

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6690/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s. Pratik Syntex Private Ltd.,A-51, Rustomji Adarsh Heritage, Adarsh Vihar Complex, Opp. Marve Road, Malad (W), Mumbai 400064	बनाम/ v.	ITO 13(1)(4), Mumbai
स्थायी लेखा सं./ PAN : AAEC3487H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:		Shri Haresh P. Shah
Revenue by :		Shri Rajat Mittal (DR)

सुनवाई की तारीख /**Date of Hearing** : **01.05.2018**

घोषणा की तारीख /**Date of Pronouncement** : **11.05.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 6690/Mum/2016 , is directed against appellate order dated 08.09.2016 passed by learned Commissioner of Income Tax (Appeals)-21, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 28.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

1. *On the facts and circumstances of the Appellant's case and in law the Ld. Commissioner of Income Tax (Appeals) erred in confirming the addition made by the Ld. AO amounting to Rs. 3 Crores being share*

capital and premium by invoking the provisions of 68 of the Income Tax Act, 1961.”

3. The brief facts of the case are that the assessee is dealer in textiles yarn & is also commission agent. During the course of assessment proceedings u/s 143(3) r.w.s. 143(2), the AO observed that assessee has raised new share capital as per chart below for which the assessee was asked by the AO to prove identity and creditworthiness of all the new shareholders as well genuineness of transaction of raising share capital, detailed as hereunder:

Sr. No.	Name of the Share Holder	No. of shares
1	Viharilal Jhawar	60000
2	Urmila Devi Jhawar	270000
3	Pratik Jhawar	30000
4	Motivate Financial Services Pvt. Ltd	20000
5	Tej Corporate Services Pvt. Ltd	20000
6	Anumeeta Corporate Services Pvt. Ltd	20000

The AO observed that three shareholders namely Shri. Viharilal Jhawar, Smt. Urmila Devi Jhawar and Shri Pratik Jhawar as per chart above from whom share capital was raised during relevant previous year were ‘original shareholders’ of the assessee company and other three shareholders per above chart namely Motivate Financial Services Pvt. Ltd , Tej Corporate Services Pvt. Ltd and Anumeeta Corporate Services Pvt. Ltd are ‘new shareholders’ who subscribed to the shares of the assessee company during the relevant period under consideration. It was observed by the AO that these three new shareholders have invested Rs. 1 crores each in the assessee company by subscribing to the equity shares of the assessee company having face value of Rs. 10 each at a share premium of Rs. 490 each per equity share. The assessee submitted confirmation of accounts of all these three new equity shareholders namely Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd and Anumeeta Corporate Services Pvt. Ltd along with the copy of the relevant page of the bank statement. The AO observed that all three loan confirmations of these

three new shareholders were signed by one Shri. Pradeep Kumar. The assessee could not submit any documents/ evidence to prove genuineness and creditworthiness of these three investing companies namely Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd and Anumeeta Corporate Services Pvt. Ltd. . The AO deputed Inspector to make field enquiries and verify the whereabouts of the shareholders . The inspector submitted report dated 20.03.2015 wherein he stated that shareholders are not available on the given addresses and whereabouts of all these three investing companies are not known. The assessee was confronted about the result of the field enquiry being conducted by the inspector. The AO asked assessee to submit details/whereabouts of these three new shareholders and to prove the genuineness and creditworthiness of these three new shareholders who invested in assessee company to the tune of Rs. 1 crore each aggregating to Rs. 3 crores during the previous year relevant to the impugned assessment year. The assessee in response submitted their unsigned scanned copies of financial statements with respect to Motivate Financial Services Pvt. Ltd and Tej Corporate Services Pvt. Ltd.. No other documents were submitted by the assessee to prove genuineness and creditworthiness of these three new shareholders who introduced share-capital inclusive of share premium to the tune of Rs. 1 crores each aggregating to Rs. 3 crores during previous year relevant to the impugned assessment year. The AO observed that the total share capital (inclusive of share premium) of the assessee company was Rs. 3.37 crores, out of which Rs. 3 crores is invested by the these three new shareholders which comes to 89.02% of the total capital fund of the assessee company and still the assessee is not able to trace these three new shareholders . It was observed by the AO that genuineness and creditworthiness of these three new shareholders could not be proved by the assessee and the onus was on the assessee to prove identity, genuineness and creditworthiness of these three new shareholders which was not satisfied by the assessee as genuineness and creditworthiness of these three new shareholders namely Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd and Anumeeta Corporate Services Pvt. Ltd. could not be proved which were treated by the AO to be unexplained and unproved chargeable to tax within deeming fiction of Section 68, which led to the additions to the tune of Rs. 3 crores in the

hands of the assessee company, vide assessment order dated 28.03.2015 passed by the AO u/s 143(3) of the 1961 Act.

4. Aggrieved by the assessment order dated 28.03.2015 passed by the AO u/s 143(3), the assessee filed an appeal with learned CIT(A). The assessee filed copy of its return of income, computation of income and audited accounts before learned CIT(A). The assessee submitted before learned CIT(A) that all its assets and bank account of the Directors are attached by Debt Recovery Tribunal(DRT) and assessee is not in a position to pay any tax. It was requested by the assessee to decide the appeal on merits based on material on record. The learned CIT(A) observed from appeal memo enclosure that the assessee had claimed to have filed name and address, PAN number, confirmation letter , copy of ledger account and bank statements of the investing companies in respect of the investment received during the year . The learned CIT(A) also observed from appeal memo enclosures that it was also claimed by the assessee that valuation of business were done which justified the price charged for the shares . It was also claimed by the assessee that transactions were entered into with independent unrelated parties and share premium was claimed to be charged keeping in view future profits expected from this line of business. The claim was also made by the assessee in the appeal memo enclosure that issue of shares at a premium is a commercial decision which does not require justification . It was claimed in the appeal memo enclosure by the assessee that just because shares were issued at premium additions u/s 68 was not warranted. The assessee had claimed that if identity of the shareholders stood proved , then no addition can be made u/s. 68 . It was also claimed by the assessee in the appeal memo enclosure filed before learned CIT(A) that payment received in respect of shareholders is on capital account which does not give rise to any taxable income.

The learned CIT(A) rejected the contentions of the assessee keeping in view deeming fiction of the provisions of Section 68 of the Act as in the opinion of learned CIT(A) , the assessee could not discharge its onus u/s 68 to prove identity, creditworthiness and genuineness of the transactions of having received Rs. 3.00 crores as share capital inclusive of share premium from the three new shareholder namely Motivate Financial Services Pvt. Ltd, Tej

Corporate Services Pvt. Ltd and Anumeeta Corporate Services Pvt. Ltd . The learned CIT(A) observed that these three investing companies were not found at the addresses furnished by the assessee . The learned CIT(A) observed that the assessee could not provide whereabouts of these three new shareholders who invested in the share capital of the assessee company. The learned CIT(A) observed that when these parties are not traceable, then sanctity of their confirmations, documents etc are lost. The learned CIT(A) observed that the assessee is a Private Limited Company who must be aware of its investors. The learned CIT(A) observed that even evidences in support of creditworthiness of these investors were not filed. The learned CIT(A) observed that equity shares of Rs. 10 each were issued at a share premium of Rs.490/- per share and no justification/basis for such a huge premium is brought on record . The learned CIT(A) observed that no document/ evidence to prove genuineness of these share capital issued at such a huge premium of Rs. 490/- as against face value of Rs. 10 were submitted by the assessee. It was observed by learned CIT(A) that the assessee company has not declared any dividend and it is beyond human probabilities that such large investments were made without any likelihood of return of such investments. The learned CIT(A) invoked deeming fiction of provisions of Section 68 of the 1961 Act to bring to tax share capital including share premium which otherwise were capital receipt to fasten tax liability on the assessee. The learned CIT(A) confirmed additions to the income in the hands of the assessee of Rs. 3,00,00,000/- which was received by the assessee from these three companies namely Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd and Anumeeta Corporate Services Pvt. Ltd on account of share capital and share premium on the grounds that the assessee had failed to discharge its burden u/s 68 as to establishing identity, creditworthiness of these investing companies as well genuineness of the receipt of share capital and share premium transactions to the tune of Rs. 300 lacs could not be proved by the assessee and hence additions were sustained by learned CIT(A) vide appellate order dated 08-09-2016. While confirming/sustaining additions, the learned CIT(A) relied upon following decisions:

- a) N. Tarika Property Invest (P.) Ltd. v. CIT [2014] 51 taxmann.com 387 (SC),

- b) CIT v. Sophia Finance Ltd. [1994] 205 ITR 98/[1993] 70 Taxman 69 (Delhi),
- c) CIT v. Steller Investment Ltd. [1991] 192 ITR 287/59 Taxman 568 (Delhi),
- d) CIT v. Lovely Exports Ltd. [2008] 299 ITR 268,
- e) CIT v. Nova Promoters & Finlease P. Ltd. [2012] 342 ITR 169/206 Taxman 207/18 taxmann.com 217(Delhi),
- f) CIT v. Nipun Builders & Developers [2013] 350 ITR 407/214 Taxman 429/30 taxmann.com 292 (Delhi),
- g) CIT v. N.R. Protfolio P. Ltd. [2014] 222 taxman 157/42 taxmann.com 339 (Delhi),.
- h) CIT v. Korlay Trading Co. Ltd. (1998) 232 ITR 820(Cal.)
- i) C.Kant & Co. v. CIT (1980) 126 ITR 63(Cal.)
- j) Shankar Industries v. CIT (1978) 114 ITR 689(Cal.)

5. Aggrieved by the appellate order dated 08-09-2016 passed by learned CIT(A), the assessee has come in an appeal before the tribunal . The Ld. counsel for the assessee submitted that the assessment year under consideration is AY 2012-13 and the addition have been made towards unexplained share capital and share premium to the tune of Rs. 3,00,00,000/- . It was submitted that there is an amendment to Section 68 by Finance Act ,2012 with effect from 01.04.2013 and said amendment is not applicable to the assessee as the year under consideration is AY 2012-13 which is prior to the amendment by Finance Act, 2012 . Thus, it was submitted that the Revenue cannot ask for source of source of investments made these three new shareholders. It was submitted that confirmations were filed from these three new shareholders along with their bank statements. It was submitted that financial statements were also filed of two of the new shareholders namely M/s Motivate Financial Services Pvt. Ltd and Tej Corporate Services Pvt. Ltd.. It was submitted that Form No. 2 executed by the assessee was also filed in the paper book wherein it is declared that the assessee has allotted equity shares of face value Rs 10 each at a share premium of Rs. 490 per share.It was submitted that the said form was duly filed with Ministry of Corporate Affairs and receipt is also placed in paper book. Our attention was drawn to list of allottees, Resolution passed by the assessee company to substantiate that the proper

documentations were produced before the authorities below. The said documents are placed in paper book filed by the assessee with the tribunal. The Ld. Counsel for the assessee relied upon the decision of Hon'ble Bombay High Court in the case of CIT v. Gagandeep Infrastructure Private Ltd. (2017) 394 ITR 680 (Bom). The learned counsel for the assessee also relied upon the decision of Hon'ble Supreme Court in the case of CIT v. Lovely Exports P. Ltd. (2008) 216 CTR 195(SC), decision of Hon'ble Bombay High Court in the case of Principal CIT v. Apeak Infotech reported in (2017) 397 ITR 0148(Bom.) , decision of Hon'ble Bombay High Court in the case of CIT v. Orchid Industries Private Limited (2017)397 ITR 0136(Bom.), decision of ITAT Mumbai in the case of Shakti Hardware Collections Private Limited v. DCIT in ITA no. 6301/Mum/2014 dated 31.01.2018 and decision of the Mumbai-Tribunal in the case of Arceli Realty Ltd. v. ITO reported in (2017) 50 CCH 0154(Mum-trib.).

The Ld. DR on the other hand relied upon the appellate order of the learned CIT(A) and submitted that Inspector was specifically deputed to make field enquiries and trace the shareholders but they could not be located . It was submitted that the copy of the inspector report was given to the assessee but the assessee could not give current addresses of these parties . The learned DR submitted that the assessee could not discharge onus cast on it by virtue of Section 68 and hence additions as were sustained by learned CIT(A) are justified. The learned DR relied upon the decision of Hon'ble Bombay High Court in the case of Konark Structural Engineering P. Ltd. v. DCIT [2018] 90 taxmann.com 56(BOM) , Hon'ble High Court of Gujarat decision in the case of Pavankumarm Sanghvi v. ITO [2018] 90 taxmann.com 386 (Guj) . The learned DR submitted that money is coming into the bank accounts of these investing companies and thereafter immediately the said money is going out from the bank account and there is no significant bank balance maintained by these investing companies which clearly shows that these are conduit/shell companies used to launder money by way of accommodation / hawala transactions towards share capital/share premium. It was also submitted that there are not much income in the P&L account of these investing companies which also go on to prove that these are shell companies. The learned DR drew our attention to the paper book filed by assessee wherein bank statements of all the three investing companies as

well as financial statements of the two companies namely Motivate Financial Services Pvt. Ltd and Tej Corporate Services Pvt. Ltd were placed . The Id. DR submitted that no audited financial statement of Anumeeta Corporate Services Pvt. Ltd were submitted by the assessee. The learned DR also relied upon the decision of Hon'ble Delhi High Court decision in the case of Principal CIT v. Bikram Singh (2017) 85 taxmann.com 104(Del.). It was submitted by Ld. DR that these companies who have invested Rs. 3 crores in assessee company do not have necessary financial capabilities to invest such a huge amount with the assessee company.

The Ld. AR on the other hand made an attempt to distinguish the decision relied upon the by learned DR and submitted that the cases relied upon by Ld. DR related to the cash credit by way of loans and not by way of share capital. The learned AR submitted that amendment to section 68 made by Finance Act, 2012 is not retrospective . It was submitted that Revenue cannot insist on explaining source of source of these investments. It was submitted that share premium is a capital receipt and assessee has discharged its onus.

6. We have considered rival contentions and perused the material on record including orders of the authorities below , paper book filed by the assessee running into 1-32 pages and case laws relied upon by the both the parties . The assessee is engaged in the business as dealers of textiles yarn & commission agent. The assessee has share capital (inclusive of share premium) issued to the tune of Rs. 337 lacs out of which Rs. 37 lacs is invested by original promoters namely Shri. Viharilal Jhawar, Smt. Urmila Devi Jhawar and Shri Pratik Jhawar(hereinafter called "original promoters") while the assessee raised balance share capital(inclusive of share premium) to the tune of Rs. 3 crores from three new parties namely M/s Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd. and Anumeeta Corporate Services Pvt. Ltd each subscribing Rs. 1 crores each . These three new parties have invested Rs. 3 crores in 60000 equity share of the assessee company of the face value of Rs. 10 each at a premium of Rs. 490 per equity share. Thus, the issue price to these three new share holders was at Rs. 500 per share as against the face value of equity share of Rs. 10 each of the assessee company while the original promoters are allotted equity shares of

Rs. 10 each at par and no share premium is charged from original shareholders. It is pertinent to mention that 3,60,000 equity shares of Rs. 10 each were issued to original promoters at face value of Rs. 10 per share in this year itself while new shareholders were allotted 60000 equity shares of Rs. 10 each at share premium of Rs. 490 per share i.e. at issue price of Rs. 500 per share. Thus , these three new parties inducted 89% out of the total share capital inclusive of share premium being Rs. 3 crore while the assessee's original promoters only inducted Rs. 37 lacs which consisted of 11% of the capital introduced in the assessee company. These three investing companies namely M/s Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd. and Anumeeta Corporate Services Pvt. Ltd have subscribed to 60000 equity share by investing Rs. 300 lacs as against Rs. 37 lacs invested by the original promoters by subscribing to 3,70,000 equity shares of Rs. 10 each at face value. Thus by investing 89% of the total capital , these three new shareholders got 14% shares of the company while by investing merely 11% of the capital introduced , original promoters got hold of 86% of shares. It is incomprehensible that the assessee company is not aware of the whereabouts of the new shareholder who had substantially contributed to the capital of the assessee company to the tune of Rs. 300 lacs out of total capital deployed of Rs.337 lacs. It is well known that the ownership , management and control over the companies is exercised by persons holding majority of shares . Thus, the shareholders who invested as much 89% of the capital introduced have been allotted 14% of the company's shares i.e. they are reduced to minority shareholders albeit they contributed bulk of capital introduced in the assessee's company while the majority shareholding holding shares to the tune of 86% are held by the original promoters who merely invested 11% of the total capital introduced in the assessee's company. Thus, within this relevant year under consideration shares were allotted to original promoters at par value of Rs. 10 per share while new shareholders were allotted shares at a price of Rs. 500 per share. No justification for such different issue price even within this relevant year under consideration is brought on record. No doubt situations could arise in genuine investments also about the differential pricing of shares to outsiders vis-a-vis promoters , but the problems of the assessee got aggravated by non tracing of these three new shareholders as the assessee also could not furnish the current addresses of these new shareholders and the

whereabouts of these new shareholders are also not known. The inspector who was deputed by the AO to make field enquiries reported that these three new shareholders are not available at the given addresses and their whereabouts are not known. The assessee was confronted with the adverse inspector report but the assessee could not produce current addresses of these three new shareholders. The assessee did not file any cogent material/evidences to justify chargeability of such a huge share premium from these three new shareholder vis-a-vis issuing shares at par to the original promoters within the same relevant year under consideration. The assessee did not placed reliance even on its own audited financial statements to prove and justify chargeability of huge share premium of Rs. 490/- per share as against face value of Rs. 10 per share . The assessee did not rely on its own financial statements , business model and financial indicators as are existing in its audited financial statements to justify charging of huge share premium of Rs. 490 per share as against face value of Rs. 10 per share from these new shareholders. The problem got further aggravated when the assessee does not bring on record project report or any other cogent material justifying issue of shares at huge premium which could reflects viability, higher profitability and bright future prospects of the assessee company by implementing project for which funds were raised at huge share premium to justify chargeability of such a huge share premium . The assessee's claim in statement of fact/written submissions as to justification of share premium / valuation etc are not substantiated through any cogent evidences on record and are merely bald statements which cannot be relied upon in the absence of cogent material/evidences brought on record by the assessee. The assessee raised funds to the tune of Rs. 300 lacs from these new shareholders and it was for the assessee to have brought on record cogent material to substantiate its contentions and if the evidences are withheld by the assessee then it is at assessee's own peril as presumption will be drawn against the assessee. The assessee has raised share capital inclusive of share premium from these three parties to the tune of Rs. 3 crores and onus is on the assessee to prove genuineness of the transaction for raising of share capital to the tune of Rs. 300 lacs as well to prove identity and creditworthiness of these three shareholders. This is the mandate of Section 68 of the 1961 Act and it was for the assessee to have brought cogent evidences to satisfy the ingredients of Section 68 of the 1961

Act. No doubt Section 56(2)(viib) of the 1961 Act read with Section 2(24)(xvi) are placed in the statute by Finance Act, 2012 w.e.f. 01-04-2013 and the impugned AY under consideration is AY 2012-13 but when the genuineness of the transaction of raising of share capital at huge valuations is itself in question then parameters of Section 68 are to be compulsorily fulfilled and the onus is on the assessee to prove that the transaction is genuine. Thus, to contend that Section 56(2)(viib) r.w.s. 2(24)(xvi) are placed in statute by Finance Act, 2012 w.e.f. 01-04-2013 and no question can be raised as to the valuation of shares at an huge share premium is not correct as in the instant case, the genuineness of the transaction of raising of share capital inclusive of share premium to the tune of Rs. 300 lacs from these three new shareholders is itself not proved and the assessee was asked by the authorities to prove the same keeping in view mandate of Section 68 of the 1961 Act which assessee failed to prove. Section 68 of the Act cast obligation on the assessee 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 of credit thereof or the explanation offered by the assessee is found not satisfactory in the opinion of the AO, the sum so credited may be treated as income and charged to income-tax as income of the assessee of that previous year. The burden/onus is cast on the assessee and the assessee is required to explain to the satisfaction of the AO cumulatively about the identity and capacity/creditworthiness of the creditors along with the genuineness of the transaction to the satisfaction of the AO. All the constituents are required to be cumulatively satisfied. If one or more of them is absent, then the AO can make additions u/s 68 of the Act as an income of the tax-payer. There are companies which are widely held companies in which public are substantially interested which comes out with an initial public offers(IPO) wherein shares are listed on stock exchanges and widely traded, wherein members of public make subscriptions in pursuance to the Prospectus issued by the company. Issue of shares in these cases to general public in India as well abroad are approved, regulated and monitored by various authorities who are engaged in regulating and managing securities market such as Securities and Exchange Board of India(SEBI), Stock Exchanges, Government of India etc.. Those members of public who make subscription in Public issues of securities are widely scattered all over the country or even outside India as

any person entitle to apply as per the conditions prescribed in the prospectus can place an application subscribing to the shares of the company by depositing duly filled in application along with application money with the designated authorized recipients of the company stipulated in the prospectus such as bankers, brokers, under-writers, merchant bankers, company offices etc. These shareholders who are member of public are un-known persons to the company issuing shares and the company issuing shares have no control/mechanism to verify their creditworthiness etc. and the burden of proof in such cases is different , but there is another class of companies which are closely held companies in which public are not substantially interested who are mostly family controlled closely held companies and they raise their share capital from their family members, relatives and friends and in these companies since share capital is received from the close knit circles who are mostly known to the company/promoters, the onus as required u/s 68 of the Act is very heavy to prove identity and capacity of the shareholders and genuineness of the transaction. The onus of widely held company could be discharged on the submissions of all the information contained in the statutory share application documents and on not being satisfied the AO may proceed against the shareholders u/s 69 of the Act instead of proceeding against the company, but in the closely held companies as in the instant case before us the share capital are mostly raised from family, close relatives and friends and the assessee is expected to know the share subscribers and the burden is very heavy on the assessee to satisfy cumulatively the ingredients of Section 68 of the Act as to identity and establish the credit worthiness of the creditors and genuineness of the transaction to the satisfaction of the AO , otherwise the AO shall be free to proceed against the assessee company and make additions u/s 68 of the Act as unexplained cash credit. The use of the word 'any sum found credited in the books' in Section 68 indicates that it is widely worded and the AO can make enquiries as to the nature and source thereof. The AO can go to enquire/investigate into truthfulness of the assertion of the assessee regarding the nature and the source of the credit in its books of accounts and in case the AO is not satisfied with the explanation of the assessee with respect to establishing identity and credit worthiness of the creditor and the genuineness of the transactions, the AO is empowered to make additions to the income of the assessee u/s 68 of the Act as an unexplained credit in the

hands of the assessee company raising the share capital because the AO is both an investigator and adjudicator. In our considered view, merely submission of the name and address of the share subscriber, Balance Sheet of affairs of the share subscriber and bank statement of the share subscribers is not sufficient as the AO is to be satisfied as to their identity and creditworthiness as well as to the genuineness of the transaction entered into. These three new share holders in this instant case are not traceable and their whereabouts are not known. The inspector has given adverse report after making field enquiries. The assessee could not give their latest addresses nor could produce them before the authorities below and even before us these shareholders could not be produced for their examination. These shareholders have contributed 86% of the capital deployed in the assessee company being Rs. 300 lacs out of total capital deployed of Rs. 337 lacs and still the major contributors of the capital are not available which itself cast serious apprehension about the genuineness of the transaction of raising share capital by the assessee company . Once the AO got field enquiries made through inspector who gave adverse report, the onus shifts back to the assessee to produce the shareholders before the AO and if the assessee falters the additions can be made u/s 68 of the Act.. The Hon'ble Supreme Court dealt with this issue in A. Govindarajulu Mudaliar v. CIT (1958) 34 ITR 807(SC),as under:

*“Now the contention of the appellant is that assuming that he had failed to establish the case put forward "by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, **that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree.** Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. **When both these explanations were rejected, as they have been, it was clearly open to the Income-tax Officer to hold that the income must be concealed income.** There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash*

received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs.”

Now. Let us evaluate the quality of evidences furnished by the assessee before the authorities below which are placed in paper book filed before us containing 1-32 pages. The assessee has filed confirmation from these three parties which is signed by the same person namely one Mr. Pradeep Sharma in all the three cases (pb/page 1,11 and 21) which is indicative of the fact that one person controlled all these three new shareholders. The assessee did file unsigned financial statements of M/s Motivate Financial Services Pvt. Ltd and Tej Corporate Services Pvt. Ltd. which has common auditors namely N H Vyas and Company which is again indicator of the same persons controlling these companies. The assessee did not file financial statements of Anumeeta Corporate Services Private Limited. The perusal of the financial statements of the two new shareholders so filed namely M/s Motivate Financial Services Pvt. Ltd and Tej Corporate Services Pvt. Ltd. revealed that both the said companies have miniscule paid up capital of Rs. 1 lacs while share application money raised by them are Rs. 250 lacs which is stated to be invested as shown under the head 'Investments' to the tune of Rs. 250 lacs, for which no details of investing companies as well as invested companies are given in their financial statements. Their Income and cash flows are also not substantial but very modest and are not sufficient enough to justify that these companies are making genuine investments. The assessee has filed bank statement from 01-02-2012 to 31-03-2012 of M/s Motivate Financial Services Pvt. Ltd, Tej Corporate Services Pvt. Ltd. and Anumeeta Corporate Services Pvt. Ltd. The bank statement of Tej Corporate Services Private Limited filed in paper book did not reveal the transaction of investing of Rs. 100 lacs by the said company in the assessee company as no such bank entry towards transfer of Rs. 100 lacs to the assessee company could be seen from the bank statements filed before the tribunal (pb/page 13-14). The perusal of the bank statement of these three parties otherwise clearly reveals that the money is just received in their bank account on several occasions which is immediately transferred out of their bank account to some other entities and the balance maintained at any given point of time in

their bank account is minuscule . It is also observed from their bank statement for the period of February 2012/March 2012 that common parties are transferring huge amount of money into their bank accounts such as Loyana Mercantile Private Limited , Olympia Sales Agency Private Limited and Girivar Infrastructures Private Limited etc on several occasions . The perusal of the Balance Sheet of the two companies namely Motivate Financial Services Pvt. Ltd and Tej Corporate Services Pvt. Ltd. clearly reveals that they do not have any financial strength of their own to justify such a huge investment in the assessee company and that too at share premium of Rs. 490 per share as against face value of share of Rs. 10 each. The perusal of the financial statements does not reveal that these companies are into any organised business of certain magnitude while perusal of the financial statements typically reveals and points towards peculiarity of being typical a shell companies which instead of doing any genuine business are undertaking huge voluminous movement of money from one entity to another entity.

Now, coming to the case laws relied upon by both the rival parties. First, we will deal with the case laws relied upon by the assessee. The assessee relied upon decision of ITAT-Mumbai in the case of Arceli Realty Limited(supra) but the said case is distinguishable as in this case , the tax-payer duly discharged onus caste on it per Section 68 , existence of shareholders were not in doubt and all the primary evidences were duly submitted by the taxpayer satisfying all the ingredients of Section 68 which led tribunal to rule in favour of assessee, while in the instant case before us, these three new shareholders are not traceable , their creditworthiness is not proved and genuineness of the entire share transaction was not proved as discussed in details by us in this order. Similar was the fact situation in the case of Shakti Hardware Collections Private Limited(Supra) wherein tribunal based on factual matrix of the case and evidence on record arrived at the decision that no additions are warranted u/s 68 as ingredients of Section 68 of the Act stood complied with in the said case and the taxpayer did discharged its onus caste u/s 68. The assessee reliance on the case of Orchid Industries Limited(supra) is also not correct as in that case the finding of fact is arrived at that the shareholders have sufficient funds in their bank accounts for making investment in the tax-payer company and their creditworthiness

stood proved which was supported by the strength of their financial statements while in the instant case before us, we have undertaken detailed evaluation of evidence on record to come to conclusion that the creditworthiness of new shareholders is not proved as well genuineness of transaction of raising share capital also stood unproved. Similar is the case of Apeak Infotech(supra) relied upon by the assessee as in this case the shareholders confirmed the transaction during assessment proceedings before the AO while in the instant case, the shareholders are not traceable. In that case of Apeak Infotech(supra), the tax-payer led the evidence to satisfy ingredients of Section 68 as to identity, creditworthiness and genuineness of the transaction while in the instant case we have arrived at finding of fact that creditworthiness of the shareholders and genuineness of the transaction was not proved. This takes us to the landmark judgment of Hon'ble Supreme Court in the case of Lovely Exports Private Limited(supra) relied upon by the assessee . It was held by Hon'ble Calcutta High Court in the case of Rajmandir Estates Private Limited v. Pr. CIT reported in (2016) 70 taxmann.com 124(Cal.) at para 25 that

“the judgement in the case of Lovely Exports (P.) Ltd. (supra) lends no assistance to the assessee because in that case the Division Bench reiterated that omission to make an enquiry, where such an exercise is provoked, shall render the order of the assessing officer both erroneous and prejudicial to the revenue. The Division Bench went on to hold that the revenue should not harass the assessee where “the preponderance of evidence indicates absence of culpability”. In the present case there exists reasonable suspicion if not prima facie evidence of culpability”

The decision of Hon'ble Calcutta High Court in the case of Rajmandir Estates Private Limited(supra) stood affirmed by Hon'ble Supreme Court in the case of Rajmandir Estates Private Limited v. Pr. CIT reported in (2017) 77 taxmann.com 2845(SC) and SLP stood dismissed. This takes us to the decision of Hon'ble Bombay High Court in the case of CIT v. Gagandeep Infrastructure Private Limited(supra) wherein Hon'ble Bombay High Court considered the factual matrix of the case wherein it was observed that the taxpayer satisfied the three ingredients of Section 68 which stood proved namely identity and creditworthiness of shareholders and genuineness of the transaction and on that factual matrix decision of the tribunal was accepted wherein tribunal ruled in favour of the assessee by holding that the taxpayer did satisfied all the three ingredients of Section 68. Thus all the case

laws relied upon by the assessee are distinguishable keeping in view factual matrix of the case before us.

The learned DR on the other hand has rightly relied upon the decision of Hon'ble Bombay High Court in the case of Pr. CIT v. Bikram Singh(supra) wherein Hon'ble Bombay High Court confirmed additions as the taxpayer could not prove the financial strength of the lender to have lent such a huge sums of money to the taxpayer. The same is the factual matrix of the case before us as the three new shareholders financial capability and creditworthiness to invest Rs. 300 lacs could not be, inter-alia , stood proved apart from non proving of the genuineness of the aforesaid share transactions to the tune of Rs. 300 lacs with these three new shareholders. The learned DR also rightly relied upon decision of Hon'ble Bombay High Court in the case of Konark Structural Engineering Private Limited(supra) wherein the summons issued by the AO to the shareholders u/s 131 returned unserved and also the shareholders were first time assessee's and were not earning enough income to make deposits in question , the Hon'ble Bombay High Court on that factual matrix of the case confirmed additions u/s 68. In the instant appeal before us, the inspector was deputed by the AO to make field enquiries who could not locate these three shareholders and the assessee also could not furnish the current addresses of these three new shareholders. These in the instant case before us, these three shareholders did not have sufficient income to justify making these huge investments and factual matrix of the instant appeal before us justify confirming additions u/s 68 which are similar to the factual matrix in the case of Konark Structural Engineering Private Limited(supra). Similarly, learned DR rightly relied upon decision of Hon'ble Gujarat High Court in the case of Pavankumarm Sanghvi(supra) as in this case the loans made by the lenders to the tax-payer are preceded by credit entry of similar amounts in their bank account and the bank balance maintained in their bank account is miniscule , on that factual matrix the Hon'ble Gujarat High Court affirmed the additions. In the instant case before us, the factual matrix is similar as the investment in assessee company by these new shareholders as detailed by us is preceded by the credit entries in the bank account of these new shareholders of equivalent amount and the bank balance regularly maintained by these new shareholders is miniscule.

Thus, in our considered view based upon our detailed discussions and reasoning as given above, we are of the view that the assessee is not able to prove creditworthiness of these three investing companies and genuineness of these transactions of issuing share capital of Rs. 300 lacs(inclusive of share premium)by the assessee company could also not be proved and the additions were rightly made by the AO within deeming fiction of Provisions of Section 68 of the Act. The onus was on the assessee company to bring on record the cogent evidences to prove the creditworthiness of the share subscribers and genuineness of the transaction which in the instant case the assessee is not able to prove the same as per the facts emerging from the records and material before us as set out above and in our considered view in the instant case the transactions were nominal rather than real. The creditworthiness of the shareholders is not proved because they did not had their own money as every payments made by them towards share money in favour of the assessee is preceded by deposit in the bank account of the new shareholders and the balance maintained regularly in their bank accounts was miniscule. The genuineness of the transactions is also not proved as to how such a huge sum of money got invested by the share subscribers and that too at a huge share premium of Rs. 490 per share as no evidences as to the strength of its financial statement or details of some very lucrative profitable project carried on by the assessee is also not brought on record which could warrant justification of such as huge share premium as well justification for these unknown companies being new shareholders to have invested Rs. 300 lacs in the assessee company. These three new shareholders could not be traced and they could not be interrogated by the AO which was essential to unearth the truth as they were not traceable and assessee did not produced the shareholders before the authorities below. Merely saying that return of allotment in form no 2 was filed with the Ministry of Corporate Affairs or Resolutions were passed by the assessee or these companies have Corporate Identification Numbers is not sufficient as these are merely ministerial/administrative functions which needs to be done in any case by all the companies allotting shares but the moot question is as to the creditworthiness of these three new share holders to invest such a huge amount of Rs. 300 lacs in assessee company as well whether these share transactions raising Rs. 300 lacs from these three new shareholders at

huge valuation/share premium were genuine and justified which we have wide detailed reasoning above held otherwise. Under these circumstances keeping in view of cumulative reasons and summation of our discussions as set out above, we are of the considered view that the Revenue has rightly made the addition of Rs. 300 lacs received as share subscription as unexplained cash credit u/s. 68 of the Act which we sustained and we donot found any infirmity in the orders of the learned CIT(A) which we sustain/upheld. The assessee fails in this appeal. We order accordingly.

7. In the result , appeal of the assessee is dismissed.

Order pronounced in the open court on 11.05.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 11.05.2018 को की गई ।

Sd/-

Sd/-

(C.N PRASAD)
JUDICIAL MEMBER

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 11.05.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI