आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 1835/Mum/2014

(**निर्धारण वर्ष /** Assessment Year : 2006-07)

आयकर अपील सं./I.T.A. No. 1836/Mum/2014

(**निर्धारण वर्ष /** Assessment Year : 2007-08)

M/s Royal Rich Developers Pvt. Ltd., C/o Suresh Velji Faria, Mahavir General Store, 154, Bora Bazar Street, Fort, Mumbai – 400001.	**बनाम**/ v.	D.C.I.T. – OSD – II, Central Range – 7, 4th floor, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai.
स्थायी लेखा सं./PAN : AADCR 2578 J		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Shri Kirit Sheth
Revenue by :	Shri A.K. Srivastava,CIT DR & Shri Sunil Kumar Agarwal,JCIT

सुनवाई की तारीख /**Date of Hearing : 26.05.2016**

घोषणा की तारीख /**Date of Pronouncement : 24-08-2016**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

These two appeals filed by the assessee company for the assessment years 2006-07 and 2007-08 are directed against two separate appellate orders of the learned Commissioner of Income Tax (Appeals)- 40, Mumbai (Hereinafter called "the CIT(A)") both dated 24th February, 2014, the appellate proceedings before the learned CIT(A) arising from the two separate assessment orders dated 14.12.2009 and 18.12.2009 respectively passed by

the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) read with Section 147 of the Income Tax Act,1961 (Hereinafter called "the Act") and Section 143(3) of the Act respectively.

2. The following common grounds of appeal (only change in the figures) are raised by the assessee in both these appeals in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

> "1. The learned C.I.T. (A) has erred in upholding the addition of Rs. 1,60,00,000/- (for A.Y. 2006-07) and Rs. 3,75,00,000/- (for A.Y. 2007-08) on account of alleged bogus share subscription, as unexplained cash credit u/s. 68 of the Income Tax Act, 1961.
>
> Your appellant respectfully submits that on facts and in law the addition of Rs. 1,60,00,000/- (for A.Y. 2006-07) and Rs. 3,75,00,000/- (for A.Y. 2007-08) is unjustified and should therefore be deleted."

3. First we shall take up the assessee's appeal in ITA No. 1835/Mum/2014 for the assessment year 2006-07. The brief facts in this case are that the assessee company belongs to Shri Vinod Faria/Milan Dalal group of cases. A search and seizure action u/s 132 (1) of the Act was carried out on 30th May, 2008 at the office and residential premises of Shri Vinod Faria, Director and the key person of the group were covered. The premises of the assessee company at Mahavir Annexe, 345, Kalbadevi Road, Mumbai was also covered u/s 133A of the Act on 30th May, 2008. During the course of survey action at the office of the assessee various incriminating documents containing share application forms, blank transfer forms and blank receipts for repurchase of the allotted shares , copies of bank pass book of share subscribers where cash has been deposited etc. were found and impounded. The assessee company was incorporated on 17th March, 2006 and the Directors were Shri Vinod K. Faria, Shri Suresh K. Faria and Shri Parag Amarshi Nisar. The assessee company had issued 4 lacs equity sharers in

financial year 2005-06 and 9,37,500 shares in financial year 2006-07. The shares of the face value of Rs. 10/- per share had been issued at a premium of Rs. 30/- per share. Thus an amount of Rs. 1.60 crores was credited as share subscription in the financial year 2005-06 and Rs. 3.75 crores in the financial year 2006-07 .The details of the incriminating documents found and impounded during the survey action are as under:-

> "Annexure A-1 Pages 1 to 216 impounded from R. No.47. 2nd Floor. Bhupen Chamber, Dalal Street, Fort, Mumbai -1.
>
> This file contains the documents such as acknowledgement of the return filed, copy of the bank passbook, blank transfer forms and blank stamped receipts given by the share subscribers of the assessee company. The share subscription credited in the books of accounts of the assessee in the names of the various persons is mere accommodation entries obtained by payment of the equivalent amount of cash + other charges and hence the same is bogus in nature. The documentary evidence in this file confirms the findings.
>
> 3. Annexure A-2 containing Pages 1 to 104
>
> This file contains the copies of share application forms and undated letter from the share subscriber of the assessee in respect of share subscription credited in the books of accounts of the assessee during the F.Yrs. 2005-06 and 2006-07. It was observed that all the share application forms are filled in with common handwriting, all the share applicants have merely signed the application form, no application number is given in any of the applications, the acknowledgement due to be issued to the share subscribers has not been issued at all and the request letter addressed to the Board of Directors of the assessee company has also not been dated. These facts evidence show that the accommodation entries in the guise of share subscription have been stage managed and this fact has also been admitted by the Director of the assessee company, Mr Vinod Faria in his statement u/s 132(4) dated 31-05-2008. Besides the above two impounded loose Annexures, Annexure A-3 (pages 1 to 212) also contains the similar nature of incriminating documents showing

> the clear-cut evidence that the assessee company has introduced bogus share subscription in the names of various parties which are nothing but mere accommodation entries."

The case was reopened u/s 147 of the Act as the Revenue had reasons to believe that the income has escaped assessment to the tune of Rs. 1.60 crores. The reasons for reopening of the assessment were recorded and notice u/s 148 of the Act was issued on 4th September, 2009 and served upon the assessee. The Copy of the reasons recorded was provided to the assessee.The assessee requested that the original return filed u/s 139(1) of Act be treated as return of income filed in pursuance of notice u/s 148 of the Act. The Copies of the statements recorded of Shri Parag A. Nisar, Shri Suresh V. Faria and Shri Vinod K. Faria, the Directors of the assessee company were also provided by the AO to the assessee company. The A.O. also referred to the proceedings u/s 133A of the Act and also during the recording of statement u/s 131 of the Act whereby the Directors of the assessee were confronted with all the impounded material and questions were asked based upon the incriminating papers. In the statement recorded of Shri Parag A. Nisar, Director on 18-06-2008 whereby he has submitted that he has not rendered any services to the assessee and he has been paid salary only for signing the documents of the assessee. He stated that Shri Vinod K. Faria looked after all the affairs of the assessee company and the books of accounts are maintained by Mr Viren Mehta at his office.

As per the AO, the statement recorded of Mr Suresh V. Faria , the other Director of the assessee recorded on 18-06-2008 also evidences that Sh Suresh V. Faria also did not participated in the day to day business activities of the assessee company. The said Suresh V Faria also confessed in reply to question no. 13 in the statement recorded that the share subscriptions are only accommodation entries. On being asked about who managed the cash for obtaining the accommodation entries in guise of share subscriptions, Sh

Suresh V. Faria replied that he does not know anything and that all the affairs are looked after by Mr. Vinod K Faria.

The A.O. observed that the whole and sole key person of the business activities of the assessee is Sh Vinod K Faria . The statement of Shri Vinod K. Faria were recorded u/s 131/132(4) of the Act on various dates in which he admitted that the share subscription for the assessee was bogus and they were mere accommodation entries and his confession regarding the accommodation entries of share subscription is clear from the following answer to the question No. 23 in his statement recorded on 31st May, 2008 u/s. 132(4) of the Act:-

> "Q. 23 I am drawing your attention to the documents No. A-l to A-4 impounded during the course of survey u/s 133A at Room No. 47, 2nd, Floor, Bhupen Chambers ,Fort, Mumbai 400 001. These files contain the blank receipts obtained from the shareholders of this company and blank transfer forms. There is no evidence of share certificates sent to any of them. These facts indicate that the share subscription of Rs. 5.50 crore is nothing but book entries obtained from various persons against cash payments. What do you have to comment about these observations?
>
> Ans. Your presumption is correct. I am unable to furnish my further comments thereon.

While Shri Vinod K. Faria in reply to question No. 32 replied as under:-

> "Ans. Searches and surveys have been carried out at our group offices as well as at the residences of myself and my brother, Mr. Mahesh Faria and my associates, Mr. Milan Dalal. During the course of search/survey, I have been given to understand that various incriminating evidence has been found evidencing the investment in the immovable and movable properties by me and other entities. We may also not be in a position to prove the genuineness of the share capital subscribed by M/s Royal Rich Developers Pvt. Ltd to the satisfaction of the Department.

> Considering these facts, I, as an authorized representative of all these entities, declare an income of Rs. 10.00 crore as additional income over and above to the regular income recorded in the' books of accounts. Details of entity and assessment year-wise breakup of the income offered to tax will be furnished separately after going through the seized records and other details from our books of accounts."

The A.O. allowed for inspection of the impounded loose papers to the assessee and copies of the impounded material was also furnished to the assessee. The contention of the assessee was that loose papers were not found in the premises of the assessee was rejected on the ground that the loose papers were found in the business premises of the main group of concerns where all the Directors were doing their business activities.

The A.O. observed that two Directors of the assessee in their statement recorded had denied having knowledge of the affairs of the assessee and they were merely signing the documents as an when called upon to sign the same by Shri Vinod K Faria who was the main and Key Director of the assessee and was in charge of all the activities including financial affairs of the assessee. Sh Vinod K Faria has admitted in his statement recorded u/s. 132(4) of the Act on 30th May,2008 that the share subscription was bogus and were mere accommodation entries. Further, Shri Suresh V. Faria, another Director in his statement recorded u/s 131 of the Act in reply to question No. 13 has confirmed that the share subscription were bogus and they were mere accommodation entries. Another Director Shri Parag A. Nisar in his statement recorded on 18th June, 2008 u/s 131 of the Act admitted that all the day-to-day business activities were done by Shri Vinod K. Faria and he was not aware of the nature of the business of the assessee. The assessee did not gave any replies to the documents impounded on the grounds that they were not impounded from the premises of the assessee.

Thus, the A.O. made addition of Rs.1.60 crores as unexplained cash credit u/s 68 of the Act on the grounds that the assessee has introduced bogus share subscription of Rs.1.60 crores in its books of accounts which the assessee could not explain either during the survey or post survey enquiries. The main Director of the assessee Sh. Vinod K Faria has ultimately confessed that the share subscription is mere accommodation entries , and accordingly additions of Rs.1.60 crores were made by the AO to the income of the assessee as unexplained cash credit u/s 68 of the Act, vide assessment order dated 14-12-2009 u/s. 143(3) read with Section 147 of the Act .

4. Aggrieved by the assessment order dated 14-12-2009 passed by the A.O. u/s. 143(3) read with Section 147 of the Act, the assessee filed its first appeal before the ld. CIT(A).

5. Before the ld. CIT(A) the assessee submitted that the independent enquiry be made with each shareholder to find out the truth about the genuineness of the share transaction. The assessee contended that the assessee may be given opportunity to produce the shareholders before the A.O. in person, for examination. The ld. CIT(A) forwarded the submissions of the assessee to the A.O. for his remand report. In the said forwarding letter by the learned CIT(A) to the AO , it was mentioned that during the assessment proceedings similar request was made by the assessee to the A.O. for conducting independent enquiries with the shareholders to ascertain the genuineness or otherwise of the share subscription but the A.O. has not acceded to the request , and also it is contended by the assessee that the sufficient time was not given by the AO to the assessee to produce the lenders. In the remand report submitted by the A.O. to learned CIT(A), it was contended by the AO that reasonable opportunity were given to the assessee in remand proceedings, wherein show cause notices were issued on 10th July 2013 and 11th September, 2013 to the assessee, wherein the assessee in reply

contended that the assessee is a Private Limited Company registered with the Registrar of Companies ,Maharashtra on 17-03-2006 and the main object of the company is to carry on the business to construct, develop, buy, sell , to act as commission agent and contractor in land, building, house, industrial gala, sheds and real estate. It was also submitted that the assessee has not started its business activities till 31st March, 2006. It was submitted that it is inconceivable as to how the assessee could have earned some unaccounted income when the company came into existence only on 17th March, 2006 and the assessee had not started its business. It was submitted that the assessee has issued shares at premium of Rs. 30/- per share and the face value of the shares is Rs. 10 /- per share and the reserve and surplus of Rs. 1.20 crores is appearing in the Balance Sheet which is the said share premium. The assessee submitted that as far as the assessee is concerned, the share subscription transaction is genuine and the assessee is not able to comment whether Mr Vinod K Faria or anyone else had provided unaccounted funds to the shareholders for them to subscribe to the share capital of the assessee company. The assessee relied upon various decisions of the Hon'ble Courts and Tribunal which are listed in the appellate order dated 24-02-2014 of the ld. CIT(A) appearing in page 5 & 6 of his appellate order and contended that it is not possible for the assessee to earn such huge amount within a short time of 15 days i.e. from 17-03-2006(date of incorporation) to 31-03-2006(end of previous year relevant to the instant assessment year under appeal) . It was submitted by the assessee that complete name, address and PAN of each subscriber who had subscribed to the equity capital of the company during the relevant previous year was furnished and requested the AO that independent enquiry may be made with the shareholders in order to determine genuineness of the transactions. The assessee submitted that the assessee company was incorporated on 17th March, 2006 and furnished the bank statement for the period 21st March to 31st March 2006 .

The A.O. observed that the assessee was incorporated on 17-03-2006 which means that there are only 15 days in the previous year 2005-06 relevant to assessment year 2006-07 wherein the assessee company was in existence. The assessee has submitted its bank statement from 21-03-2006 to 31-03-2006 . There were no business activities carried out by the assessee company during this period except deposit of cheques from shareholders. It was observed by the A.O. that the assessee had issued 4 lacs equity shares in financial year 2005-06 and the face value of the shares Rs. 10/- per share while the shares had been issued at a premium of Rs. 30/- per share and the assessee credited an amount of Rs. 1.60 crores as share subscription.

During the remand proceedings, assessee was asked by the AO to produce all shareholders for verification of the genuineness of the transaction and show cause notices were issued by the AO to the assessee on 10th September, 2013 asking assessee to produce shareholders between the period of 18.9.2013 to 25.9.2013 along with all relevant documents such as bank statement, copy of return of income, copies of details of allotment of share certificate with allotment letters, capital account and balance sheet. But the assessee failed to produce the shareholders on the stipulated time period from 18-09-2013 to 25-09-2013 and submitted that it will take some more time to co-ordinate and produce the shareholders before the A.O. as large number of shareholders are to be contacted. It was further submitted that the assessee's CA was busy with tax audit preparation for which the last date of filing the tax-audit report was 30-09-2013. As per the request of the assessee, further time was given by the AO to the assessee to produce shareholders on 11th October, 2013 whereby this time also the assessee could not produce the shareholders even till 24-10-2013 , and only on 25-10-2013 the assessee filed some details of the shareholders in tapal. Since the assessee failed to produce the shareholders with the relevant details,

Summons u/s 131 of the Act were issued by the AO to the shareholders requesting them to attend personally before the AO on 11-11-2013 and submit the following details :

1. Personal attendance is compulsory.
2. Explanation on their nature of business and address of business premises.
3. Source of income for purchase of shares of the assessee company and date of purchase of shares.
4. The copy of bank passbook/statement with making of payment made for purchase of shares.
5. The copies of Balance Sheet from the financial year in which loan advance and copy of Balance Sheet for the assessment year 2006-07 and 2007-08.
6. Xerox copies of share certificate issued by the assessee.
7. Copy of acknowledgment of return of income filed with the computation of income for assessment year 2006-07 and 2007-08.
8. The note explaining that how they have purchased shares of newly incorporated company at a premium of Rs. 30 per shares as against the face value of share of Rs.10 per share.

The hearing which was fixed for 11th November, 2013 shareholders to attend and submit details , none of the shareholder appeared before the AO and no details were filed. In the month of December, 2013 some shareholders filed reply , the details are as under:-

Ledger folio No.	Name & Address	No.of shares	Reply file
A001	Vonod K. Faria	3300	Yes
A002	Suresh V. Faria AAAPFO535H	3300	No
A003	Parag A Nisar	3400	No
A004	Dipesh D. Mange AJTPMO888J	55000	Yes
A005	Dharmesh G. Bhanushali	50000	No

	AAACPB6845D		
A006	Dinesh Gada HUF AACHD5643J	2500	No
A007	Annapurna Kachhawaha AHCPK1337F	62500	No
A008	Laxmi D.Mange AHWPM1495N	30000	Yes
A009	Ramji M. Bharwad AACPB1219L	37500	Yes
A010	Deepak D. Dani AACPM1444J	25000	Yes
A011	Kailashchand J. Kachhawaha HUF AADHK3700Q	45000	No
A012	Pradeep M. Mange HUF AAIHP0455L	30000	Yes
A013	Jayesh S. Kalola AITPK7624B	25000	Yes
A014	Dharmesh J Joshi ADHPJ3912C	40000	No
A015	Meena Joysar AEYPJ6107M	37500	Yes
A016	Kantilal Joshi AEYPJ0250R	25000	Yes
A017	Jeram Karotra AIXPX2394J	35000	No
A018	Nishit Madiar AEWPM4655F	25000	Yes
A019	Alka Y Gandhi	30000	No
A020	Anil J Shinde	25000	No
A021	Bharat Patel	37500	Yes
A022	Chhya V. Dama AIHPD6019K	30000	Yes
A023	Chhtalal T. Kalola AQUPK7634A	12,500	No
A024	Drupad N. Bhatt HUF AADHD0055P	37,500	Yes
A025	Geetesh Jadhav AKRPJI859P	22,500	No
A026	Gopal P Bhanushali AGIPB7609L	26,250	No
A027	Haresh P. Bhanushali AACPB6068P	25000	No
A028	Jaswantrai J Ghatalia HUF AADHJ5530R	25,000	Yes
A029	Kashavji Vershi Bhadra ALJPB2370A	31,250	No
A030	Mahendra B Bhadra AFZPB4393P	34,375	Yes
A031	Mathuradas B Bhadra AIYPB3294K	34,375	Yes
A032	Mayur U Bhanishali AKTPB1741J	12,500	Yes
A033	Morarji K Bhanushali HUF AAGHM8194P	25,000	Yes
A034	Nanbai Keshavji Bhanushali ALJPB2427N	31,250	Yes
A035	Narayan R Mange AHWPM1303K	7,500	Yes
A036	Petha Uka Patel AAHPP8401D	30,000	No
A037	Rachna J Tak ACKPT5359F	25,000	No

A038	Rajiben M Patel AFQPP8677R	12,500	Yes
A039	Ratanshi Kanji Bhanushali AGKPB9496M	25,000	No
A040	Rajnikant G Karia HUF AADHK3828H	10,000	Yes
A041	Sanjay M Joshi AFZPJ8227N	25,000	Yes
A042	Shamuram Liladhar Bhanushali AIZPK5139P	25,000	No
A043	Shamjji K Patel AESPD2802D	30,000	Yes
A044	Shushant R Jadhav AGZPJ9813B	22,500	No
A045	Vanita J Joshi ADHPJ3910A	25,000	Yes
A046	Veshram G Chad	5000	No
A047	Venilal Padharia ADSPP9972H	25,000	Yes
A048	Vijay T Raojadeja ADXPR1575K	45,000	Yes

whereby the above shareholders (the above list are subscribers having subscribed shares in both the assessment year 2006-07 and 2007-08 respectively) filed copy of acknowledgement of income tax return, balance sheet and copies of bank statement/pass book. The reason for high premium paid for purchase of share, it was submitted by the shareholders that the investment criteria were purely based on growth prospects and profitability. The A.O. observed that the shareholders had failed to explain the source for purchase of share of the assessee company. The nature of their business was not explained by the shareholders and also they did not submitted the copy of share certificate issued by the assessee company , the transaction was held by the AO to be not genuine in remand proceedings . Accordingly, the remand report was submitted by the AO to the ld. CIT(A).

The ld. CIT(A) observed from the remand report that despite several opportunities being provided to the assessee by the AO in remand proceedings, the assessee failed to produce the relevant details in respect of share subscribers and also failed to produce shareholders in person before the AO for examination . The learned CIT(A) observed that the A.O. had

issued summons u/s 131 of the Act to the share subscribers but none of the share subscriber appeared before the A.O.in compliance to the summons issued u/s 131 of the Act which proved that the assessee failed to discharge its onus.

A copy of the remand report was forwarded to the assessee for its comments whereby the assessee replied as under:-

Sr No	The learned A.O.'s remarks/observations	Our comments on A.O.'s remarks/observation
1	As details filed on record seen that the assessee company was incorporated 17.3.2006 which was 15 days before the financial year 2005-06 relevant to A.Y. 2006-07. The assessee has submitted copy of bank statement for the period from 21.3.2006 to 31.3.2006. There is business no activities found during this period except of cheque deposits, which were received from the shareholders.	The learned A.O. himself has recorded two finding namely (i) the appellant company was incorporated on 17.3.2006 and (ii)the appellant company has not started any business activities in the 15 days of existence during the financial year relevant to A.Y. 2006-07. Thus, there is no dispute about the above two factual aspects.
2	A.O.'s remark about documents submitted to him/obtained by him during the course of remand proceedings.	Copies of documents submitted to him/obtained by him during the course of remand proceedings are enclosed. There are certain errors in remand report which are contrary to these documents. We request your honour to consider the tabular representation of facts enclosed as part of paper book for clearer understanding of the facts.
3	The substance of remand report is that the source	All the shareholders have PAN. Summons issued by the A.O. were

	of investment in shares is not proved. The remand report nowhere suggests that any of the shareholders is non-existent.	served on each of them. More than 70% of the shareholders have filed the documents mentioned in the enclosed chart. The existence of each shareholder established. Even the A.O. has not disputed the fact of their existence. Addition is made only on the ground that the shareholders have not proved source of their investment in shares.
4	The A.O. has not disputed the veracity of the documents submitted including the individual balance sheet of shareholders.	Individual Balance Sheet submitted in the case of about 70% shareholders reflects investment in shares of the appellant company. Veracity of any of these balance sheets is not called in question by the A.O. Once the genuineness of the balance sheets is accepted the source of all investments reflected in the balance sheets (which includes investment in shares of the appellant company) stands established.
5	(i) The A.O. in para 7 of the assessment order, has interalia quoted part of Shri Vinod Faria's recorded statement u/s 132(4) as follows: 1. As an authorized representative of all these entities, declare a income of Rs.10.00 crore as additional income	Contradictory assertions of Shri Vinod Faria about the true ownership of the so called unexplained share capital – (i) in statement recorded u/s 132(4) and (ii) in the letter dated 7.11.2013 submitted by him during the course of remand proceedings.

	over and above to the regular income recorded in the books of accounts. (ii) During the remand proceedings, Shri Vinod Faria in his letter dated 7.11.2013, has stated as follows: Suresh Velji Rupshi Faria and Parag Amarshi Manshi Nishar in turn converted his transaction into cash for its block money profits.	
6	A.O"s silence on comparability of facts of the present case with that of three judicial pronouncements relied on by the appellant.	The learned A.O. has not proved any comments on the three judicial pronouncements mentioned in para 4 of our letter dated 8.2.2010. The A.O. has not disputed that the facts of the present case are similar to the facts in the said three judicial pronouncements.
7	Non-consideration by the A.O. of subsequent change in law (effective from A.Y. 2013-14) which has bearing on the proper understanding of law as it was applicable	The law requiring to prove source of source in case of share application, share capital and share premium is introduced for the first time w.e.f. 1.4.2013 i.e. A.Y. 2013-14 by amending section 68 of the I.T. Act, 1961.

	for A.Y. 2006-07	This amendment is prospective in application and does not apply retrospectively to A.Y. 2006-07. Thus for all assessment years prior to A.Y. 2013-14 the law as laid down by Hon'ble Supreme Court in the case of CIT v. Lovely Exports P. Ltd. (SC) 216 CTR 195 continues to apply.

It was observed by the ld. CIT(A) that certain incriminating documents were found from the premises of the assessee company during the course of survey from the premises of the assessee, in the form of share application forms, blank transfer forms, blank receipts for repurchase of allotted shares, copies of bank pass books of share subscribers, wherein cash/cheque was deposited apparently immediately before issuing subscription cheque to the assessee company. It was observed that though the company was incorporated only on 17th March, 2006, these subscribers chose to purchase these shares at a premium of Rs. 30/- which raises doubts about the genuineness of the transaction. The share applications were not numbered and they were filled in by the same person raising doubts about the genuineness . Further during the course of survey, statement on oath of all the Directors was recorded and Shri Parag A Nisar, Director of the assessee admitted that he does not know anything about the business activities of the assessee company and stated that Sh. Vinod K Faria looked after all the affairs of the assessee. As per the statements of Shri Suresh K. Faria in reply to question no. 13 , he admitted that share subscription entries were merely accommodation entries . These facts were confronted to Sh Vinod K Faria and in his statement recorded on 31-05-2008, Mr Vinod K Faria admitted that presumption of the Revenue that these share subscription entries of Rs.5.50 crores (received in assessment year 2006-07 and 2007-08) were nothing but accommodation entries. Thus, it was held by the ld. CIT(A) from the above statement of the Director that the

entire share subscription of Rs. 5.50 crores (including Rs. 1.60 crorers in the current year) was bogus and purely accommodation entries. It was observed by the learned CIT(A) that Shri Vinod K Faria, in his statement had declared Rs. 10 crores as additional income over and above the regular income recorded in the books. The A.O. has made efforts whereby the assessee was asked to produce all the subscribers before him for examination both in assessment proceedings as well in remand proceedings but the assessee failed to produce the shareholders. Even summons u/s 131 of the Act were issued by the AO during remand proceedings to the shareholders directing them to appear in person before the AO but still no shareholder appeared before the AO. Certain documents like confirmations, income tax returns etc. of the shareholders were produced but that does not conclusively prove the genuineness of the transactions. It was observed by the learned CIT(A) that in the bank accounts of the subscribers , equivalent amounts have been deposited either in cash or through cheques or through draft etc either on the same day or a day before the payment to share subscriptions , which raised doubts about genuineness of the transactions. It was observed by the learned CIT(A) that in some of the accounts, there were several credits ranging from Rs. 49,000/- to Rs. 49,500/- which shows that bank drafts of these amounts might have been purchased through deposits in cash. In-fact in most of the bank accounts of share subscribers , there are hardly any balance before and after subscription in the shares, indicating that these persons hardly have any means. From the acknowledgement of the income tax returns, it was further observed by the learned CIT(A) that income of subscribers in most of the cases was less than Rs. 1 lac. The learned CIT(A) observed that it is not understandable that how a person having meager income of Rs. 80000-90000, which is hardly sufficient to meet personal expenses of household expenses in expensive city like Mumbai , could make investment running from Rs. 5 lacs to Rs. 10 lacs in shares with the assessee company and that too on premium. It was observed by the learned CIT(A) that on perusal of the

Balance Sheet or statement of affairs of share subscribers of the assessee company submitted in some of the cases, the said Balance Sheet/statement of affairs does not have any significant asset other than investment in the assessee company.

The learned CIT(A) referred to the amended provisions of Section 68 of the Act to hold that burden of proof in the case of share subscription is quite strong and the assessee has to prove not only the source but the sources' source. The learned CIT(A) held that for all the issues being decided post 01-04-2013, the amended Section 68 of the Act is applicable. Thus, the ld. CIT(A) confirmed the additions by treating the same as bogus transactions. The ld. CIT(A) also relied upon the provisions of section 68 of the Act. The ld. CIT(A) distinguished the case law in the case of CIT v. Lovely Exports Pvt. Ltd., 216 CTR 195 (SC) whereby he held that various incriminating documents were seized during the course of search and seizure operation which indicates that the share subscription was not genuine. Further, the statements of the three Directors on oath were recorded during the course of the search whereby all the three Directors accepted that the entire share subscription was bogus and was in the nature of accommodation entries. The learned CIT(A) also observed that various incriminating material was found during the course of search/survey , in the form of blank signed share transfer forms indicating shares allotted in the names of these so called subscribers were already agreed to be transferred by them. Further, it was observed by learned CIT(A) that in the bank passbook of the share subscribers, there is deposit in the bank accounts of the subscribers just a few days before the investment in the shares indicating that these shareholders do not have financial capacity to make the investment. The share subscribers were not produced before the AO despite several opportunities being granted by the AO during the course of assessment and remand proceedings . Thus, the ld. CIT(A) held that the ratio of Hon'ble Supreme Court decision is distinguishable on the facts of the

present case . Similarly , the learned CIT(A) held that the case of CIT v. P K Noorjahan 237 ITR 570(SC) and Mitesh Rolling Mills Private Limited reported in 258 ITR 278(Guj) are distinguishable on facts and are not applicable to the facts of the present case. Thus, The learned CIT(A) upheld/confirmed the assessment order dated 14-12-2009 passed by the AO u/s 143(3)/147 of the Act wherein the subscription amount of Rs. 1.60 crores was treated as unexplained cash credit u/s 68 of the Act and hence learned CIT(A) upheld / sustained the addition made by the A.O vide his appellate orders dated 24-02-2014.

6. Aggrieved by the appellate order dated 24-02-2014 passed by the ld. CIT(A), the assessee is in further appeal before the Tribunal.

7. The ld. Counsel for the assessee reiterated its submissions as were made before the authorities below and submitted that the additions have been made u/s 68 of the Act of Rs. 1.60 crores as unexplained cash credit to the income of the assessee for the instant assessment year. The assessments have been reopened u/s 147/148 of the Act within a period of 4 years. The ld. Counsel further submitted that the assessee is not challenging the reopening of the assessment u/s 147/148 of the Act. The addition of Rs. 1.60 crores has been made based upon the issue of 4 lacs equity shares of Rs.10 each at a premium of Rs.30 per share. He submitted that the assessee company was incorporated only on 17th March, 2006 whereas the previous year ending on 31st March, 2006. The ld. Counsel submitted that the assessee has not done any business activities for the above period of 15 days since its incorporation on 17th March 2006 till the end of previous year on 31st March, 2006. The search u/s. 132(1) of the Act had been conducted by the Revenue on the Directors of the assessee company on 30-05-2008 and not on the assessee company . Only survey u/s. 133A of the Act was conducted in the case of the assessee company on 30-05-2008. There was no

search warrant against the assessee company and there was no panchnama drawn against the assessee company. The ld. Counsel drew our attention to the statement recorded in the case of Shri Vinod K Faria u/s 132(4) of the Act on 31st May, 2008 at the business premises of his proprietary concern M/s Mayur Ply 'N' Veneers whereby a reference was made to question No. 35 placed at paper book page 14 filed with the Tribunal. It was submitted that search had taken place against M/s Mayur Ply 'N' Veneers which is properietory concern of Mr Vinod K Faria and not against the assessee. The ld. Counsel drew our attention to paper book page 13 and submitted that certain loose documents were found which contain blank receipts obtained from the shareholders whereby it was submitted that there is presumption regarding the book entries, it was not stated that evidence have been found that cash have been paid against share subscription. Our attention was also invited to question No. 18 at paper book page 12 whereby it was stated that furniture work was in progress at the premises being office at 2nd Floor , Bhupen Chambers,Dalal Street, Fort, Mumbai-23 from where the incriminating material was found . It was submitted that the said premises is not the office of the assessee as the office of the assessee is at Kalbadevi and the incriminating material were not seized from the assessee. The said office at 2nd Floor at Bhupen Chamber is of Mr Vinod K Faria and not of the assessee. It was submitted that assessee's premises were not searched and it cannot be presumed that documents belonged to the assessee. There is a presumption u/s 292C of the Act that the document belonged to the person searched from whose possession the documents are recovered but in the instant case no document is found from the possession of the assessee as the premises of the assessee was not searched. No business activity has been started by the assessee for the period of 15 days starting from date of incorporation on 17-03-2006 till the end of financial year on 31-3-2006. The ld. Counsel drew our attention to the assessment order framed against the assessee for assessment year 2011-12 which is placed at paper book page 72

& 73 wherein it was clearly stated that there is no business activity carried out by the assessee company and assessment was completed at nil income. The ld. counsel submitted that the two other Directors namely Mr Suresh V Faria and Mr Parag A Nisar are saying that these are accommodation entries but they are not aware of the affairs of the business of the assessee . It is submitted that even if it is concluded that it is an undisclosed income and accommodation entries have been taken by the assessee, it cannot be concluded that this is an undisclosed income of the assessee as there is no income during the period as the assessee has not undertaken any business during the period of 15 days from 17-03-2006 to 31-03-2006. It is submitted that in the remand proceedings, complete details were furnished about the name, address and PAN etc. of share subscribers along with Balance Sheet and bank statements of the share subscribers to tune of Rs.115 lacs w.r.t. 13 share subscribers , while for the rest 4 share subscribers subscribing shares of Rs.45 lacs name, complete address and PAN of the share subscriber were submitted. All the documents were placed in the paper book filed with the Tribunal.It is submitted that it is not the case of Revenue that these parties who subscribed shares were non-existent. It is submitted that the statement of Shri Vinod K Faria recorded u/s 132(4) of the Act whereby he accepted that these are accommodation entries is not binding on the assessee company. Our attention was drawn to the question no 38 of the statement of Mr Vinod K Faria wherein he stated that all the entries were arranged by Chartered Accountant whereby equivalent cash was paid along with premium @8% for arranging these entries. It was submitted before us that the Revenue has not recorded the statement of CA nor any action has been taken against the said CA. The ld. Counsel relied on the decision of Hon'ble Supreme Court in the case of CIT v. P K Noorjahan 237 ITR 570(SC) , decision of the Hon'ble Gujarat High Court in the case of Mitesh Rolling Mills Private Limited reported in 258 ITR 278(Guj) , decision of the Hon'ble Supreme Court in the case of CIT v. Bharat Engineering and Construction Co.,(1972) 83 ITR

187(SC) ,decision of Hon'ble Supreme Court in the case of Roshan Di Hatti v. CIT (1977)107 ITR 938(SC) and decision of Hon'ble Delhi High Court in the case of CIT v. Five Vision Promoters Private Limited in ITA no 234/2015 vide decision dated 27-11-2015 reported in (2016) 380 ITR 289(Delhi), whereby it submitted that when there is no other known source of income as the assessee never did any business, thus it cannot be brought to tax as undisclosed income as there is no possibility of having any income as the assessee never did any business. It was also submitted that if the existence of shareholder is not in doubt then the addition is to be made in the hands of the shareholders and not in the hands of the assessee company receiving the share subscription. The assessee also relied upon decision of Hon'ble Supreme Court in the case of CIT v. Lovely Exports Private Limited 216 CTR 195(SC), dismissal of SLP by Hon'ble Supreme Court in the case of CIT v. Divine Leasing and Finance Limited in civil appeal no CC 375 of 2008 vide orders dated 21-01-2008 , decision of Hon'ble Bombay High Court in the case of CIT v. Creative World Telefilms Limited (2011) 333 ITR 100(Bom. HC) and decision of Hon'ble Delhi High Court in the case of CIT v. Value Capital Private Limited in 307 ITR 334(Del. HC)

8. The ld. D.R. submitted that section 68 of the Act has been amended by Finance Act 2012, w.e.f. 01-04-2013 whereby the onus is on the assessee to prove source of source in the case of receipt of share subscription to the satisfaction of the AO. The ld. D.R. relied on the decision of ITAT, Kolkata Bench in the case of Subhlakshmi Vanijya (P.) Ltd. v. CIT, [2015] 60 taxmann.com 60 (Kol. Trib) whereby amendment to section 68 of the Act by insertion of proviso by Finance Act, 2012 was held to clarificatory in the case of closely held companies in which public are not substantially interested and applicable with retrospective effect. The ld. D.R. submitted that all the three Directors of the company have accepted in the statement recorded on oath that these are bogus transactions and are merely accommodation entries

wherein cash was paid in lieu of cheque obtained towards share subscription amount . The assessee was asked to produce the shareholders before the A.O. in the assessment as well even in the remand proceedings but the assessee failed to produce them. The summons were issued u/s 131 of the Act directing the shareholders to appear before the AO but none appeared before the AO. It was submitted that the existence of these shareholder's is in doubt. It is also submitted that detailed finding is given by authorities below to come to conclusion that these are non genuine transactions and the share subscribers does not have capacity to give huge share subscription to the assessee company and that too at a huge premium. The assessee company does not have any business activity and was only incorporated on 17-03-2006 wherein the share subscribers paid huge premium of Rs 30 per share as against face value of Rs.10 per share in a newly incorporated company having no business/project in hand. Even in subsequent years the company has not done any business activity which is evident from the assessment framed u/s 143(3) of the Act by the Revenue for the assessment year 2011-12 which is placed in paper book page 72-73. It was submitted that the Directors of the assessee company was searched on 30-05-2008 and it is a closely held company who was engaged in accepting bogus accommodation entries to channelize illegitimate money into the company. The ld. D.R. further relied on the orders of authorities below. The ld. DR relied upon the decision of ITAT , Kolkatta Tribunal in Subhalakshmi Vanijya Private Limited v. CIT reported in (2015) 60 taxmann.com 60(Kol. Trib) and decision of Hon'ble Calcutta High Court in the case of Rajmandir Estates Private Limited v Pr. CIT reported in(2016) 70 taxmann.com 124(Cal.HC).

9. In the rejoinder, the ld. Counsel submitted that all the documents as desired by the A.O. were filed before the authorities below to prove identity, genuineness and creditworthiness/capacity of share subscribers to subscribe to the share capital in the assessee company . No business activity have been

conducted by the assessee and no income has been earned, hence no addition can be made in the hands of the assessee as in the absence of possibility of having any income from whatever sources, no addition can be sustained. The ld. Counsel submitted that amendment to provisions of Section 68 of the Act by Finance Act, 2012 is prospective in nature as can be seen from explanatory memorandum explaining rationale behind introduction of this proviso and hence the same is applicable from assessment year 2013-14 and onward years.

9. We have considered the rival contentions and also perused the material available on record including case laws relied upon by the rival parties. We have observed that the assessee company was incorporated on 17th March, 2006 with the objective of undertaking construction and development of properties and to do business in the field of real estate . However, the assessee has not carried out any business activity from 17th March 2006(date of incorporation) to 31st March, 2006 (end of previous year) i.e. for the fifteen days as it falls in this relevant previous year 2005-06 as per the facts emerging from the records.

   There was a survey action carried out by the Revenue on 30th May, 2008 u/s 133A of the Act whereby the assessee's premises were surveyed . Search action was simultaneously conducted by the Revenue u/s 132(1) of the Act on the Directors and other entities on 30-05-2008.

   Certain documents were found during the course of survey operation and based upon the said documents, the case was reopened and notices were issued u/s 148 of the Act to the assessee by the AO to frame assessment u/s 147/148 of the Act. The said notice u/s 148 of the Act was issued within four years from the end of the assessment year. The original assessment was not framed u/s 143(3) of the Act. The assessee has not

challenged the reopening of the assessment u/s 147/148 of the Act , while the assessee has objected to the addition made by the Revenue. The documents found during the course of survey were regarding various share application forms from share subscribers which were not having application numbers, all the share application forms were filled in the same handwriting and acknowledgment were not given to the shareholders, blank signed share transfer forms from the share subscribers and blank receipts from the shareholders were impounded during the course of survey u/s 133A conducted on 30-05-2008. Based upon this, it was revealed that the assessee has raised share capital amount to the tune of Rs. 1.60 crores during previous year relevant to the instant assessment year, against which the assessee issued 4 lacs shares with a face value of Rs. 10/- per share with premium of Rs. 30/- per share.

Shri Vinod K. Faria, one of the Director and key person of the assessee company who was looking after the affairs of the assessee company stated on oath in the statement recorded u/s 132(4) of the Act on 31st May, 2008 that these share subscription money of Rs. 1.60 crores received during the previous year relevant to the impugned assessment year is bogus and were merely accommodation entries. The said Director Sh. Vinod K. Faria while recording statement on oath u/s. 132(4) of the Act on 31-05-2008 surrendered Rs.10 crores and offered the same as an additional income over and above the regular income recorded in the books of accounts . For the surrender of Rs. 10 crores , one of the grounds mentioned by Mr. Vinod K. Faria was that they will not be able to establish the genuineness of the share capital received by the assessee. The other Director Sh. Suresh V. Faria also stated on oath in the statement recorded on 18-06-2008 u/s 131 of the Act that these share subscription are bogus and merely accommodation entries.

During the course of proceedings before the AO as well before the learned CIT(A), the assessee has submitted that these are genuine share capital raised by the assessee and the assessee has produced the copies of bank statement, income tax returns , certain confirmations , Balance Sheets/statement of affairs of the share subscribers from the share holders with respect to share subscription to the tune of Rs.115 lacs from 13 shareholders, while name , address and PAN of the rest 4 shareholders subscribing Rs. 45 lacs were produced . The same are also produced before the Tribunal in paper book filed before the Tribunal and similar contentions are advanced before the Tribunal. The Revenue has doubted the genuineness of the transaction on the ground that assessee having no business/project in hand and being merely paper company have received huge share capital money to the tune of Rs. 1.60 crores on issue of 4 lacs equity shares and that too at a huge premium of Rs 30 per shares as against face value of Rs.10 per share. The assessee has not filed any valuation report or explanation to justify issuance of shares of face value of Rs.10 per share at a premium of Rs. 30 per share. The Revenue has also doubted the creditworthiness/capacity of the shareholders having meager known sources of income and assets declared to Revenue in their return of income to have invested huge amounts in the share capital of the assessee and that too at a huge premium of Rs. 30 per share against the face value of Rs. 10 per share of the assessee company which is a newly incorporated company having no existing business/project in hand and is merely a paper company. The authorities below have analysed the documents submitted by the shareholders and came to conclusion that these shareholders have meager income of Rs.80000-90000 declared in their return of income filed with the Revenue, the Balance Sheet/statement of affair has insignificant assets apart from this share investment in the assessee company. The issue of cheque/draft in favour of the assessee

company towards share subscription by these share subscribers is preceded by deposit of cheque/cash in their bank accounts , and even otherwise both prior to as well subsequent to the issue of the cheque/draft's to the assessee from their bank accounts , there is no bank balance available in the said bank accounts of the share subscribers except the amount deposited by cash/cheque to clear the cheque/demand draft in favour of the assessee company towards this investment. Thus, genuineness of the transaction and creditworthiness/capacity of the share subscribers to make subscription towards share capital including share premium was doubted by the Revenue and it was held that the assessee had failed to discharge the burden cast on the assessee u/s 68 of the Act and accordingly additions were made to the income of the assessee. The said additions as made by the AO were confirmed by the learned CIT(A) vide his appellate order in the first appeal filed by the assessee.

The share application forms were not properly filed up, acknowledgment of receipt of share application were not issued to the subscriber, share application forms were not serially numbered and the share application forms were filled in with the same handwriting. The blank transfer forms and blank receipts were obtained by the assessee in advance from all these share subscribers agreeing to sell/transfer the shares held by them . The assessee company did not issue share certificates to the share subscribers as no evidence of issuance of share certificate was brought on record . There is no business conducted by the assessee during the relevant previous year and also even till the assessment year 2011-12 which is evident from the assessment order passed by the AO u/s 143(3) of the Act. These above stated discrepancies in the issuance of shares by the asssessee company in our considered view do not happen in usual course of business and certainly required deeper probe to unravel the truth behind the huge share subscription raised by the assessee company to the

tune of Rs.5.50 crores in assessment year 2006-07 and 2007-08 within short span of incorporation of the assessee company with no worthwhile business/project in hand and the assessee company being merely a paper company. The assessee was rightly asked by the Revenue to produce the shareholders in the assessment as well remand proceedings before the AO, as the role of the AO is both of investigator and adjudicator whereby he is duty bound to unravel the truth behind the smokescreen, but the assessee could not produce the shareholders despite sufficient , adequate and proper opportunity granted by the Revenue in the assessment as well remand proceedings. Summons u/s 131 of the Act were issued by the AO to the share subscribers directly directing the shareholders to personally appear before the AO with relevant details and evidences , but there was no compliance by the shareholders and none of the shareholders appeared before the A.O. . However, the details were filed by some of the shareholders in Tapal. No doubt , the assessee has produced the copies of bank statement, acknowledgment of income tax returns , certain confirmations , Balance Sheets/statement of affairs of the share holders with respect to share subscription to the tune of Rs.115 lacs from 13 shareholders, while name , address and PAN of the rest 4 shareholders subscribing Rs. 45 lacs were produced but in our considered view this is not sufficient to discharge the onus cast on the assessee as contemplated u/s. 68 of the Act as the Revenue has doubted the creditworthiness/capacity of the shareholders having meager means and known sources of income to have invested huge amount of share subscription and that too at huge premium as well the genuineness of the transaction was doubted by the Revenue wherein the assessee company did not have any business/project in hand and is merely a paper company , as it is brought on record that these share subscribers are persons of meager means declaring income mostly below Rs.1,00,000/- and their Balance Sheet/statement of affairs revealed that they have otherwise

insignificant assets other than investment in the assessee company . Section 68 of the Act cast onus on the assessee to satisfy the ingredients of Section 68 to establish the identity and creditworthiness of the creditors and to establish the genuineness of the transactions. Once assessee filed the basic details such as name and address of creditor, PAN, income tax return, confirmation and bank statement , the initial onus gets discharged. Since the Revenue has doubted the creditworthiness of the share subscribers and genuineness of the transaction as per the reasons cited and set out above, the onus shifts back to the assessee company to offer an explanation to the satisfaction of the AO as contemplated u/s 68 of the Act which could have been discharged by producing the shareholders before the AO so that truth behind the smokescreen could have been unraveled by the AO by interrogating them. In the absence of the same, the AO has the powers to make additions to the income as unexplained cash credit u/s. 68 of the Act. We have observed that the assessee is a newly incorporated company which is a closely held company having received huge share capital money including huge share premium of Rs.1.6 crores in this relevant previous year with no business activity / project in hand as per the facts emerging from the records. The assessee has received huge share premium @ Rs. 30/- per share against the face value of Rs.10/- per share without any worthwhile business/project in hand. The assessee did not also filed any valuation report before the authorities below as well before us to justify the issuance of shares of Rs.10 per share at the premium of Rs. 30 per share while the assessee company was a newly incorporated company having no business/project in hand and having no networth of its own being merely a paper/shell company. It is the contention of the assessee that the documents were not impounded from the premises of the assessee during survey operations u/s 133A of the Act but from the premises belonging to the Promoter-Director of the assessee company namely Mr Vinod K. Faria and hence no

additions can be made by the Revenue in the hands of the assessee. It is pertinent to mention here that in closely held family concerns, it is not necessary that all the documents of the assessee company are kept in the business premises of the assessee as they may be kept or secreted at the residential or other premises of the Directors/Promoters as assessee being closely held company having no business in hand may not be equipped with battery of professional staff and proper office/infrastructure of its own to take care of various functions of the business and it is very much possible that Directors or their nominated person is discharging multiple functions in the absence of business in hand of the assessee company. It is already brought on record that the till the assessment year 2011-12, there was no business carried on by the assessee company.In any case the Revenue has invoked Section 147/148 of the Act and they have with them fresh tangible incriminating material which has come into their possession during the course of search and survey operations on 30-05-2008 and post enquiries which the AO has relied upon to invoke provisions of Section 147/148 of the Act whereby the re-opening of the assessment has been done within four years from the end of the assessment year and the original assessment has not been framed u/s 143(3) of the Act. Thus this contention of the assessee is jettisoned. The assessee company has also contended that in the absence of any business and consequentially no income during previous year 2005-06, no income can be added in the hands of the assessee u/s 68 of the Act. We are of the considered view that Section 68 of the Act creates a legal fiction which cast obligation on the assessee to explain to the satisfaction of the AO about nature and source of credit in case any amount is found credited in the books of the assessee maintained for any previous year. This creates a legal fiction and in case the assessee did not offer explanation to the satisfaction of the AO as to the nature and source of credit of any amount found credited in the books of the assessee for any previous year by cumulatively satisfying the AO

about the identity and creditworthiness of the creditor and about the genuineness of the transaction , the amount found credited in the books of the assessee shall be treated to be the income of the assessee as unexplained income under legal fiction created by Section 68 of the Act. The Section 68 of the Act created a legal fiction which does not require that the Revenue has to show the sources of the income before bringing the amount to tax since the amount is found to be credited in the books of the assessee in case the assessee has not offered explanation to the satisfaction of the AO and more-so in the instant case the Directors of the assessee company had admitted that these share subscriptions is bogus and are merely accommodation entries taken by the assessee whereby equivalent amount was paid to the investors . The Director of the assessee Mr Vinod K Faria also surrendered Rs. 10 crores whereby one of the ground of the surrender was that the assessee company will not be able to show the genuineness of the share subscription. This contention of the assessee is also rejected.

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 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 the additions u/s 68 of the Act as an income.

There are companies which are widely held companies in which public are substantially interested which comes out with an initial public offers 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. . These members of public who make subscription 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 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, income tax returns, Balance Sheet/statement of affairs of the share subscriber and bank statement of the share subscriber 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. The share holders in this instant case did not appear before the AO at the instance of the assessee as well in pursuance to the summons u/s 131 of the Act issued by the AO and thus, 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). In the instant case, we have noted that at first the assessee raised the bogey in appellate proceedings before the learned CIT(A) that the AO in assessment proceedings has not given adequate and proper opportunity to the assessee to produce the shareholder but when adequate , proper and sufficient opportunity was afforded to the assessee in remand proceedings by the AO to produce the shareholders, the assessee failed to produce them despite sufficient , proper and adequate opportunity granted by the AO. The shareholder also did not appear before the AO even on being summoned by the AO directly u/s 131 of the Act. Section 68 of the Act has been amended by Finance Act, 2012 w.e.f. 01-04-2013 whereby the onus is cast upon the assessee company to justify the sources of share subscription including share premium raised , to explain the source of the source of raising the share subscription. Thus, Section 68 of the Act has been amended by insertion of proviso casting the onus on the assessee company to explain the source of source of raising share subscription which has been held to be clarificatory in nature and hence retrospective by the decision of the Kolkata Tribunal in the case of Subhlakshmi Vanijya (P.) Ltd. (supra) wherein it was held as under by the Kolkatta Tribunal:

> ***"13.u**. Now we espouse the next leg of the arguments of the ld. AR that the insertion of proviso to section 68 by the Finance Act, 2012 w.e.f. 1.4.2013 empowering the AO to examine the genuineness of the share capital in the case of a company in which public are not substantially interested, is prospective and, hence, the CIT in the year under consideration question was not right in directing the AO to examine the genuineness of share capital with premium. On the other hand, the ld. DR advocated the retrospective operation of this amendment.*
>
> ***13.v**. In order to evaluate the rival the contentions on this issue, we consider it apt to reproduce the relevant part of the proviso to section, which reads as under : —*

*'**Provided** that where the assessee is a company, (not being a company in which the public are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

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

***13.w**. As per this proviso where any share capital etc. is credited in the case of closely held company, the explanation given by such company shall be deemed to be not satisfactory, unless the resident shareholder offers an explanation about the nature and source of such sum so credited and such explanation is found to be satisfactory by the AO. The essence of this amendment is that a closely held company is required to satisfy the AO about the share capital etc. issued by it, in the absence of which, an addition u/s 68 can be made in the hands of the company. If we accept the amendment to be prospective, then it would mean precluding the AO from examining the genuineness of transactions of receipt of share capital with premium under consideration and hence prohibiting him from making any addition u/s 68 notwithstanding the same being non-genuine. In the oppugnation, if the amendment is held to be prospective, then it would mean that the AO would have all the powers to examine the genuineness of share capital and share premium received by the assessee company on the touchstone of section 68. If the assessee fails to satisfy him on the identity and capacity of the subscribers and genuineness of transactions, then addition will be called for u/s 68 of the Act. We, therefore, firstly need to decide as to whether the amendment to section 68 by way of insertion of proviso is retrospective or prospective?*

***13.x.** It is settled rule of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Ordinarily the courts are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. However, some times what happens*

is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature. In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment has to be considered as retrospective from the date when the earlier provision was made effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it takes retroactive effect from the date when the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi-judicial authorities, on a challenge made to it, can justifiably hold such amendment to be retrospective. The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the date such provision was initially introduced. The intention of the legislature while introducing the provision is gathered, inter alia, from the Finance Bill, Memorandum explaining the provision of the Finance Bill etc.

***13.y**. The facts of CIT v. Gold Coin Health Food (P.) Ltd. [2008] 304 ITR 308/172 Taxman 386 (SC) are that the Finance Act, 2002 amended Explanation 4 to section 271(1)(c) with effect from 01.04.2003 providing that the penalty would be imposed even if the returned income is loss. In the case of Virtual Soft Systems Ltd. v. CIT [2007] 289 ITR 83/159 Taxman 155 (SC) (a Bench comprising of two Hon'ble Judges) it was held that prior to the amendment with effect from 1st April, 2003 penalty for concealment of income could not be levied in the absence of any positive income. Doubt was expressed over the correctness of this view by a subsequent Bench. Thereafter in the case of Gold Coin Health Food (P.) Ltd. (supra), a bench of three Hon'ble Judges overruled the judgment in the case of Virtual Soft Systems Ltd. (supra) by holding that Explanation 4 to section 271(1)(c)(iii) regarding the imposition of penalty, even if there is a loss, is clarificatory and not substantive. It was held to be applying even to the assessment years prior to 1st April, 2003, being the date from which it was brought into force. Thus, it can be easily noticed that the retrospective effect to the amendment to Explanation 4 by the Finance Act, 2002 has been given by holding that the position even anterior to such amendment was the same inasmuch as the penalty was imposable even in the case of loss. The intention of the legislature was found to be imposing penalty in all such cases even prior to the amendment and that is how this amendment was held to be clarificatory and therefore, retrospective.*

13.z. *Similar is the position in the case of CIT v. Kanji Shivji & Co. [2000] 242 ITR 124/108 Taxman 531 (SC). Explanation 2 to section 40(b) was introduced with effect from 1st April, 1985 providing that where an individual is a partner in a firm otherwise than as partner in representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of clause (b) to section 40. The Hon'ble Supreme Court in the case of Brij Mohan Das Laxman Das v. CIT [1997] 223 ITR 825/90 Taxman 41 held this insertion to be declaratory in nature and hence retrospective. In this case it was held that the interest paid by the firm to a partner on his individual deposits is not hit by section 40(b), if the person is a partner not in his individual capacity but as representing HUF. The same view was taken in Suwalal Anandilal Jain v. CIT [1997] 224 ITR 753/91 Taxman 337 (SC). However in Rashik Lal & Co. v. CIT [1998] 229 ITR 458/96 Taxman 16 (SC), somewhat contrary view was expressed. That is how the matter came up before the larger bench of the Hon'ble Supreme Court in Kanji Shivji & Co. (supra). In this case Explanation 2 to section 40(b) has been held as declaratory and hence retrospective in operation by affirming the judgments in the cases of Brij Mohan Das Laxman Das (supra) and Suwalal Anandilal Jain (supra).*

13.aa. *A survey of the above judgments makes it patent that any amendment to the substantive provision which is aimed at clarifying the existing position or removing unintended consequences to make the provision workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively. In our considered opinion the border line between a substantive provision having retrospective or prospective effect, is quite prominent. One needs to appreciate the nature of the original provision in conjunction with the amendment. Once a provision has been given retrospective effect by the legislature, it shall continue to be retrospective. If on the other hand, if the statute does not amend it retrospectively, then one has to dig out the intention of the Parliament at the time when the original provision was incorporated and also the new amendment. If the later amendment simply clarifies the intention of the original provision, then it will always be considered as retrospective. Like the case of Gold Coin Health Food (P.) Ltd. (supra) in which the Hon'ble Supreme Court held that the amendment to Explanation 4 to section 271(1)(c)(iii) simply clarified the position which was existing since inception of the provision that the penalty is leviable on concealment irrespective of the fact whether ultimately assessed income is positive or negative. Similarly in the case of Kanji Shivji & Co. (supra), the Hon'ble Apex Court held that the purpose of Explanation 2 to section 40(b) was simply to clarify that the Income-tax Act recognizes individual status of a person as different from his representative capacity. This Explanation did not bring in a new*

provision but clarified that the position was so since the introduction of the provision itself. In this class of clarificatory or explanatory amendments to the substantive provisions, the object is always to clarify the intention of the legislature as it was there at the time of insertion of the original provision. That is the reason for which the clarificatory amendments are always retrospective irrespective of the date from which effect has been given to them by the legislature.

***13.ab**. Armed with the above understanding of the retrospective or prospective effect, let us analyze whether or not the insertion of proviso to section 68 is clarificatory? We have noted above that for ruling out the application of section 68, the assessee must satisfy the AO as to the identity and capacity of the creditor in addition to the genuineness of transaction. When we advert to the language of section 68, it transpires that it refers to 'any sum credited' in the books of an assessee maintained for any previous year. The expression 'any sum credited' has not been specifically defined in the provision. Thus, it would extend to all the amounts credited in the books of account. A sum can be credited in the books of account, which would invariably either find its place either on the income side of the Profit and loss account or in the liability side of the balance sheet. Items credited to the Profit and loss account are themselves income and hence there can be no reason to make addition once again for them. Items appearing on the liability side of the balance sheet can be loans or share capital etc. Once there is specific reference in section 68 for applying it to 'any sum credited', there can be no reason to restrict its application only to 'loans' and not to 'share capital'. The burden of proof under 68 can be no different in respect of issue of share capital by closely held companies vis-à-vis loans or gifts. The Hon'ble jurisdictional High Court in Maithan International (supra), Active Traders (P.) Ltd.(supra), Mimec (India) (P.) Ltd. (supra) and Nivedan Vanijya Niyojan Ltd. (supra) has specifically held that the above three ingredients are required to be satisfied even in case of issue of share capital by a closely held company. First two out of the above four judgments have considered the judgment in the case of Lovely Exports (P.) Ltd. (supra). It shows that the intention of the legislature, as interpreted by the Hon'ble jurisdictional High Court, is always to cast duty on the assessee to prove the satisfaction of the three ingredients in case of transaction of issue of share capital by a closely held company in the same way as is in the case of transaction of loans.*

***13.ac.** At this juncture, it would be relevant to note the relevant part of the Memorandum explaining the provisions of the Finance Bill, 2012, which is as under : -*

> *"Section 68 of the Act provides that if any sum is found credited in the books of an assessee and such assessee either*

(i) does not offer any explanation about nature and source of money ; or

(ii) the explanation offered by the assessee is found to be not satisfactory by the Assessing Officer,

then, such amount can be taxed as income of the assessee.

The onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is not found to be satisfactory then the sum is added to the total income of the person. Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as share capital, share premium etc.

Judicial pronouncements, while recognizing that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. The courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large.

In the case of closely held companies, investments are made by known persons. Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and credit worthiness of creditor and genuineness of transaction. This additional onus, needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit. If the company fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income.

It is, therefore, proposed to amend section 68 of the Act to provide that the nature and source of any sum credited, as share capital, share premium, etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee-company in the hands of the resident-shareholder. However, even in the case of closely held companies, it is proposed that this additional onus of satisfactorily explaining the source in the hands of the shareholder, would not apply if the shareholder is a well regulated entity, i.e., a Venture Capital Fund, Venture Capital Company registered with the Securities and Exchange Board of India(SEBI).

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years."

13.ad. *A careful perusal of the first para of the Memorandum brings out that the onus of satisfactorily explaining issue of share capital with premium etc. by a closely held company is on the company. In the next para, it has been clarified that : 'Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as share capital, share premium, etc…'. Next para recognizes that judicial pronouncements, while considering that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. The courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large. After going through the above parts of the Memorandum explaining provisions of the Finance Bill, there remains no doubt whatsoever that the onus has always been on the closely held companies to prove the issue of share capital etc. by the company in terms of section 68. An analysis of the above discussed judgments, including four from the Hon'ble jurisdictional High Court, reveals that section 68 has been understood as casting obligation on the closely held companies to explain the amount of share capital etc. credited in its books of account. When we read the Memorandum explaining the provisions of the Finance Bill, it becomes vivid that certain contrary judicial pronouncements created doubts about the onus of proof and the requirements of this section. Thus, the amendment makes it manifest that the intention of the legislature was always to cast obligation on the closely held companies to prove receipt of share capital etc. to the satisfaction of the AO and it was only with the aim of setting to naught certain contrary judgments which 'created doubts' about the onus of proof by holding that there was no requirement on the company to prove the share capital etc. and as such no addition could be made in the hands of company even if such shareholders are bogus. As the amendment aims at clarifying the position of law which always existed, but was not properly construed in certain judgments, there can be no doubt about the same being retrospective in operation.*

13.ae. *The about discussed judgments from the Hon'ble Summit Court holding a clarificatory substantive provision as retrospective, despite the same being made applicable from a particular year, fully govern the position under consideration. It is interesting to note that the judgment of the Hon'ble jurisdictional High Court in Maithan International (supra) holding that the burden of proving the credit of share capital etc. is on a closely held company and failure to do so attracts the rigour of section 68, has been delivered on 21.1.2015, much after the amendment carried out by the Finance Act, 2012. This case pertains to pre-amendment era as the order of the tribunal assailed in this case is dated 24.6.2011. It shows that the Hon'ble High Court has also*

impliedly approved the proposition that the position anterior to the A.Y. 2013-14 was the same inasmuch as the onus to prove the share capital by a closely held company was on it. We, therefore, hold that the amendment to section 68 by insertion of proviso is clarificatory and hence retrospective. The contrary arguments advanced by the ld. AR, being devoid of any merit, are hereby jettisoned.

13.af. *At this stage, we consider it appropriate to discuss the submission of the ld. AR that a simultaneous amendment to section 56(2) connected with the amendment to section 68, has also been made w.e.f. 1.4.2013 and hence section 68 amendment is also retrospective. Before appreciating this argument, we set out clause (viib) of section 56(2) as under : —*

"where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:" shall be considered as income from other sources.

13.ag. *This provision mandates that where a closely held company receives any consideration for issue of shares in any previous year from any resident and the consideration received for issue of shares exceeds the face value of such shares, then the aggregate consideration received for such shares, as exceeds the fair market value of the shares, shall be chargeable to income-tax under the head "Income from other sources". A bare perusal of this provision makes it explicit that a new obligation has been put on the closely held companies which issue shares for a consideration greater than the fair market value of its shares. When the shares are so issued at a higher price, then such excess becomes income from other sources in the hands of the company. This amendment is obviously prospective as the position of law before such amendment was different. Such share premium was always considered as a capital receipt not chargeable to tax. Since this insertion has increased the ambit of income of such companies henceforth for the first time, which was not the position hitherto, it ceases to be clarificatory and hence cannot be construed as retrospective.*

13.ah*. We fail to find out any parallel between the amendments made to section 68 and section 56(2)(viib) except for the fact that these provisions have been added by the Finance Act, 2012. A conjoint reading of proviso to section 68 and section 56(2)(viib) divulges that where a closely held company receives, inter alia, some amount as share premium whose genuineness is not proved by the assessee company or its source etc. is not proved by the shareholder to the satisfaction of the AO, then the entire amount including the fair market value of the shares, is chargeable to tax u/s 68 of the Act. If however, the genuineness of the amount is proved and the shareholder also proves his source, then the hurdle of section 68 stands crossed and the share premium, to the extent stipulated, is chargeable to tax u/s 56(2)(viib) of the Act. It shows that only when source of*

such share premium in the hands of a shareholder is properly explained to the satisfaction of the AO, that the provisions of section 56(2)(viib) gets triggered. Approaching this section pre-supposes that the assessee genuinely received share premium from the share-holder having satisfactorily explained the transaction. Thus it is evident that sections 68 and 56(2)(viib) can never simultaneously operate. The later excludes the former and vice versa. Consequently, we are unable to accept the contention of the ld. AR that the proviso to section 68 attached a new obligation and hence should be declared as prospective. It is axiomatic that proving genuineness of a transaction of any credit, including share capital, was always an essential constituent of section 68. Since section 68 covers 'any sum credited' in the books without any exception, which, inter alia, includes share capital, it cannot be held that the examination of share capital with premium etc. was earlier outside the ambit of section 68 and now this amendment has brought it into its purview. We have noted it from several judgments dealing with share capital in pre-amendment period and the Memorandum explaining the provisions that proving the genuineness of share capital etc. by a company has always been considered a necessary requirement to escape the magnetization of section 68. The amendment has simply made express which was earlier implied. We, therefore, hold that though amendment to section 56(2)(viib) is prospective, but to section 68 is prospective. If that is the position, then the assessee is always obliged to prove the receipt of share capital with premium etc. to the satisfaction of the AO, failure of which calls for addition u/s 68.

***13.ai**. The ld. AR relied on the judgment of the Hon'ble Bombay High Court in Vodafone India Services (P.) Ltd. v. Addl. CIT [2014] 368 ITR 1/50 taxmann.com 300/[2015] 228 Taxman 25 to contend that share premium can under no circumstances be construed as a revenue receipt chargeable to tax. He submitted that the ld. CIT was not justified in revising the assessment order requiring the AO to examine the receipt of share capital/premium from the angle of taxability. It was argued that the share premium can be charged to tax only in the circumstances given in section 56(2)(viib) and that too from the assessment year 2013-14.*

***13.aj.** We are in full agreement with the ld. AR that the judgment in the case of Vodafone India Services (P.) Ltd.(supra) is an authority for the proposition that share capital/premium are capital receipts and cannot be charged to tax. We also fully endorse the argument about the introduction of section 56(2)(viib) w.e.f. assessment year 2013-14 which provides for charging share premium to tax in the circumstances and to the extent provided therein. However, it is significant to note that we are not concerned with the chargeability of share premium to tax in the present appeal. Here, the question is about the taxability or otherwise of such share capital/premium in terms of section 68. It is self evident that when the assessee fails to prove the identity and capacity of shareholders along with the genuineness of transactions, the amount of share capital, etc. is liable to be*

added u/s 68. It is only where share capital/ premium are genuinely received and all the three necessary ingredients stand proved to the satisfaction of the AO that the share premium is not chargeable to tax before assessment year 2013-14 and, thereafter, chargeable to the extent and in the circumstances as enshrined in section 56(2)(viib). This contention, consequently, fails.

***13.ak**. To sum up, we hold that the contention of the ld. AR that since the AO of the assessee-company is not empowered to examine or make any addition on account of receipt of share capital with or without premium before amendment by the Finance Act, 2012 w.e.f. A.Y. 2013-14 and hence the CIT by means of impugned order u/s 263 could not have directed the AO to do so, is unsustainable."*

Thus, it is for the assessee to explain the creditworthiness of the share subscribers and genuineness of the transaction including the source of source. The AO wanted to examine the share subscribers to go to bottom of the truth to find out the real nature of the transaction in order to verify genuineness of the transaction and to verify credit worthiness of the share subscribers that how persons with meager known sources of income and assets have invested huge amount of share money in the assessee company and that too at a huge premium. In the instant case, the business of the assessee is non-existent nor there is any project initiated by the assessee which could warrant justification and rationale for such a huge premium and consequentially investment of such a magnitude vis-à-vis reported and known sources of income and assets of the share subscribers. No rational person with sound mind will invest such a huge amount in the share subscription of a paper/shell company having no worthwhile business/project in hand at such a huge premium and it was for the assessee to have brought on record cogent material to prove the genuineness of the transaction as well credit worthiness of the share subscribers. The assessee scuttled the investigation launched by the AO wherein no share subscriber appeared before the AO during the assessment and remand proceedings even at assessee behest when the AO called the assessee to produce the shareholders , nor the shareholder appeared in pursuance to summons issued by the AO u/s 131 of the Act directly to these shareholders. The contentions of the assessee

that the AO did not gave proper and adequate opportunity to the assessee to produce share subscribers during assessment proceedings are merely hollow words and such a plea is nothing but an attempt to thwart and delay justice . In any case adequate, proper and sufficient opportunity was given to the assessee to produce share subscriber in remand proceedings. The heavy onus was on the assessee to prove the genuineness of the transaction and the reasons for collecting the premium at Rs. 30/- per share as against the face value of the shares of Rs 10 per share wherein the assessee company was merely a paper/shell company having no business/known project in hand. The assessee is not able to demonstrate the reasons and justification for charging of Rs. 30/- premium per share as against the face value of Rs. 10 per share and during the course of search and survey action on 30-05-2008 and post enquiries, the two Directors namely Mr Vinod K Faria and Suresh V Faria of the assessee company have admitted in statement recorded on oath that these share subscription entries are accommodation entries and are bogus transactions whereby cash is paid in lieu of share subscription. It is not shown and brought on record that these statements recorded on oath were retracted by the Directors of the assessee at any stage of proceeding till now. The Director of the Company Mr. Vinod K. Faria in statement recorded u/s 132(4) of the Act on 31-05-2008 surrendered Rs. 10 crores over and above regular income recorded in the books of accounts maintained by the assessee and one of the grounds for the surrender of Rs. 10 crores was that the assessee company will not be able to prove the genuineness of the share capital of Rs.5.5 crores (both in AY 2006-07 and 2007-08) raised by the assessee company to the satisfaction of the AO. We would like to usefully refer to the findings of Hon'ble Calcutta High Court in the case of Rajmandir Estates Private Limited(supra) which are reproduced hereunder:

> ***"21.*** *After hearing the learned advocates, we are of the opinion that the following questions arise for consideration:—*

(a) Whether in the light of the views expressed in the case of Lovely Exports (supra) & Steller Investment (supra) the order under Section 263 directing further investigation is legal?

(b) Is the finding of the Commissioner of Income Tax that unaccounted money was or could have been laundered as clean share capital by creating facade of paper work, routing the money through several bank accounts and getting it the seal of statutory approval by getting the case reopened under Section 147 suo motu perverse?

(c) Whether the order passed by the assessing officer under Section 143(3)/147 of the Income Tax Act is erroneous and also prejudicial to the interest of the revenue?

(d) Whether the impugned judgement of the learned Tribunal is perverse?

22. *We shall consider the second question first.*

In a commentary on the Prevention of Money Laundering Act, 2002 by Dr. M. C. Mehanathan published by Lexis Nexis, 2014, the steps of money laundering are described as follows:—

"STEPS OF MONEY-LAUNDERING

Although money-laundering often involves a complex series of transactions, it generally includes the following three basic steps:

1. Placement

It involves introduction of the proceeds of crime into the financial system. This is accomplished by breaking up large amounts of cash into smaller sums that are then deposited directly into a bank account, or by purchasing monetary instruments, transferring the cash overseas for deposit in banking/financial institutions, use for purchase of high value things such as gold, precious stones, art works etc. and reselling the same through cheques or bank transfers etc.

2. Layering

This involves formation of complex layers of financial transactions which distance the illicit proceeds from their source and disguise the audit trail. In this process a series of conversions or transactions are involved for moving the funds to places such as offshore financial centres operating in a liberal regulatory regime. Often "front" companies are formed to accomplish this task. These companies obscure the real owners of the money through the bank secrecy laws and attorney-client privilege. The techniques used for the purpose are to lend the proceeds back to the owner as loans, gifts and etc., under invoicing the items exported to the real owner or etc. In some cases,

the transfers may be disguised as payments for goods or services, thus giving them a legitimate appearance.

3. Integration

This involves investment in the legitimate economy so that the money gets the colour of legitimacy. This is achieved by techniques such as lending the money through "front" companies etc. The money may be invested in real estates, business and etc.

The stages at which money-laundering could be easily detected are those where cash enters into the domestic financial system, either formally or informally, where it is sent abroad to be integrated into the financial systems of tax haven countries and where it is repatriated in the form of transfers."

The role of the revenue authorities in tackling the menace of laundering black money was commented by the learned author as follows:—

"It has to be kept in view that India has a problem of black economy, which is unacounted and many a time the holders of black money also launder the black money in order to acquire legitimate assets. Legal or illegal income which evades tax and illegal income that comes within the exempted taxation slab constitute the unreported Gross Domestic Product or black economy. Laundering the black money and laundering proceeds of crime are two different issues, although there is frequent overlap between the two. While laundering black money is to be handled through taxation laws or similar laws, the laundering of proceeds of crime is to be handled through special anti-money-laundering laws."

23. *The following pieces of evidence are noticeable:—*

(a) *39 corporate subscribers purchased 7,92,737 shares of Rs.10 each at a premium of Rs.390/- per share. In the process the assessee company raised a paid up share capital of Rs.79.27 lakhs with a premium of Rs.31.7 crores.*

(b) *From the information made available by the assessee, it appears that 19 out of 39 applicants secured funds, for the purpose of contributing to the share capital of the assessee, on account of share application money. In other words, those 19 applicants collected funds on account of share application money in their respective companies and that money was contributed to the share capital of the assessee. 15 out of the 39 applicants procured the requisite fund by selling shares. The rest of the applicants of shares, in the share capital of the assessee company, did not disclose the nature of receipt at their end though the source of fund was identified. What has not been specified is, as to on what account was the money received.*

(c) The forms of share application purporting to have been signed by the applicant companies have also been disclosed from which it appears that the date of allotment, number of allotment, number of shares allotted, share ledger folio, allotment register folio, application number, have all been kept blank. These particulars, Mr. Poddar, submitted should have been filled up by the assessee, but that has not been done.

(d) Another significant fact admitted by the assessee in reply to the notice to show cause under Section 263 is that the "shares were offered to, and subscribed by the closely held companies owned by the Promoters/Directors or their close relatives and friends".

(e) From the bank statements disclosed it appears that to have the cheques issued in favour of the asseessee honoured, matching amounts were credited to the accounts of the subscribers shortly before the cheques issued in favour of the assessee were presented for collection.

(f) 19 applicants of shares within a period of less than six months had money contributed to their share capital which in their turn they contributed to the share capital of the assessee. So that, the 19 companies which contributed to the share capital of the assessee in the name of assets were left merely with the share-scripts of the assessee. The other lot of 15 subscribers in substance had the share-scripts held by them substituted by the share-scripts of the assessee.

(g) Though, Mr. Poddar made extensive submissions scanning the order under Section 263 in between the lines, he did not criticize the finding of the Commissioner that "the A.O. did not examine a single Director of the assessee company or of the subscribing company" which goes to show that correctness of this assertion is not in dispute.

***24.** From the aforesaid evidence the following, prima facie, inferences can safely be drawn:—*

(a) The promoter/directors of the assessee and their close relatives and friends had united with the common object of creating at least 20 (19+1) companies apparently having a large capital base, but, in fact these are mere paper companies having no real worth. The transaction of sale and purchase of shares was nominal rather than real.

(b) The allegation, in response to the notice to show-cause u/s. 263 that "it bears importance to state here that the investor companies of shares were interested to subscribe shares of the assessee company as, according to them, the assessee company had prospect in future," is a plain lie.

(c) The blank share application forms etc. tabulated above go to show

that the alleged application for shares and the alleged allotment were not in the usual course of the business.

(d) In the light of the aforesaid pieces of evidence and the prima facie finding, we are emboldened to say that the three requirements: (A) identity of the share-holders; (B) genuineness of the transaction and (C) the creditworthiness of the share-holders repeatedly impressed, by Mr. Poddar, upon us, have not been satisfied. Identity of the alleged share-holders is known but the transaction was not a genuine transaction. The transactionwas nominal rather than real. The creditworthiness of the alleged share holders is also not established because they did not have any money of their own. Each one of them received from somebody and that somebody received from a third person. Therefore, prima facie, the share-holders are mere name lenders.

25. *For the reasons discussed in the preceding paragraph, we are satisfied that the judgement in the case of Steller Investment (supra) has no manner of application to the facts and circumstances of this case. The question as to whether there has been a device adopted for money laundering also did not crop up for consideration in that case.*

The Prevention of Money Laundering Act, 2002 was not also there on the statute at that point of time. Before the appeal in Steller Investment Ltd. was dismissed by the Apex Court, the question had cropped up in the case of Sophia Finance Ltd. (supra) wherein a special bench held as follows:—

"As we read section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income-tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income-tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, the Income-tax Officer may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name-lender or not. Be that as it may, it is clear that the Income-tax Officer has jurisdiction to make enquiries with regard to the

nature and source of a sum credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money."

In the case of Sumati Dayal (supra). Their Lordships held that a capital receipt can become taxable if the explanation offered by the assessee about the nature and source thereof is not satisfactorily explained.

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.

26. *The learned Tribunal in the impugned judgement in paragraphs 3, 4 and 5 observed, inter alia as follows:-*

"We have heard the rival submissions and perused the relevant material on record. It is relevant to mention that we have disposed of more than 500 cases involving same issue through certain orders with the main order having been passed in a group of cases led by Subhlakshmi Vanijya Pvt. Ltd. v. CIT (ITA No.1104/Kol/2014) dated 30.07.2015 for the A. Y. 2009-10.

Both the sides have fairly admitted that facts and circumstances of the cases under consideration are mutatis mutandis similar to those decided earlier, except for certain issues which we will advert to a little later. In our aforesaid order in Subhalakshmi Vanijya Pvt. Ltd. v. CIT (ITA No. 1104/Kol/2014 A.Y. 2009-10), we have drawn the following conclusions:-

** ** **"

It is noticed that all or some of the above conclusions are applicable to the appeals in this batch."

The appellant has disclosed a copy of the judgement delivered by the learned Tribunal in Subhalaxmi Vanijya (P.) Ltd. v. CIT. The learned Tribunal in paragraph 17.i. opined as follows:-

"All the cases under consideration have the same common feature of passing assessment orders in undue haste. When we consider the above factual matrix, there can be no escape from an axiomatic conclusion that in all these cases the enquiry conducted by the AOs is exceedingly inadequate and hence fall in the category of 'no enquiry' conducted by the AO, what to talk of charactering it as an 'inadequate enquiry'. In our considered opinion, the highly inadequate enquiry conducted by the AO resulting in drawing incorrect assumption of facts, makes the orders erroneous and prejudicial to the interests of the revenue."

27. *In the case of Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC) the Tribunal had held as follows:-*

"The Tribunal further held that if the orders for 1955-56 to 1959-60 were left out and the assessment order for 1960-61 was considered by itself, it could not be said that the assessment order was prejudicial to the interests of revenue. It was also observed that the factum of advance of initial capital, realization of amounts by sale of gold ornaments and the carrying on of the money-lending and speculative business had already been accepted and assessed in the previous years, that even in the year of assessment in question the Income-tax Officer had added Rs.1,499 to the disclosed income from speculative business and Rs.1,270 to the disclosed income from interest and made the assessment on a total income of Rs.9,037; as such it could not be said that the assessment was prejudicial to the interests of revenue and that at the most it could be said that the assessee could not have carried on any business at the addresses given by her but where an assessment has been made without territorial jurisdiction it could not be said to be prejudicial to the interests of revenue."

This Court set aside the order of the learned Tribunal. In an appeal by the assessee before the Apex Court their Lordships upheld the order of this Court holding, inter alia as follows:—

"The learned advocate for the assessee contends that under section 33B the Commissioner had no jurisdiction to cancel the assessment made by the Income-tax Officer inasmuch as it cannot be said that where an assessee has been assessed to tax it was prejudicial to the interests of revenue on the ground that no assessment could have been made in respect of the income of

which she made a voluntary return. This contention in our view is unwarranted by the language of section 33B. The words of the section enable the Commissioner to call for and examine the record of any proceeding under the Act and to pass such orders as he deems necessary as the circumstances of the case justify when he considers that the order passed was erroneous in so far as it is prejudicial to the interests of the revenue. It is not, as submitted by the learned advocate, prejudicial to the interests of the revenue only if it is found that the assessment for the year was disclosed on the basis that an income had been earned which is assessable. Even where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to the interests of the revenue. If so and we think it is so the Commissioner under section 33B has ample jurisdiction to cancel the assessment and may initiate proceedings for assessment under the provisions of the Act against some other assessee who according to the income- tax authorities is liable for the income thereof."

The reasoning advanced by their Lordships in respect of an alleged revenue receipt is, according to us, equally applicable to an alleged capital receipt which, in fact, was received only in papers. The attempt of the assessee, it was apprehended in the case of Smt. Tara Devi Aggarwal (supra) was to assist someone else. An identical attempt is involved in this case. Who is the person sought to be assisted by the assessee? This question can only be answered after a thorough enquiry, directed by the CIT, is held. The assessee is interested in stalling that investigation on the plea that the order of the assessing officer is neither erroneous nor prejudicial to the interest of the revenue.

28. *We have indicated above the pieces of evidence which go to show that the Commissioner had reasons to entertain the belief that this was or could be a case of money laundering which went unnoticed because the assessing officer did not hold requisite investigation except for calling for the records. The evidence which we have tabulated above and the prima facie inference drawn by us is deducible from the documents also submitted before the assessing officer. The fact that the assessing officer did not apply his mind to those pieces of evidence would be evident from the assessment order itself which reads as follows:—*

"During the Financial Year the assessee company has issued 792737 No. of equity share with a face value of Rs.10/- along with a premium of Rs.390/-.

Thereafter, Notices u/s. 133(6) of the I.T. Act, 1961 were also issued to verify the transactions of the assessee on test check basis. The case is discussed and heard. Issue relevant for determination of total income of the assessee is discussed as under:"

The issues relevant according to the assessing officer were a receipt of a sum of Rs.61,000/- on account of consultancy charges and the preliminary expenses written off amounting to a sum of Rs.60,000/-. He, therefore, completed the assessment after making addition of a sum of Rs.1,21,000/-. When is an order erroneous in so far as the same is prejudicial to the interest of the revenue was considered by this Court in the case of Maithan International (supra) to which one of us (Girish Chandra Gupta, J.) was a party wherein the following views were expressed:—

'It is not the law that the Assessing Officer occupying the position of an investigator and adjudicator can discharge his function by perfunctory or inadequate investigation. Such a course is bound to result in erroneous and prejudicial orders. Where the relevant enquiry was not undertaken, as in this case, the order is erroneous and prejudicial too and, therefore, revisable. Investigation should always be faithful and fruitful. Unless all fruitful areas of enquiry are pursued the enquiry cannot be said to have been faithfully conducted. In a different context the apex court observed "contra veritatem lex nunquam aliquid permittit : implies a duty on the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation"

(See Sidhartha Vashisht alais Manu Sharma v. State (NCT of Delhi) reported in [2010] 6 SCC 1 paragraph 200 at page 80)'

In the case of N.R. Portfolio (P.) Ltd. (supra) the following views were expressed:—

"What we perceive and regard as correct position of law is that the Court or Tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PANs or the fact that third persons or company had filed Income-tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover

up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, control and manage them."

The persons behind the assessee company and the persons behind the subscribing companies were not interrogated which was essential to unearth the truth. Reference may also be made to the judgement of this Court in the case Active Traders (P.) Ltd. (supra).

The question for consideration is whether in the presence of materials discussed above the Commissioner was justified in treating the assessment order erroneous and prejudicial to the interest of the revenue. That question in the facts and circumstances has to be answered in the affirmative.

We find no substance in the submission that the order of the learned Tribunal is perverse, after examining all the submissions advanced by Mr. Poddar.

29. *Whether receipt of share capital was a taxable event prior to 1st April, 2013 before introduction of Clause (VII b) to the Sub-section 2 of Section 56 of the Income Tax Act; whether the concept of arms length pricing in a domestic transaction before introduction of Section 92A and 92BA of the Income Tax Act was there at the relevant point of time are not questions which arise for determination in this case. The assessee with an authorised share capital of Rs.1.36 crores raised nearly a sum of Rs.32 crores on account of premium and chose not to go in for increase of authorised share capital merely to avoid payment of statutory fees is an important pointer necessitating investigation. Money allegedly received on account of share application can be roped in under Section 68 of the Income Tax Act if the source of the receipt is not satisfactorily established by the assessee. Reference in this regard may be made to the judgement in the case of Sumati Dayal (supra) wherein Their Lordships held that any sum "found credited in the books of the assessee for any previous year, the same may be charged to income tax....". We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd. (supra) opined that "the use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not*

precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of Nova Promoters and Finlease (P) Ltd. (supra). Similar views were expressed by this Court in the case of Precision Finance (P.) Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to be correct. We find no substance in the submission that the exercise of power under Section 263 by the Commissioner was an act of reactivating stale issues. In the case of Gabriel India Ltd. (supra) the CIT was unable to point out any error in the explanation furnished by the assessee. Whereas in the present case we have tabulated the evidence which was before the assessing officer which should have provoked him to make further investigation. The assessing officer did not attach any importance to that aspect of the matter as discussed above by us. The judgement in the case of Leisure Wear Exports Pvt. Ltd. (supra) relied upon by Mr. Poddar has no applicability because the evidence furnished by the assessee in this case does suggest a cover up. We also have held prima facie that neither the transaction appears to be genuine nor are the applicants of share are creditworthy.

The judgement in the case of Omar Salay Mohamed Sait (supra) cited by Mr. Poddar has no application for reasons already discussed. It is not true that the Commissioner in this case has merely on the basis of suspicion held that this was or could be a case of money laundering. We as a matter of fact have discussed this issue in great detail and need not reiterate the same. The order passed by the Commissioner is by no means an act of substituting his own views to that of the assessing officer. It is true that the assessing officer had requisitioned the necessary details by his notice u/s.142(1) but he thereafter did not apply his mind thereto. The judgement in the case of J. L. Morrison (India) Ltd. has no manner of application because in that case the question essentially was whether the receipt was of a capital or revenue nature. The facts and circumstances were not in dispute. Moreover

the view taken by the assessing officer was not shown nor was held by the Court to be an erroneous view. Whereas in this case we have demonstrated in some detail as to why is the order of the assessing officer erroneous and prejudicial to the revenue.

The judgement in the case of Malabar Industrial Co. Ltd. (supra) and Max India Ltd. do not apply to the facts of this case for reasons already discussed by us. From the judgement of the learned Tribunal in the case of Subholaxmi, placed before us in great detail by Mr. Poddar, we find that all important issues placed for consideration by no other than Mr. Poddar himself were duly considered by the learned Tribunal.

30. *For reasons already discussed we answer the issue No. (a) and (c) in the affirmative and the issue No. (b) and (d) in the negative. In the result the appeal fails and is dismissed. It is clarified that the views expressed herein are for the purpose of disposal of this appeal and shall not preclude the statutory authority from arriving at its own conclusion in accordance with law."*

We may now turn to the case laws relied upon by the assessee company . The assessee company relied upon the following case laws:

1. CIT v. Smt. P. K. Noorjahan (1999) 237 ITR 570(SC)- In this case, the Hon'ble Supreme Court has held that the AO is vested with discretionary powers as the word used in Section 69 of the Act is 'may' and not 'shall' and in case the assessee offers an explanation which is found not to be satisfactory by the AO , then the AO may treat the same as income of the assessee and discretion is vested with the AO and it is not that in each and every case the addition is to be made if the explanation is found to be not satisfactory by the AO. This discretion is to be exercised in a proper manner by the AO keeping in view the circumstances of the case. There is no quarrel with this proposition as in the instant case the AO was not satisfied with the explanation of the assessee as to the creditworthiness of the shareholder as well genuineness of the transaction and the AO wanted to interrogate the

shareholder which attempt of the AO was thwarted by the assessee as the shereholders were neither produced by the assessee nor the shareholders appeared in pursuance to summons issued by the AO.

2. Mitesh Rolling Mills Private Limited v. CIT (2002) 258 ITR 278(Guj)- In the instant case, it was held by the Hon'ble Court that it is for the assessee to offer an explanation as to nature and source of credit as appearing in the books of accounts of the assessee and the AO if not satisfied with the explanation of the assessee may treat the same as income of the assessee u/s 68 of the Act keeping in view the overall circumstances of the case and it is not that the AO shall make addition if the explanation offered by the assessee is not satisfactory and the matter was remanded by the Hon'ble Court to Tribunal to decide the matter in light of decision of the Hon'ble Apex Court in the case of CIT v. Smt P. K. Noorjahan (1999) 237 ITR 570(SC) , Roshan Di Hatti v. CIT (1977) 107 ITR 938(SC) and CIT v. Bharat Engineering and Construction Company (1972)83 ITR 187(SC).

3. The case of Roshan Di Hatti v. CIT (1977) 107 ITR 938(SC) was decided under the Income Tax Act, 1922 which did not have the provision equivalent to Section 68 and 69 of the Act which creates legal fiction as discussed in preceding para's of this order. The HUF assessee in that case was carrying on business in Lahore till June 1947. In June 1947, its Karta transferred from Lahore certain sums to banks in New Delhi. The Karta thereafter left Lahore for India with a sealed trunk containing gold ornaments, jewellery and cash which he deposited with a bank at Amritsar. Though initially the karta had gone to Mussoorie, he shifted to Delhi in October 1947 and started the gold business at Delhi in February 1948. The first entry in the books of account of the assessee was dated 30-3-1948 bringing in an aggregate capital of certain amounts including gold ornaments and bank and cash balances. When asked to explain the

source of the capital brought into the business, the assessee explained that the gold ornaments and cash were brought at the time of migration from Lahore and that from June 1947 till March 1948, the HUF assessee or its Karta had no other business or means of income from which the assets in question could be earned. The Assessing Officer, the AAC as well as the Tribunal and also the High Court held that there was material on the basis of which it was possible to conclude that a substantial amount in question represented the undisclosed income of the assessee. On appeal, the Supreme Court reversed the finding and held that though it was a finding of fact, the finding given by the Tribunal was such that no person acting judicially or properly instructed as to the relevant law could come to such a finding. The business carried on by the assessee at Lahore was reasonably large business though its extent could not be verified by any reliable material produced by the assessee. Therefore, utter improbability amounting almost to impossibility of the assessee having earned such a large amount as profit within a few months in the disturbed conditions which were then prevailing in India was a circumstance which ought to have been taken into account by the Tribunal. In the said decision, the Apex Court reiterated the principle that the onus of proving the source of a sum of money found to have been received by an assessee is on him. If he disputes the liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the revenue is entitled to treat it as taxable income. To put it differently, where the nature and source of a receipt, whether it be of money or of other property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that that income is from any particular source.Again this decision in fact support the case of Revenue instead of advancing the case of the assessee as the assessee did not discharged its burden as cast u/s

68 of the Act.In any case , Section 68 of the Act placed in the Act of 1961 creates a legal fiction wherein if the assessee did not offer an explanation to the satisfaction of the AO, then the amount found credited in the books of the assessee shall be treated as income of the assessee u/s 68 of the Act. In the instant case under appeal , the Directors of the assessee have admitted in statement recorded on oath that these share subscription is bogus and were merely accommodation entries wherein cash was given to obtain cheques from the share subscribers.

4. The case of CIT v. Bharat Engineering and Construction Company (1972)83 ITR 187(SC) was again decided under the Act of 1922 where there was no provision equivalent to Section 68 and 69 of the Act. . In *Bharat Engg. & Construction Co.'s* case (*supra*), the assessee-company was an engineering construction company which commenced its business in May 1943, but there were several cash credit entries in the first year of its business aggregating to Rs. 2.50 lakhs. The Assessing Officer called upon the assessee to explain those cash credit entries. The explanation given by the assessee was found to be false by the Assessing Officer, the AAC and the Tribunal. But, the Tribunal felt that those cash credit entries could not represent the income or profits of the assessee as they were all made very soon after the company commenced its activities. The Tribunal was of the view that in the very nature of things the assessee could not have earned such a huge amount as profits very soon after it commenced its activities. The Apex Court, therefore, inferred that it was reasonable to assume that those cash credit entries were capital receipts although for one reason or other the assessee had not come out with the true story as regards the person from whom it got those amounts. The Apex Court, therefore, did not disturb the finding of the Tribunal. First of all this decision was rendered under the old Act of 1922 where there was no equivalent provision Section 68 and 69 as are contained in Act of 1961 which creates

legal fiction and secondly there was a finding of fact recorded by the Tribunal on peculiar facts of the case. In the instant case under appeal , the Directors of the assessee have admitted in statement recorded on oath that these share subscription is bogus and were merely accommodation entries wherein cash was given to obtain cheques from the share subscribers.

5. CIT v. Five Vision Promoters Private Limited (2016) 380 ITR 289(Del)- in this case it was held that mere facts that shareholders have common address was not a valid basis to doubt their identity and genuineness of the transaction. It was held that under section 68 of the Act, the Assessing Officer has jurisdiction to undertake enquiries with regard to the amount credited in the books of the account of an assessee. This could be any sum whether in the form of sale proceeds or receipt of share capital money. First, the Assessing Officer is to enquire whether the alleged shareholders in fact exist or not. The truthfulness of the assertion by the assessee regarding the nature and the source of the credit in its books of account can be examined by the Assessing Officer. Where the identity of the shareholders stands established and it is shown that they had in fact invested money in the purchase of the assessee's shares, then the amount received would be regarded as capital. Where the assessee offers no explanation at all or the explanation offered is unsatisfactory, the provision of section 68 may be invoked. The Revenue in this case made sweeping broad generalized allegation that the assessee being developer is accepting 'on-money' which is taken in cash which has not been prima facie established by the Revenue while all cash credit appearing in the books of the assessee were added as income treating the investor companies as paper companies while the addition was deleted on the grounds that the revenue was unable to produce material to substantiate its case that the genuineness and creditworthiness of the investors and the source of the

money received by the assessee by way of investments in the assessment year in question was not satisfactorily explained by the assessee. While in the instant year under appeal, the Revenue has categorically held based on material on record that the share subscribers are persons of meager means and shares were issued at huge premium despite the fact that there is no business/project in hand of the assessee. In the instant case under appeal , the Directors of the assessee have admitted in statement recorded on oath that these share subscription is bogus and were merely accommodation entries wherein cash was given to obtain cheques from the share subscribers.

6. CIT v. Lovely Exports Private Limited (2008) 216 CTR 195(SC) -
   It was held by Hon'ble Calcutta High Court in the case of Rajmandir Estates Private Limited(supra) 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"

While in the instant case , there is also an admission by the Directors of the assessee company in their statement recorded on oath that these share subscription was merely an accommodation entries and cash was given in lieu of cheques received by the assessee company. The assessee company being a closely held company has not been able to establish the

creditworthiness of the share subscriber as well genuineness of the transaction as to how huge amounts have been invested by persons of meager means and that too at a huge premium in a newly incorporated company having no worthwhile business / project in hand and having no netwoth of its own. Moreover, we have seen that Section 68 of the Act has been amended wherein the case of share subscription the company which is a company in which public is not substantially interested is required to explain source of the source of the amount received.

7.CIT v. Creative World Telefilms Limited (2011) 333 ITR 100(Bombay) This case was decided relying on Hon'ble Apex Court decision in Lovely Exports Private Limited(supra) which we discussed in preceding para.

8. CIT v. Value Capital Services Private Limited (2008) 307 ITR 334(Del)- The Hon'ble Delhi High Court held that the burden is on the Revenue to prove that the money emanated from the coffers of the assessee which went into to get the amount of cash credit in the books of the assessee. This case is distinguishable as in the instant case there is an un-retracted statement u/s 132(4) of the Act by Director of the assessee that the amount of share subscription was bogus and merely an accommodation entry. The assessee has also not been able to establish the creditworthiness of the share subscribers and also the genuineness of the transaction.

We are of the considered view that the onus is on the assessee company to bring on record the cogent evidences to prove the identity and 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 cheque/draft issued in

favour of the assessee is preceded by deposit of cash/cheque in the bank account of the shareholder and these share holders are merely name lenders. 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 premium when the company was merely a paper/shell company having no business/project worth in its hand. The shareholders could not be interrogated by the AO which was essential to unearth the truth as the assessee did not produced the shareholders nor they appeared before the AO in response to summons issued u/s 131 of the Act. The Directors namely Mr. Vinod K Faria and Mr Suresh V. Faria of the assessee company have admitted in their statement recorded on oath u/s 132(4)/131 of the Act that these share subscription was bogus and were merely accommodation entries. The blank transfer forms and receipts from the shareholders were found during survey with respect to transfer of these shares from shareholders to the persons to be nominated by the promoters, all the share application forms were filled in the same handwriting , there was no serial numbers in share application form , the acknowledgment of receipt of share application forms were not given to the share subscribers by the assessee and these are not usual conduct of the carrying on of business . 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.1.60 crores 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. We order accordingly.

11. In the result, assessee's appeal in ITA No. 1835/Mum/2014 for the assessment year is dismissed.

12. Regarding the assessee's appeal in ITA No. 1836/Mum/2014 for the assessment year 2007-08, our above decision in ITA No. 1835/Mum/2014 for the assessment year 2006-07 shall apply mutatis mutandis to the assessee's appeal in ITA No. 1836/Mum/2014 wherein the facts are identical.

13. In the result, both the appeals filed by the assessee in ITA No. 1835/Mum/2014 for the assessment year 2006-07 and ITA No. 1836/Mum/2014 for the assessment year 2007-08 are dismissed.

Order pronounced in the open court on 24th August, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांकः 24-08-2016 को की गई ।

Sd/-	sd/-
(SAKTIJIT DEY)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **24-08-2016**

व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "D" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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