eternity Multi Trade Pvt. Ltd.- Mumbai	Notice could not be served as Respondent-Assessee not available at the address given. The premises is owned by some other person.	90,00,000
7.	NehaCassetes Pvt. Ltd.- Kolkatta	A submission on 15.12.2011 through dak was received wherein it was submitted, that the company had applied for 45,000 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (45,00,000/- Ch. No. 039302 dt. 21.10.2008 & Rs. 45,00,000/- Ch. No. 039315 dt. 21.10.2008 drawn on Axis Bank. The Company had shown a total income of Rs. 9,744/- in return for A.Y. 2009-10	Rs. 90,00,000 invested on 21.10.2008 Returned income Rs. 9744
8.	Warner Multimedia Ltd. Kolkatta	A submission on 15.12.2011 through dak was received wherein it was submitted, that the company had applied for 47,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (50,00,000/- Ch. No. 000084 dt. 21.10.2008 & Rs. 45,00,000/- Ch. No. 000083 dt. 21.10.2008 drawn on Kotak Mahindra Bank. The Company had shown Nil income for A.Y. 2009-10.	Rs. 95,00,000 invested on 21.10.2008 Returned income Rs. Nil
9.	Gopikar Supply Pvt. Ltd. Kolkatta	A submission on 15.12.2011 through dak was received wherein it was submitted, that the company had applied for 45,000 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not	Rs. 90,00,000 invested on 21.10.2008 Return income Rs.28,387

		given any reason for paying such a high premium. (50,00,000/- Ch. No. 000040 dt. 21.10.2008 & Rs. 40,00,000/- Ch. No. 000039 dt. 21.10.2008 drawn on Kotak Mahindra Bank. The Company had shown income of Rs. 28,387/- for A.Y. 2009-10.	
10.	Ganga Builders Ltd. Kolkatta	It was submitted, that the company had applied for shares of NRA Iron and Steel Pvt.Ltd. However, they had not specified how many shares, and at what premium they had purchased. The Company had not enclosed their Bank Statement showing the source of fund for share application money. (50,00,000/- Ch. No. 000001 dt. 24.10.2008 & Rs. 40,00,000/- Ch. No. 000002 dt. 24.10.2008 drawn on Kotak Mahindra Bank. The Company had shown income of Rs. 5,850/- for A.Y. 2009-10	Rs. 90,00,000 invested on 21.10.2008 Return income Rs.5850
11.	Gromore Fund Management Ltd. Kolkatta	It was submitted, that the company had applied for 47,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. The Company had shown income of Rs. 14,130/- for A.Y. 2009-10	Rs. 95,00,000 invested on 24.10.2008 Return income Rs.14130
12.	Bayanwala Brothers Pvt. Ltd. Kolkatta	It was submitted, that the company had applied for 47,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (50,00,000/- Ch. No. 000020 dt. 06.11.2008 & Rs. 45,00,000/- Ch. No. 000021 dt. 06.11.2008 drawn on Kotak Mahindra Bank	Rs. 95,00,000 invested on 6.11.2008 Return income Rs. 10626

		The Company had shown income of Rs. 10,626/- for A.Y. 2009-10	
13.	Super Finance Ltd. Kolkatta	It was submitted, that the company had applied for shares of NRA Iron and Steel Pvt. Ltd. However, they had not specified how many shares, and at what premium they had purchased. The Company had not enclosed their Bank Statement showing the source of fund for share application money. (50,00,000/- Ch. No. 069123 dt. 17.11.2008 & Rs. 40,00,000/- Ch. No. 069124 dt. 17.11.2008 drawn on Deutsche bank. The Company had shown income of Rs. 10,730/- for A.Y. 2009-10	Rs. 90,00,000 invested on 17.11.2008 Return income Rs. 10730
14.	Shivlaxmi Export Ltd. Kolkatta	It was submitted, that the company had applied for 47,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (50,00,000/- Ch. No. 121824 dt. 18.11.2008 & Rs. 45,00,000/- Ch. No. 121825 dt. 18.11.2008 drawn on Deutsche Bank. The Company had shown income of Rs. 10,480/- for A.Y. 2009-10	Rs. 95,00,000 invested on 18.11.2008 Return income Rs.10480
15	Natraj Vinimay Pvt. Ltd. Kolkatta	It was submitted, that the company had applied for 41,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (50,00,000/- Ch. No. 000098 dt. 19.11.2008 & Rs. 45,00,000/- Ch. No. 000009 dt. 19.11.2008 drawn on Kotak Mahindra Bank. The Company had shown income of Rs. 42,083/- for A.Y. 2009-10	Rs. 95,00,000 invested on 19.11.2008 Return income Rs.42083

16	Neelkanth Commodities Pvt. Ltd. Kolkatta	It was submitted, that the company had applied for 47,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (50,00,000/- Ch. No. 209681 dt. 5.12.2008 & Rs. 45,00,000/- Ch. No. 209677 dt. 5.12.2008 drawn on Centurion Bank of Punjab Rs. 95 lakhs invested on 5.12.2008 By 2 cheques The Company had shown income of Rs. 9,470/- for A.Y. 2009-10	95,00,000 Return income Rs.9420
17	Prominent Vyappar Pvt. Ltd. Kolkatta	It was submitted, that the company had applied for 47,500 equity shares of Rs. 10/- of NRA Iron and Steel Pvt. Ltd. each at a premium of Rs. 190/- each. The Company had not given any reason for paying such a high premium. (50,00,000/- Ch. No. 205185 dt. 5.12.2008 & Rs. 45,00,000/- Ch. No. 205189 dt. 5.12.2008 drawn on HDFC (Centurion Bank of Punjab) The Company had shown income of Rs. 10,307/- for A.Y. 2009-10	Rs. 95,00,000 invested on 5.12.2008 By 2 cheques Return income Rs.10307
		TOTAL	17,60,00,000

The AO recorded that the enquiries at Mumbai revealed that out of the four companies at Mumbai, two companies were found to be non-existent at the address furnished.

With respect to the Kolkata companies, the response came through dak only. However, nobody appeared, nor did they produce their bank statements to substantiate the

source of the funds from which the alleged investments were made.

With respect to the Guwahati companies – Ispat Sheet Ltd. and Novelty Traders Ltd., enquiries revealed that they were non-existent at the given address.

3.9. On the basis of the detailed enquiries conducted, the A.O. held that the Assessee had failed to prove the existence of the identity of the investor companies and genuineness of the transaction.

The A.O. found that :

i. None of the investor-companies which had invested amounts ranging between Rs. 90,00,000 and Rs. 95,00,000 as share capital in the Respondent Company – Assessee during the A.Y. 2009-10, could justify making investment at such a high premium of Rs. 190 for each share, when the face value of the shares was only Rs. 10;

ii. Some of the investor companies were found to be non-existent;

iii. Almost none of the companies produced the bank statements to establish the source of funds for making such a huge investment in the shares, even though

they were declaring a very meagre income in their returns;

iv. None of the investor-companies appeared before the A.O., but merely sent a written response through dak.

The AO held that the Assessee had failed to discharge the onus by cogent evidence either of the credit worthiness of the so-called investor-companies, or genuineness of the transaction.

As a consequence, the amount of Rs. 17,60,00,000/- was added back to the total income of the Assessee for the assessment year in question.

4. The Respondent Company – Assessee filed an Appeal before the Commissioner of Income Tax (Appeals)-I, New Delhi. Reliance was placed on the decision of the Delhi High Court in *CIT* v. *Lovely Exports Pvt. Ltd*[1]. wherein it was held that :

> *"In the case of a company the following are the propositions of law under section 68. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable cannels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address of PAN indetity of the creditor/subscriber alongwith copies of the*

[1] (2008) 299 ITR 268 (Delhi)

shareholders register, share application forms, share transfer register, etc, it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notice; The Assessing Officer is duty bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation." The SLP filed against the judgment was dismissed."

The Commissioner of Income Tax (Appeals)-I, New Delhi vide Order dated 11.04.2014 deleted the addition made by the A.O. on the ground that the Respondent had filed confirmations from the investor companies, their Income Tax Return, acknowledgments with PAN numbers, copies of their bank account to show that the entire amount had been paid through normal banking channels, and hence discharged the initial onus under Section 68 of the Act, for establishing the credibility and identity of the shareholders.

5. The Revenue filed an Appeal before the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT"). The ITAT dismissed the appeal, and confirmed the order of the CIT(A) vide Order dated 16.10.2017 on the ground that the Assessee had discharged their primary onus to establish the identity and

credit-worthiness of the investors, especially when the investor companies had filed their returns and were being assessed.

6. The Revenue filed an Appeal bearing I.T.A. No. 244/2018 u/S. 260A of the Act before the Delhi High Court to challenge the order of the Tribunal. The Respondent Company – Assessee did not appear before the High Court. Hence, the matter proceeded *ex-parte.* The High Court dismissed the Appeal filed by the Revenue *vide* the Impugned Order dated 26.02.2018, and affirmed the decision of the Tribunal on the ground that the issues raised before it, were urged on facts, and the lower appellate authorities had taken sufficient care to consider the relevant circumstances. Hence no substantial question of law arose for their consideration.

7. Aggrieved by the Order passed by the High Court, the Revenue filed the present S.L.P. (C) No. 29855/2018 before this Court. This Court issued Notice on 12.11.2018 returnable in six weeks. After service was effected on the Respondent Company – Assessee, the matter was listed on 02.01.2019. However, none appeared on behalf of the Respondent Company – Assessee. Consequently, the matter was adjourned for two weeks, and posted on 18.01.2019, when it was ordered that in

case the Respondent Company – Assessee chooses not to enter appearance, the matter would be disposed of ex-parte.

The matter was thereafter listed again on 23.01.2019, when the following Order was passed:

> *"Notice was issued in the matter on 12.11.2018, Office report dated 22.12.2018 indicated that notice was served upon the sole Respondent but none had entered appearance.*
> *By order dated 02.01.2019, last opportunity was given to the Respondent and it was indicated that if the Respondent chose not to enter appearance, the matter would be disposed of ex-parte. Even then none has entered appearance.*
>
> *Having gone through the matter, we give one more opportunity to the Respondent to enter appearance and make submissions with respect to the merits of the matter. If the Respondent still chooses not to appear, the matter shall definitely be decided ex-parte."*

The Respondent Company – Assessee however remained unrepresented even on the subsequent dates i.e. on 31.01.2019 and 05.02.2019. The matter was finally heard on 05.02.2019, when judgment was reserved.

8. We have heard the Ld. Counsel for the Revenue, and examined the material on record.

8.1. The issue which arises for determination is whether the Respondent / Assessee had discharged the primary onus to

establish the genuineness of the transaction required under Section 68 of the said Act.

Section 68 of the I.T. Act (prior to the Finance Act, 2012) read as follows:

> *"68. Cash credits- Where any sum is found credited in the book 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"*
>
> *(emphasis supplied)*

The use of the words "any sum found credited in the books" in Section 68 of the Act indicates that the section is widely worded, and includes investments made by the introduction of share capital or share premium.

8.2. As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer[2] :

- Proof of Identity of the creditors;

[2] *CIT* v. *Precision Finance Pvt. Ltd.* (1994) 208 ITR 465 (Cal)

- Capacity of creditors to advance money; and
- Genuineness of transaction

This Court in the land mark case of *Kale Khan Mohammad Hanif* v. *CIT*[3] and, *Roshan Di Hatti* v. *CIT*[4] laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assesse, and there would be no further burden on the revenue to show that the income is from any particular source.

8.3. With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence, that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge.

[3] [1963] 50 ITR 1 (SC)
[4] [1977] 107 ITR (SC)

The Delhi High Court in *CIT* v. *Oasis Hospitalities Pvt. Ltd.*[5], held that :

> *"The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise."*

It has been held that merely proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established.

In *Shankar Ghosh* v. *ITO*[6], the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The loan amount was rightly held to be the assessee's own undisclosed income.

8.4. Reliance was also placed on the decision of *CIT* v. *Kamdhenu Steel & Alloys Limited and Other*[7] wherein the Court that :

[5] 333 ITR 119 (Delhi)(2011)
[6] [1985] 23 TTJ (Cal.)
[7] (2012) 206 Taxaman 254 (Delhi)

> *"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise if going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."*

9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness.

10. On the issue of unexplained credit entries /share capital, we have examined the following judgments :

i. In *Sumati Dayal* v. *CIT*[8] this Court held that :

> *"if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, vis., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably"*

ii. In *CIT* v. *P. Mohankala*[9] this Court held that:

> *"A bare reading of section 68 of the Income-tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee ; (ii) such credit has to be a sum of money during the previous year ; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee.*

[8] [1995] 214 ITR 801 (SC)
[9] 291 ITR 278

The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature."

(emphasis supplied)

iii. The Delhi High Court in a recent judgment delivered in *PR.CIT -6, New Delhi* v. *NDR Promoters Pvt. Ltd.*[10] upheld the additions made by the Assessing Officer on account of introducing bogus share capital into the assessee company on the facts of the case.

iv. The Courts have held that in the case of cash credit entries, it is necessary for the assessee to prove not only the identity of the creditors, but also the capacity of the creditors to advance money, and establish the genuineness of the transactions. The initial onus of proof lies on the assessee. This Court in *Roshan Di Hatti* v. *CIT*[11], held that if the assessee fails to discharge the onus by producing cogent evidence and explanation, the AO would be justified in making the additions back into the income of the assessee.

[10] 410 ITR 379

[11] (1992) 2 SCC 378

v. The Guwahati High Court in *Nemi Chand Kothari* v. *CIT*[12] held that merely because a transaction takes place by cheque is not sufficient to discharge the burden. The assessee has to prove the identity of the creditors and genuineness of the transaction. :

> *"It cannot be said that a transaction, which takes place by way of cheque, is invariably sacrosanct. Once the assessee has proved the identity of his creditors, the genuineness of the transactions which he had with his creditors, and the creditworthiness of his creditors vis-a-vis the transactions which he had with the creditors, his burden stands discharged and the burden then shifts to the revenue to show that though covered by cheques, the amounts in question, actually belonged to, or was owned by the assessee himself"*
>
> (emphasis supplied)

vi. In a recent judgment the Delhi High Court[13] held that the credit-worthiness or genuineness of a transaction regarding share application money depends on whether the two parties are related or known to each other, or mode by which parties approached each other, whether the transaction is entered into through

[12] [2003] 264 ITR 254 (Gau.)
[13] *CIT* v. *N.R. Portfolio (P.) Ltd.*[2014] 42 taxmann.com 339/222 Taxman 157 (Mag.) (Delhi)

written documentation to protect investment, whether the investor was an angel investor, the quantum of money invested, credit-worthiness of the recipient, object and purpose for which payment/investment was made, etc. The incorporation of a company, and payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus.

vii. Other cases where the issue of share application money received by an assessee was examined in the context of Section 68 are *CIT* v. *Divine Leasing & Financing Ltd.*[14], and *CIT* v. *Value Capital Service (P.) Ltd.*[15]

11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

[14] (2007) 158 Taxman 440
[15] [2008]307 ITR 334

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.

12. In the present case, the A.O. had conducted detailed enquiry which revealed that :

i. There was no material on record to prove, or even remotely suggest, that the share application money was received from independent legal entities. The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee.

For example:

a. The companies Hema Trading Co. Pvt. Ltd. and Eternity Multi Trade Pvt. Ltd. at Mumbai, were found to be non-existent at the address given, and the premises was owned by some other person.

b. The companies at Kolkatta did not appear before the A.O., nor did they produce their bank statements to substantiate the source of the funds from which the alleged investments were made.

c. The two companies at Guwahati viz. Ispat Sheet Ltd. and Novelty Traders Ltd., were found to be non-existent at the address provided.

The genuineness of the transaction was found to be completely doubtful.

ii. The enquiries revealed that the investor companies had filed returns for a negligible taxable income, which would show that the investors did not have the financial capacity to invest funds ranging between Rs. 90,00,000 to Rs. 95,00,000 in the Assessment Year 2009-10, for purchase of shares at such a high premium.

For example:

Neha Cassetes Pvt. Ltd. - Kolkatta had disclosed a taxable income of Rs. 9,744/- for A.Y. 2009-10, but had purchased Shares worth Rs, 90,00,000 in the Assessee Company.

Similarly Warner Multimedia Ltd. – Kolkatta filed a NIL return, but had purchased Shares worth Rs. 95,00,000 in the Assessee Company – Respondent.

Another example is of Ganga Builders Ltd. – Kolkatta which had filed a return for Rs. 5,850 but invested in shares to the tune of Rs. 90,00,000 in the Assessee Company – Respondent, etc.

iii. There was no explanation whatsoever offered as to why the investor companies had applied for shares of the Assessee Company at a high premium of Rs. 190 per share, even though the face value of the share was Rs. 10/- per share.

iv. Furthermore, none of the so-called investor companies established the source of funds from which the high share premium was invested.

v. The mere mention of the income tax file number of an investor was not sufficient to discharge the onus under Section 68 of the Act.

13. The lower appellate authorities appear to have ignored the detailed findings of the AO from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the Respondent Company – Assessee had filed all the primary evidence, the onus on the Assessee stood discharged.

The lower appellate authorities failed to appreciate that the investor companies which had filed income tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the Assesse Company - Respondent. Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility.

The Court/Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee.

14. The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be

placed on the Assessee since the information is within the personal knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee.

15. On the facts of the present case, clearly the Assessee Company - Respondent failed to discharge the onus required under Section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the Assessee's income.

16. The Appeal filed by the Appellant – Revenue is allowed. In the aforesaid facts and circumstances, and the law laid down above, the judgment of the High Court, the ITAT, and the CIT are hereby set-aside. The Order passed by the AO is restored.

Pending applications, if any are disposed of.

Ordered accordingly.

.....J.
(UDAY UMESH LALIT)

.....J.
(INDU MALHOTRA)

New Delhi,
March 5, 2019.