

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH.L.P.SAHU, ACCOUNTANT MEMBER**

**I.T.A .No.-2525/Del/2015
(ASSESSMENT YEAR-2011-12)**

Prabhatam Investment Pvt. Ltd., Rastriya Tower, 38, Rani Jhansi Road, Jhandewalan, Delhi. PAN-AAECP1021H (APPELLANT)	Vs	ACIT, Central Circle-15, New Delhi. (RESPONDENT)
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**I.T.A .No.-2523/Del/2015
(ASSESSMENT YEAR-2011-12)**

Prabhatam Buildtech Ltd., Rastriya Tower, 38, Rani Jhansi Road, Jhandewalan, Delhi-110055. PAN-AADCP9211E (APPELLANT)	Vs	ACIT, Central Circle-15, New Delhi. (RESPONDENT)
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**I.T.A .No.-2524/Del/2015
(ASSESSMENT YEAR-2011-12)**

Prabhatam Buildwell Ltd., Rastriya Tower, 38, Rani Jhansi Road, Jhandewalan, Delhi. PAN-AADCP7475N (APPELLANT)	Vs	ACIT, Central Circle-15, New Delhi. (RESPONDENT)
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Assessee by	Sh. Gautam Jain, Adv.
Revenue by	Sh.S.S.Rana, CIT DR

Date of Hearing	28.03.2017
Date of Pronouncement	17.04.2017

ORDER

PER BHAVNESH SAINI, JUDICIAL MEMBER

This appeal shall disposed off all the above appeals filed by different assessees against different orders of CIT(A)-XXVI, New Delhi dated 27.03.2015 and 30.03.2015 for AY. 2011-12.

2. Since identical issues are involved in all the group appeals, therefore, Ld.

representatives of both the parties mainly argued in ITA No. 2525/Del/2015

(M/s. Prabhatam Investment Pvt.Ltd.) and submitted that issues are identical in the remaining appeals and order in ITA No.2525/Del/2015 may be followed in other appeals.

3. We have heard Ld. representatives of both the parties and perused the material available on record. For the purpose of disposal of all the appeals, we first decide the appeal in ITA No.2525/Del/2015 as under:-

ITA No.2525/Del/2015 (PRABHATAM INVESTMENT PVT.LTD.)

4. In the present appeal, the assessee challenged the order of Ld. CIT(A) in upholding the initiation of proceedings u/s 153A of the I.T.Act, 1961 (in short "Act") and framing of assessment u/s 153A/143(3) since no incriminating material was found as a result of search conducted in the case of the assessee and has also challenged the upholding of the addition of Rs.5.75 crores on account of unexplained share application money.

5. Briefly the facts of the case are that the original return was filed on 30.03.2012 declaring loss at Rs.3,54,378/-. Action u/s 132 of the Act was carried out by the department on 19.03.2012 in Prabhatam Group of cases at their business and residential premises of the Directors. During the course of search various books of accounts and documents etc. were found and seized. Notice u/s 153A of the Act was issued on 08.05.2013 and the assessee in response filed letter stating that it had already filed return of income u/s 139(1) of the Act and same may be treated as filed in response to notice u/s 153A of the Act. The AO issued questionnaire time to time and asked the assessee to file the required details. The assessee attended the proceedings before AO and filed the required details. The assessee company is engaged in the business of investment. In the assessment year under appeal, the

assessee has raised share application money to the tune of Rs.5.75 crores from Kolkata/Howrah based company namely M/s Puneet Oils & Chemicals Pvt. Ltd. (Rs.3.25 crores) and M/s Tanish Tradecom P.Ltd. (Rs.2.50 crores). The assessee was asked to file details of share application money, transfer of share if any, name and address of the shareholders, details of share application money received and to prove identity, creditworthiness and genuineness of the transactions. The assessee filed details of share applicants from whom share application money was received.

6. During the search, pre-search and post-search proceedings on the KJS Group group, it was found that companies of KJS received huge amount of share capital/application money with premium from various entities including entities of Kolkata. These companies were inclusive of the above two companies and M/s Pankaj Infotech Pvt. Ltd. when inquired about the history of these companies, it was gathered that these three companies were incorporated in FY 2007-08. During the first year of incorporation of the three entities allotted shares at unwarranted and unjustifiable premium against the common business sense of investor. The original shareholders remained unchanged for more than one and half year and later on other shareholders have taken the shares from the original shareholders at face value without paying premium. The AO, therefore, noticed that all the shareholders of the aforesaid three companies which were allotted shares initially or held the same through transfers till the emergence of KJS Group were close associates/affiliates of Mr. Suresh Kumar Jain of Kolkata. He created a web of companies wherein common set of shareholders and directors existed. None of the companies carried out any business except receipt of share subscription

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at premium and investing thereof in another group companies which were all managed and controlled by Mr. Suresh Kumar Jain. The AO, therefore, noted that the motive was to transfer the entire/substantial shareholding in favour of KJS Group of minimal or negligible value. The accommodation entries were provided by Mr.Suresh Kumar Jain.

7. The AO also noted that search action was also conducted at the residence of Mr. Suresh Kumar Jain, Kolkata and during his search action, his statement was recorded on oath wherein he categorically admitted that he had provided accommodation entries to KJS Group through the above said three Kolkata companies. The modus operandi of receiving cash through Mr. Amit Goyal and in turn issuance of cheques/RTGS to various entities of KJS Group and their affiliates/joint venture partners in the form of share capital and loans etc. He has agreed that accommodation entries were provided by him to KJS Group during the F.Ys. 2010-11 & 2011-12. The relevant extract of statement of Mr. Suresh Kumar Jain is reproduced in the assessment order in which he has explained that he is related to KJS Group of companies and the Directors of the lender and the other companies and how the transaction had taken place have been explained. He has explained that all the accommodation entries were provided to KJS Group of companies through Mr.Amit Goyal through cheques/RTGS. The AO noted that these three companies including M/s Puneet Oils & Chemicals Pvt. Ltd. & M/s Tanish Tale Tradecom Pvt. Ltd. are the paper companies which have been formed with intent to provide accommodation entries only.

8. During search proceedings, the statement of Mr. Dinesh Gupta, Director of the assessee company was also recorded wherein he has admitted that

money has been received in these group companies from three Kolkata based companies. He has explained that Sh.K.J.Ahluwalia and his companies are/were shareholders of these companies i.e. M/s Prabhatam Buildwell Pvt. Ltd. and M/s Prabhatam Infrastructure Ltd. till 2010. His companies have made the investments as are reflected in the books of accounts. The details were not readily available as number of entities of KJS Group have invested in No. of companies. Share certificates were not issued because it was agreed that investment made by them shall be returned by paying minimum 24% per annum of the investment made by them. He has explained how many investment made by KJS Group companies and explained the entities from which investments have been received in answer to question No.23 of his statement. The AO, therefore, noted that the assessee company has raised share application money from all these three companies of Kolkata. The statement of Sh.K.J.Ahluwalia in search was also recorded in which he has explained his relationship with M/s Prabhatam Group of companies. He admitted to have invested various funds in the M/s Prabhatam Group of companies from his own companies including three companies of Kolkata. The AO noted that it indicates towards the creation of web of companies to provide accommodation entries.

9. The AO in order to examine the genuineness of the share application money received, issued notice u/s 133(6) to both the companies namely M/s Puneet Oil & Chemicals Pvt. Ltd. and M/s Tanish Tele Tradecon Pvt. Ltd. which have been received unserved. The AO also asked the assessee to produce these parties alongwith required information vide letters dated 10.03.2014 by 19.03.2014. The assessee objected to the observation of the

AO. The assessee also submitted that statement of Mr. Suresh Kumar Jain has no evidentiary value and cannot be acted upon until and unless it is corroborated by further evidences. The AO further noted that the net income of both the above share application companies are nominal around Rs.48,000/-, therefore, they cannot advance any money to the assessee. The AO relied upon the decision of Delhi High Court in the case of *N.R. Portfolio Pvt. Ltd.* and noted that the investor had no income at all to make investment in assessee company. The assessee failed to produce the main Director of these companies. Therefore, the amount of Rs.5.75 crores was treated as unexplained cash credit in the books of accounts of the assessee and addition was made u/s 68 of the Act.

10. The assessee challenged the addition before the Ld.CIT(A). The assessee produced copies of the assessment orders u/s 143(3) in the cases of both the share applicant companies M/s Puneet Oil & Chemicals Pvt.Ltd. and M/s Tanish Tale Tradecon Pvt. Ltd. for A.Y. 2012-13 with copies of acknowledgement of their income for A.Ys. 2011-12, 2012-13 & 2013-14. It was also submitted that no incriminating material was found during the course of search and no assessment was pending, therefore, it did not abate and as such the addition is wholly unjustified. The Ld. CIT(A) however, noted that during the course of search, Number of incriminating materials and unaccounted income were found which have been admitted in statements u/s 132(4) of the Act, therefore, legal ground was dismissed.

11. The assessee on merit submitted that the assessee filed sufficient documentary evidences of investor companies before the AO which are addresses of these companies, CIN No., Incorporation date, PAN, Authorized <http://www.itatonline.org>

capital, Paid up capital, names of Directors, status in ROC, bank's name, net worth of the company, confirmations of accounts, Bank statements and acknowledgement of filing of return by them with affidavits of the Directors to prove the ingredients u/s 68 of the Act. The copy of statement of Mr. Suresh Kumar Jain has not been provided to the assessee, therefore, it could not be relied upon to make the addition. He has also retracted from his earlier statement, therefore, his statement had no evidentiary value. During the course of search, no incriminating material was found or detected in the shape of unexplained cash or investment or document in the case of the assessee. The investors company have confirmed giving share application money to the assessee. The evidences and material have been reproduced to show net worth of M/s Puneet Oil & Chemicals Pvt.Ltd. at Rs.99 crores and M/s Tanish Tale Tradecon Pvt. Ltd. at Rs.135.82 crores which are sufficient to explain the investment in assessee company that the investors are corporate entities duly assessed to tax and made investment in assessee company through banking channel from their own sources which have not been rebutted by the AO through any material or evidence on record. Merely because the investors had not replied to the notice u/s 133(6), no adverse inference should be drawn against the assessee. The assessee relied upon the decision of the Apex Court in the case of *CIT vs Lovely Exports Pvt. Ltd.[2008] 319 ITR 5 (SC)* and other decisions. It was further submitted that KJS Group had made investment of Rs.44.70 crores in the assessee company as share application money from various entities in different years and sufficient amount is refunded to KJS Group, therefore, no addition should be made

against the assessee, therefore, findings of AO are incorrect that unexplained investment is made by two companies at behest of KJS Group of Companies..

12. The CIT(A) however, did not accept the contention of the assessee and on the same reasoning as has been given by the AO, confirmed the addition and dismissed this ground of appeal of the assessee. The appeal was dismissed.

13. Ld. Counsel of the assessee reiterated the submissions made before the authorities below. He has submitted that no incriminating material was found during the course of search that the assessee received accommodation entries on account of share application, therefore, assessment u/s 153A of the Act is bad in law. No addition is based on any material found during the course of search. The addition is made on the account of share application money received which is recorded in the books of accounts of the assessee, therefore, assessment u/s 153A is illegal and unjustified. No assessment proceedings were pending before search. He has relied upon the decision of Delhi High Court in the case of *CIT vs Kabul Chawla (Del)* 380 ITR 573. He has further submitted that the assessee produced sufficient evidences before the AO to prove identity of the investor, their creditworthiness and genuineness of the transaction in the matter. The investors had admitted to make investment in the assessee company in the shape of share application money. The assessee filed complete details to show net worth of the lender company with their source to prove their creditworthiness. The copies of their assessment orders u/s 143(3) have also been filed to show that they are assessed by the Income Tax Department. Therefore, the share applicant companies cannot be non-existent. He has referred to the letter filed before the AO dated 24.03.2014 (Paper Book page 157) in which on page 161, the assessee has

given the latest address of both the companies, however, the AO did not issue any notice at their fresh address. The statement of Mr. Suresh Kumar Jain was not provided to the assessee and the assessee has not been allowed cross-examination of his statement at assessment stage, therefore, his statement cannot be read in evidence. Mr. Suresh Kumar Jain also retracted from his statement, therefore, his statement is not worth reliance. The authorities below relied upon the statement of Mr. Suresh Kumar Jain but no addition is made on his statement. His statement was not recorded in the case of the assessee. The statement of Sh. Dinesh Gutpa, Director of the assessee was recorded in which he has confirmed taking genuine share application money from both the above companies. No addition has been made on the statement of Sh. Dinesh Gupta. Both shareholders are assessed to tax and have also been searched, therefore, they are existing parties. All the proceedings have been conducted by the AO at the fag end of the assessment. Since no proceedings were pending against the assessee, therefore, there is no abatement of any proceedings so as to make assessment u/s 153A of the Act. Though, original return was filed late on 30.03.2012 but no notice u/s 143(2) have been issued. As such there is no abatement in the case of the assessee. Ld. Counsel for the assessee relied upon the following decisions:-

(i) *Decision of Supreme Court in the case of CIT vs Lovely Exports P.Ltd. [2008] 216 CTR 0195 in which it was held "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."*

(ii) *Decision of Delhi High Court in the case of CIT vs Kamdhenu Steel & Alloys Ltd. & Ors. 361 ITR 0220 (Delhi) in which it was held "Once*

adequate evidence/material is given, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has “created” evidence, the Revenue is supposed to make thorough probe before it could nail the assessee and fasten the assessee with such a liability under s.68; AO failed to carry his suspicion to logical conclusion by further investigation and therefore addition under s.68 was not sustainable.”

(iii) Decision of Delhi High Court in the case of CIT vs Wellwoth Construction Udyog Ltd. [2015] 92 CCH 0081 in which it was held “Once the initial onus is discharged, the Revenue is not absolved of its duty to collect further material which should assist it in coming to the correct conclusion.”

(iv) Decision of Delhi High Court in the case of Principal CIT vs M/s Goodview Trading Pvt.Ltd. in ITA No.377/2016 dated 21.11.2016 in which the CIT(A) noticed the details of share applicants such as their income tax returns as well as net worth available on the file of assessment record and CIT(A) deleted the addition by holding share applicants had sufficient net worth and finance to invest in assessee. Hon’ble High Court dismiss the appeal of the Revenue by following judgement in the case of CIT vs Lovely Exports Pvt. Ltd. (supra).

(v) The judgement of Delhi High Court in the case of CIT vs Vrindavan Farms P.Ltd. etc. in ITA No.71/2015 dated 12.08.2015 (Delhi) in which the sole basis for the Revenue to doubt their creditworthiness was the low income as reflected in their return of income. It was observed by the ITAT that the AO had not undertaken any investigation of the veracity of the documents submitted by the assessee, the departmental appeal was dismissed by the Hon’ble High Court. Ld. Counsel for the assessee, therefore, submitted that entire addition is wholly justified.

14. On the other hand, Ld. DR relied upon the orders of the authorities below and submitted that statements of Mr. Suresh Kumar Jain and Mr.

Dinesh Gupta, Director of the assessee, were recorded on oath u/s 132(4) and also filed details of seized papers recovered during the course of search as has been highlighted by the CIT(A) to show that incriminating material was found during the course of search, therefore, assessment u/s 153A is valid. Ld. DR relied upon the decision of the Kerala High Court in the case of *E.N. Gopakumar vs CIT [2016] 75 taxmann.com 215 (Kerala High Court)*; decision in the case of *Smt. Dayawanti vs CIT 75 taxmann.com 308 (Delhi High Court)*; decision of Allahabad High Court in the case of *CIT vs Raj Kumar Arora [2014] 367 ITR 517* and *CIT vs Kesarwani Zarda Bhandar Sahson Alld in ITA No.270 of 2014*. Ld. DR also submitted that since the assessee did not file return of income prior to search, therefore, no assessment is completed, therefore, decision in the case of *CIT vs Kabul Chawla (supra)* would not apply. Ld. DR further submitted that the investors had not responded to the notice u/s 133(6) as well as did not appear before the AO. They were having low income, therefore, additions on merit have been correctly made. Ld. DR relied upon the decision of Delhi High Court in the case of *CIT vs Nipun Builders & Developers P.Ltd. 350 ITR 407*; *CIT vs Nova Promoters & Finleases P.Ltd. 342 ITR 169*; *CIT vs Ultra Modern Exports Pvt.Ltd. 40 taxmann.com 458*; *CIT vs N.R. Portfolio Pvt.ltd. 29 taxmann.com 291*; and *CIT vs Empire Builtech P.ltd. 366 ITR 110*. Ld. DR, therefore, submitted that the appeal of the assessee has no merit, the same dismissed.

15. The Counsel of the assessee in the re-joinder also relied upon decision of Delhi High Court in the case of *CIT vs Laxman Industrial Resources Pvt.Ltd.* in *ITA No.169 of 2017* dated 14.03.2017 in which the CIT(A) took note of the material filed by the assessee and provided opportunity to the AO in Remand

proceedings. The AO merely objected to the material furnished but did not undertake any verification. The CIT(A) deleted the addition by relying upon the decision of the Hon'ble Apex Court in the case of *Lovely Exports Pvt.Ltd.* (supra) and judgement of Delhi High Court in the case of *CIT vs Divine Leasing & Finance Ltd.* [2008] 299 ITR 268. The ITAT confirmed the opinion of the Ld.CIT(A). Hon'ble High Court in view of the above findings noted that the assessee had provided several documents that could have showed light into whether truly the transactions were genuine. The assessee provided details of share applicants i.e. copy of the PAN, Assessment particulars, mode of amount invested through banking channel, copy of resolution and copies of the balance sheet. The AO failed to conduct any scrutiny of the document, the departmental appeal was accordingly dismissed.

16. The Ld. Counsel for the assessee also relied upon the decision of the Hon'ble Supreme Court in the case of *Earthmetal Electrical Pvt.Ltd. vs CIT* dated 30.07.2010 in SLP No.21073/99 in which Hon'ble Apex Court held "*we have examined the position, we find that the shareholders are genuine parties. They are not bogus and fictitious therefore, the impugned order is set aside.*" Ld. Counsel for the assessee filed copy of the judgement of the Bombay High Court and the order of the ITAT, Mumbai Bench which was subject matter in SLP before the Hon'ble Supreme Court in which the assessee failed to produce any evidence regarding confirmations of the amount supposed to have been received as share capital from third party. Ld. Counsel for the assessee, therefore, submitted that the case of the assessee is on better footing, therefore, addition on merit may be deleted.

17. We have considered rival submissions. The assessee company is engaged in the business of investment and it had received share application money to the tune of Rs.5.75 crores from Puneet & Oil Chemicals Pvt. Ltd. and M/s Tanish Tale Tradecom P.Ltd. The AO asked the assessee to file confirmation and other documents of the share applicants in order to prove identity, creditworthiness and genuineness of the transaction. The assessee admittedly produced several documentary evidence before the AO in order to prove the above ingredients of section 68 of the Act i.e. the assessee furnished address of the share applicants, CIN No., Incorporation date of company, PAN, Authorized capital, paid up capital, names of Directors, certificate issued by Registrar of Companies and return filed before ROC, net worth of both the companies, confirmation of accounts, copy of bank statement with reconciliation statement, copy of acknowledgement of filing of income tax return for AY under appeal 2011-12 with audited accounts, affidavits of Directors and copies of assessment orders u/s 143(3) for both the investors companies for AYs 2011-12 to 2013-14. The AO did not verify any of these documentary evidences in order to find out the truth in the matter. Thus, the AO failed to make any inquiry on these documentary evidences which are part of Revenue record as well. The search is also conducted in the case of Mr. Suresh Kumar Jain & KJS Group of cases with whom the AO alleged that the investor companies have relations. Therefore, these documentary evidences clearly proved that both the investor companies are existing and genuine companies registered with Registrar of Companies as well as assessed to income tax. No material is produced on record that during course of search in the case of the assessee or other parties as referred to above, any material was

found to prove that the assessee received any accommodation entries from these investors companies. Therefore, the AO did not object to the material evidence furnished and did not undertake any verification. The AO also failed to conduct any scrutiny of the documents and merely relied upon the statement of Mr. Suresh Kumar Jain and others for the purpose of making the addition. The decision of Hon'ble Delhi High Court in the case of *Pr.CIT vs Laxman Industrial Resources Ltd.* (supra) clearly apply to the facts of the case of the assessee that the assessee received genuine share application money from both the investor companies. The assessee on the basis of these documentary evidences have been able to establish that both the shareholders are genuine parties and they are not bogus and fictitious. The decision of the Hon'ble Supreme Court in the case of *M/s. Earthmetal Electrical P.Ltd.* (supra) clearly support the case of the assessee. It may also be noted that the facts considered in this case by ITAT, Mumbai Bench and Hon'ble Bombay High Court (copies of the judgement are placed on record) are not on better footing as brought on record in the case of the assessee. The facts of the case of the assessee and material evidence brought on record are on better footing as compared to the facts considered in the case of *M/s Earthmetal Electrical P.Ltd.* (supra). The assessee specifically pleaded before the CIT(A) and filed the details supported by evidence that net worth of both the investor companies are very substantial so as to make investment in assessee company. They were having sufficient funds with them to make investment in assessee company. The material produced by the assessee have not been doubted and rebutted by the authorities below.

17.1. The authorities below heavily relied upon the statement of Mr. Suresh Kumar Jain who is stated to be associate of KJS Group of cases whereas the assessee company was distinct from the KJS Group. The statement of Mr. Suresh Kumar Jain recorded u/s 132(4) referred to accommodation entry provided to the KJS Group. The statement of Mr. Suresh Kumar Jain was not recorded during the course of search in the case of the assessee. The statement of Mr. Suresh Kumar Jain have not been confronted to the assessee during the assessment proceedings. He was not produced at assessment stage to allow cross-examination by the assessee. No right to cross-examination have been given to assessee to cross-examine the statement of Mr.Suresh Kumar Jain, therefore, his statement cannot be read any evidence against the assessee. We rely upon the decision of the Hon'ble Supreme Court in the case of *Kishanchand Chellaram vs CIT 125 ITR 713 (SC)* in which it was held that any material collected at the back of the assessee and not confronted and no opportunity given to cross-examine, such material cannot be relied upon against the assessee. It may also noted here that Mr. Suresh Kumar Jain has later on retracted from the statement on which no adverse finding has been given. The search was also conducted in the case of KJS Group of cases and statement of Sh.K.J.Ahluwalia was also recorded during search wherein he has explained and confirmed/admitted to have invested in assessee company. No addition has been made against the assessee on the basis of statement of Sh.K.J.Ahluwalia. The statement of Sh.Dinesh Gupta, Director of the assessee company was also recorded in which he has confirmed that KJS Group of companies made investment in assessee company as reflected in the books of accounts but no share certificates have been issued because it was mutually

agreed that investment made by them shall be refunded by paying minimum 24% p.a. of such investment. The authorities below did not make the above addition on the basis of statement of Sh. Dinesh Gupta. The authorities below however, inferred from these statements that accommodation entries would have been received by the assessee company despite Sh.Dinesh Gupta and Sh.K.J.Ahluwalia confirmed the genuineness of the transaction in the matter. As noted above, the statement of Sh.K.J.Ahluwalia cannot be read in evidence against the assessee. Therefore, there was no other material available on record to prove that the investors have no creditworthiness or they have not genuinely made investment in assessee company.

18. The AO doubted the genuineness of the transaction because notice u/s 133(6) could not be served upon the investors and that the assessee was directed to produce both the parties by 19.03.2014. The Ld. Counsel for the assessee however, referred to Paper Book page 157 which is the reply before the AO dated 24.03.2014 in which the assessee has provided correct and updated address of the entity as per MCA website. The AO instead of issuing fresh notice u/s 133(6) at the correct address of the investor companies merely relied upon the fact that the earlier letter under the above provision has returned unserved. Since the AO did not issue fresh notice at the correct address provided by the assessee and no coercive action has been taken for the production of investors, therefore, no adverse inference could be drawn against the assessee. We rely upon the decision of the Delhi High Court in the case of *CIT vs Divine Leasing & Finance Ltd.* 299 ITR 268 in which it was held that “no adverse inference should be drawn if shareholders failed to respond to the notice by AO.” The duty of the AO to investigate creditworthiness of

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shareholders. It was further held in the case of *CIT vs Peoples General Hospital Ltd.* [2013] 356 ITR 65 (M.P. High Court) that “*dismissing the appeals, that if the assessee had received subscriptions to the public or rights issue through banking channels and furnished complete details of the shareholders, no addition could be made under section 68 of the Income-tax Act, 1961, in the absence of any positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented the company's own income from undisclosed sources. It was nobody's case that the non-resident Indian company was a bogus or non-existent company or that the amount subscribed by the company by way of share subscription was in fact the money of the assessee. The assessee had established the identity of the investor who had provided the share subscription and that the transaction was genuine. Though the assessee's contention was that the creditworthiness of the creditor was also established, in this case, the establishment of the identity of the investor alone was to be seen. Thus, the addition was rightly deleted. CIT v. LOVELY EXPORTS P. LTD. [2009] 319ITR (St.) 5 (SC) applied.*”

18.1. Hon'ble Delhi High Court in the case of *CIT vs (i) Dwarkadhish Investment P. Ltd. (ITA No.911 of 2010) & (ii) Dwarkadhish Captial P.Ltd. (ITA No.913 of 2010) [2011] 330 ITR 298 (Delhi High Court)* held “*In any matter, the onus of proof is not a static one. Though in section 68 of the Income Tax Act, 1961, the initial burden of proof lies on the assesses yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or income-tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by*

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any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "source of source". The assessee-company was engaged in the business of financing and trading of shares. For the assessment year 2001-02 on scrutiny of accounts, the Assessing Officer found an addition of Rs.71,75,000 in the share capital of the assessee. The Assessing Officer sought an explanation of the assessee about this addition in the share capital. The assessee offered a detailed explanation. However, according to the Assessing Officer, the assessee failed to explain the addition of share application money from five of its subscribers. Accordingly, the Assessing Officer made an addition of Rs.35,50,000/- with the aid of section 68 of the Act, 1961 on account of unexplained cash credits appearing in the books of the assessee. However, in appeal, the Commissioner of Income-tax (Appeals) deleted the addition on the ground that the assessee had proved the existence of the shareholders and the genuineness of the transaction. The Income-tax Appellate Tribunal confirmed the order of the Commissioner of Income-tax (Appeals) as it was also of the opinion that the assessee had been able to prove the identity of the share applicants and the share application money had been received by way of account payee cheques. On appeal to the High Court: Held, dismissing the appeals, that the deletion of addition was justified."

18.2. Hon'ble Delhi High Court in the case of *CIT vs Winstral Petrochemicals P. Ltd.* 330 ITR 603 (Del.) held that "dismissing the appeal, that it had not been

disputed that the share application money was received by the assessee-company by way of account payee cheques, through normal banking channels. Admittedly, copies of application for allotment of shares were also provided to the Assessing Officer. Since the applicant companies were duly incorporated, were issued PAN cards and had bank accounts from which money was transferred to the assessee by way of account payee cheques, they could not be said to be non-existent, even if they, after submitting the share applications had changed their addresses or had stopped functioning. Therefore, the Commissioner (Appeals) and the Tribunal were justified in holding that the genuineness of the transactions had been duly established by the assessee.”

18.3. It may also be noted here that the AO at the fag end of assessment directed the assessee to produce the investor companies by 19.03.2014. However, the AO passed an assessment order on 29.03.2014 without giving sufficient time to the assessee or to issue notice or summon at the correct address of the investors. Therefore, such circumstances would clearly prove that the assessee genuinely received share application money and investors were having sufficient fund to make investment in assessee company.

18.4. The authorities below have also considered low income of the investor and that they are not existing parties. As noted above, the KJS Group of cases and Mr. Suresh Kumar Jain were subjected to search, therefore, the investor companies were existing companies. They are also assessed to tax u/s 143(3). Copies of the assessment orders in their cases are filed on record. They have also net worth to make investment in assessee company, therefore, low income earned by investors company by itself is no ground to treat the share application money received by the assessee as not genuine. The decision of <http://www.itatonline.org>

the Delhi High Court in the case of *CIT vs Vrindawan Farms Pvt.Ltd.* (supra) squarely apply to the facts of the case. The authorities below, therefore, should not have drawn adverse inference against the assessee. The authorities below have also did not produce any material on record that such investments made in the assessee company was made from coffers of the assessee. We rely upon the decision of the Delhi High Court in the case of *CIT vs Value Capital Services P.Ltd.* [2008] 307 ITR 334 (Delhi High Court) in which it was held that *“dismissing the appeal, that the additional burden was on the Department to show that even if the share applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose.”*

18.5. It may be noted again that the investor companies have confirmed making investment in assessee company who were having sufficient net worth to make investment in assessee company. Therefore, the assessee has been able to prove identity of the share applicants, their creditworthiness and genuineness of the transaction in the matter. The decisions cited by the Ld. Counsel for the assessee clearly support our findings.

18.6. Ld. DR however, relied upon several decisions of Delhi High Court referred to above. In these cases, the gist of the findings are that the assessee failed to prove identity and capacity of the subscriber companies to pay share application money or that amount was received as accommodation entries or that when assessee managed to secured documents like income tax return and bank account of the subscribers in such circumstances, the AO was justified in drawing adverse inference against the assessee and that the AO has doubt

on the documents produced by the assessee. The facts of these decisions are clearly distinguishable from the facts of the case because in the present case, the assessee has been able to prove identity of the investors, their creditworthiness and genuineness of the transaction in the matter. Therefore, the authorities below should not have made or confirmed the addition of Rs.5.75 crores in the hands of the assessee. In view of the above discussion, we set aside the orders of the authorities below and delete the addition of Rs.5.75 crores. This ground of appeal of the assessee is allowed.

19. In view of the above findings, whereby we have deleted the addition on merit, there is no need to consider the issue of initiation of proceedings u/s 153A of the Act. However, we may briefly note that the assessee's sole reliance was on the decision of the Delhi High Court in the case of *CIT vs Kabul Chawla* (supra) in which it was held that *"On the date of search the said assessment already stood completed. Since no incriminating material was unearthed during the search, no addition could be made to such income already assessed."*

20. Ld. DR however in his written submissions referred to several documents which have been referred to CIT(A) in the impugned order to show various documents were found during the course of search in the case of the assessee. Therefore, it is not a case where no incriminating material found during the course of search. May be, this may not be relevant to the ultimate addition made on account of unexplained share application money received of Rs.5.75 crores. Further, the search is conducted in the case of the assessee on 19.03.2012 and original return of income has been filed by the assessee after search on 30.03.2012. Therefore, there is no question of assessment already stood completed on the date of search. Similarly, in the remaining cases i.e., <http://www.itatonline.org>

ITA No.2523/Del/2015, the original return was filed on 23.09.2011 and in ITA No.2524/Del/2015 the original return was filed on 30.09.2011. In these cases, even if the return was filed prior to search but no assessment was completed and no material have been provided by the assessee to prove that the assessments were completed in their cases prior to the search. In these cases also, material was recovered during the course of search. Therefore, the decision in the case of *CIT vs Kabul Chawla* (supra) would not apply to the facts of the case. In view of the above sole reliance of the assessee on the decision Delhi High Court in the case of *CIT vs Kabul Chawla* (supra) is clearly misplaced. This ground of appeal of the assessee has no merit, the same is accordingly dismissed.

21. In the result, the appeal of the assessee is partly allowed.

**ITA No.2523/Del/2015 (Prabhatam Buildtech Ltd.) &
ITA No.2524/Del/2015 (Prabhatam Buildwell Ltd.)**

22. In both the cases, the assesseees have challenged the initiation of proceedings u/s 153A of the Act, since no incriminating material was found during the course of search. Further, in both the appeals of the assessee have challenged the upholding of the addition of Rs.3 crores and Rs.10.09 crores u/s 68 of the Act on account of unexplained share application money received. Both parties submitted that the issues are same as have been considered in the case of Prabhatam Investment Pvt.Ltd. in ITA No.2525/Del/2015. We, therefore, following the reasons for decisions in the case of Prabhatam Investment Pvt.Ltd. (supra), set aside the authorities below and delete the additions of Rs.3 crores and Rs.10.90 crores. These grounds of appeal of the assessee are allowed. However, the legal issue regarding assessment framed

u/s 153A has already been decided against these assesseees, therefore, these grounds of the assessee are dismissed. In the result, both the appeals of the assessee are partly allowed.

23. In the result, all the appeals of the three different assesseees are partly allowed as indicated above.

The order is pronounced in the open court on 17th of April, 2017.

**Sd/-
(L.P.SAHU)
ACCOUNTANT MEMBER**

**Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER**

Date:-17th April, 2017

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI