INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4520/Del/2009 and 613/Del/2013
(Assessment Year: 2006-07)

M/s. Shaan Construction P Ltd, D-5/6, Okhla Industrial Corp, Ph.II, New Delhi PAN:AABCS3688Q	Vs.	ITO, Ward-8(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Rajesh Mahana, Adv Shri Manu Giri, Adv Shri Ramanand Roy, Adv
Revenue by:	Shri SS Rana, CIT DR
Date of Hearing	06/03/2018
Date of pronouncement	28/03/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the assessee against the quantum addition u/s 68 of the Income Tax Act and penalty u/s 271(1)(c) confirmed by the ld CIT(A).
2. This appeal in ITA No. 4520/Del/2009 is filed by assessee for assessment year 2006 – 07 against the order of the Commissioner of income tax (appeals) – XI, New Delhi (the Ld. CIT (A)) passed on 21/10/2009 wherein the addition made by the Income Tax Officer, Ward 8 (1), New Delhi (the Ld. AO) of Rs. 5000000/– on account of unexplained share capital and share premium under section 68 of the Income Tax Act vide assessment order passed Under Section 143 (3) of the Income Tax Act (the Act) on 19/12/2008 is confirmed.
3. The assessee has raised the following grounds of appeal in ITA No. 4520/Del/2009 for the Assessment Year 2006-07:-

   "1. Because the Ld. CIT (A)'s order is perverse on facts as well as on law.

2. *The order of CIT(A) is bad in law and void-ab-initio by not following the provisions of S-251 of I.T. Act and for exceeding their jurisdiction.*

3. *Because the order of CIT(A) is bad in law and void-ab-initio by exceeding it's jurisdiction in directing the A.O. to invoke necessary provisions of law so that the matter could be examined and decided by the competent court of law.*

4. *Because the Ld. CIT(A) has erred in confirming an addition of sum of Rs. 50,00,000/- made by the Ld. A.O. on account of unexplained share capital & share premium u/s 68 of the Income Tax Act.*

5. *That the Ld. CIT(A) has erred in confirming an addition a sum of Rs. 50,00,000/- made by the Ld. A.O. on account of undisclosed income of the Assessee Company which has been utilized for deposit of share capital & share premium account contrary to the settled law.*

6. *That the Ld. CIT(A)'s order is based upon partly relevant and partly irrelevant documents/evidences and ignoring the relevant documents/evidences hence void-ab-initio.*

7. *That Ld. CIT(A)'s order is totally against the settled positions of law enunciated by the Apex Court and jurisdiction High Court in the case of Commissioner of Income Tax vs Lovely Export P. LTd (216 CTR 195 (SC)) and Commissioner of Income Tax vs. Value Capital*

8. *That Ld. CIT(A) as well as A.O. has failed to prove that investment made by subscribe actually emanates from coffers of assessee to be treated undisclosed income of Assessee u/s 68.*

9. *That Ld. CIT (A) erred in holding that transaction in question should be treated as unsecured cash credit and not as share capital/premium money.*

10. *Whether the Assessee has discharged its onus of satisfying requirement of section 68 and there is no evidence on record to support findings of CIT [A] as well as A.O."*

4. The ground No. 1 – 3 and ground No. 11 are general in nature and therefore same are dismissed.

5. Ground No. 4 – 10 of the appeal are with respect to the single issue involved in this appeal about the confirmation of an addition of Rs. 5000000/– by the Ld. CIT (A) on account of unexplained share capital and share premium under section 68 of the income tax act.

6. The brief facts are that assessee is a company engaged in trading of plots, agricultural land and minor development work. It filed its return of income on 29/11/2006 showing income of Rs. 38350/-.

7. During the assessment proceedings the Ld. assessing officer noted that the authorized capital of the assessee company has increased from Rs. 5 lakhs to Rs. 20 lakhs and in pursuance thereof 50,000 shares of Rs. 10 which were allotted at the premium of Rs. 90 per share to the five companies. Before the assessing officer the assessee filed confirmation from these parties along with their memorandum of articles and permanent account number along with copy of their bank statements from where these amounts were paid to the assessee. The Ld. assessing officer called for information under section 133(6) from the banks of these companies and it was found by him that the bank statement submitted by the assessee were totally different from the bank account statement submitted by banker of these shares subscribers. The Ld. assessing officer therefore addressed a letter to the bank enclosing the bank statement submitted by the assessee and the banker confirmed that the copies of the bank statements submitted by the assessee were not be correct bank statement. Thereafter the Ld. assessing officer issued notice to the assessee on 12/12/2008 confronting the above fact. It was stated by the Ld. assessing officer that the confirmation filed from the parties and from the respective bank statements submitted along with them shows the wrong details where according to the statement submitted by the assessee, prior to issue of the cheque there was a clearance of various cheques, however, the bank statements submitted by the bankers directly to the assessee shows that cash is deposited in the bank accounts of the shares subscribers before issue of the cheques to the assessee company. Therefore, the Ld. assessing officer was of the view that credits in the books of the assessee shall be treated as unexplained. On the appointed date of the hearing, none appeared on behalf of the assessee. Therefore the Ld. assessing officer took a view that on perusal of the

bank statement filed by the assessee in respect of these 5 companies clearly shows a credit to the account by way of clearing or transfer while infact cash was deposited in these accounts before a cheque was given to the assessee camouflaging it to be a receipt for share capital and share premium. Therefore he took the view that assessee has failed to prove the creditworthiness of the depositors as well as genuineness of the above transaction and hence he made an addition under section 68 of the income tax act 1961. Consequently assessment under section 143 (3) was passed on 19.12.2008 at Rs. 5038350/– against the returned income of Rs. 38350/–.

8. The assessee aggrieved, filed an appeal before the Ld. CIT (A). Before the Ld. CIT (A) the remand report was called for and one of the director of one of the depositor company's was examined on oath however he could not also explain the discrepancy in the bank statement submitted by the assessee as well as the bank statement submitted by the bankers directly to the assessing officer. In the remand report also the Ld. assessing officer stated that assessee has failed to prove the creditworthiness of the such creditor as well as the genuineness of those transactions. In response to the remand report the Ld. authorised representative submitted that the assessing officer should have issued summons and he further relied on the decision of CIT Vs. Lovely Exports Private Limited (2008) 208 CTR 216 (Supreme Court). The Ld. CIT(A) after taking the note of the explanation furnished by the assessee as well as the remand report of the Ld. assessing officer confirmed the addition of Rs. 50 Lacs under section 68 of the act.

9. Aggrieved by the order of the Ld. CIT (A) the assessee has preferred an appeal before us. The main argument of the assessee before us was as under:-

(I) The Ld. authorised representative referred to letter dated 27/2/2008 submitted by the assessee before the Ld. assessing officer showing the complete details about the number of shares allotted to

these companies. He also referred that along with the submission copy of the conformation, copy of the income tax return for assessment year 2006 – 07, copy of the share application form, copy of the bank statement and copy of the PAN card and memorandum and articles of Association of all these companies were submitted. Therefore, the assessee has discharged its onus of proving the identity, creditworthiness of the depositors as well as the genuineness of the transactions.

(II) He further referred to the letter submitted by the assessee to the Ld. AO in response to the query letter of the AO dated 12/12/2008, about the bank statement submitted by the assessee along with the confirmation of the depositors, that the conformation was supplied by the depositors to the assessee in good faith and the assessee does not have any knowledge of the wrong particulars mentioned in those bank statements by the above parties. Therefore, the Ld. assessing officer was requested by the assessee to seek reply from the parties concerned and not to treat the above sum as unexplained income of the assessee. Ld. authorised representative submitted that that assessee did not have any knowledge of any mischief in the bank statement by the shareholders/depositors. He stated that assessee was under bona fide belief that the bank statement submitted by the creditors to the assessee were correct. Therefore according to him the Ld. assessing officer should not have taken a view that the above sum an unexplained income of the assessee.

(III) He further referred to the statement of Shri Sajan Singh, director of one of the company, who deposited share application money with the assessee, recorded by the Ld. assessing officer on 27/7/2009 in remand proceeding. He referred to the question No. 13 wherein it has been confirmed by that person that bank statements were submitted by the company to the assessee company for onward submission before the Ld. AO. He further referred to question No. 14 and 15 of the statement where that person also could not show that who would have made the changes

in the bank statement. In fact he also denied that they have made any change in the bank statement submitted to the assessee. In view of this the Ld. authorised representative submitted that assessee has nothing to do with the manipulation done by an unknown person in the bank statement submitted before the assessing officer of those depositors. Therefore it was stated that assessee is not at all involved in any alteration in the bank statements of those depositors. In turn he relied upon the statement made by Sh. Sajan Singh wherein he has confirmed the amount deposited by the shareholder company with the assessee. He therefore submitted that in the statement recorded by the Ld. assessing officer of the director of the company who deposited money with the assessee company have also confirmed the fact that money has been deposited by that company who is regularly assessed to income tax. He therefore submitted that even the deposition of the director of the shareholder company have also confirmed the above transaction.

(IV) He further submitted that if the Ld. assessing officer has any doubt about the source of the deposit of the shareholder then the Ld. assessing officer should have issued summons under section 131 of the income tax act. The Ld. assessing officer has not done so. Therefore his contention was that when assessee has discharged its onus completely and the Ld. assessing officer does not issue summons to the directors of the depositor company then addition cannot be made in the hands of the assessee under section 68 of the act.

(V) He further stated that assessee has submitted the confirmation of the parties as well as the complete details about the depositor. Therefore assessee has shown the "source of funds" but assessee cannot be compelled to prove the "source of source of the funds" deposited with the assessee, he therefore submitted that assessee has proved the "source of the funds" deposited with the assessee company, it has discharged its onus.

(VI) In the and he relied upon the several decisions of the Hon'ble court as under:-

a. CIT versus Wins petrochemicals private limited 330 ITR 603

b. CIT versus Five Vision promoters private limited 380 ITR 289

c. Principle Commissioner of income tax versus Lakshmanan industrial resources Ltd 397 ITR 106

d. Commissioner of income tax versus Orchid industries private limited 397 ITR 136

e. Commissioner of income tax versus Gagandeep infrastructure private limited 394 ITR 680

10. The Ld. CIT DR vehemently supported the order of the lower authorities and submitted that assessee has failed to prove the creditworthiness and genuineness of the transactions of those depositors. After submission of the preliminary details by the assessee, Assessing Officer has thrown onus back on the assessee by proving that the bank statement of the depositors submitted by the assessee are false and forged. He therefore submitted that once the assessing officer has thrown back onus on the assessee, it is the duty of assessee to produce the Directors of the Depositors before the assessing officer which assessee failed is to do so. He submitted that there is no requirement of the issue of summons under section 131 of the income tax by the assessing officer to the depositors of the assessee company. The Ld. assessing officer has independently proved that bank statement submitted by the assessee before the assessing officer are forged. He further referred to the order of the Ld. CIT (A) who has also confirmed that assessee has failed to prove the identity, creditworthiness and genuineness of the transactions of the share capital by the assessee. He further stated that assessee is merely filing return of Rs. 35850/- and garnered share capital of more than Rs. 50 lakhs which itself proved that the transaction of the share capital of obtained by the assessee is a non-genuine and bogus transaction of

money laundering. He further referred to the statement of Sh. Sajan Singh who was the director of the company w.e.f. 20/2/2007. He submitted that the impugned assessment year involved is assessment year 2006-07 therefore how a person who was not the director of the company can depose before the assessing officer and state that those companies have deposited the money with the assessee as share capital. He was specifically referring to the question No. 6 of the statement. He further stated that his company has made an investment of Rs. 10 Lacs in the assessee company however the share certificates were not given to that company till one month prior to the date of statement i.e. 27/7/2009. He therefore submitted that amount of investment is made in assessment year 2006–07 where the share certificate have not been allotted to this company till July 2009. It was further contended by him that even this director has stated that he does not know the assessee or any of its directors but it has been introduced to him by one of the chartered accountant Mr Kumar Tyagi who resides in Laxmi Nagar, Delhi. He further stated that this director does not know anything about the financial affairs of this company and has made huge investment of Rs. 10 Lacs in the assessee company. He further referred to the question No. 17 where it is specifically state that he does not know any of the directors but only knows only one of the directors of the company only through chartered accountant Mr. kumar Tyagi which has been referred to in question No. 11. He further referred to the statement where the assessee was also granted an opportunity to cross-examine that particular person and no question except the date on which the share certificates were issued was asked cross-examination to which Sh. Singh replied that he did not remember the exact dates. He therefore submitted that assessee has agreed with the total statement of Sh. Singh as no question has been asked by the assessee in cross-examination. With respect to the other four companies he referred to para No. 3 of the remand report filed by the assessing officer wherein it has been stated that though letters have

been addressed to all these four parties however none of them appeared before the assessing officer. Coming to the various judgements cited by the Ld. authorised representative he submitted that in those decisions the assessing officer has not thrown onus back to the assessee for proving the further details and those of the cases where after furnishing of the preliminary information by the assessee before the Assessing Officer, no further inquiry was carried out by the assessing officer. He submitted that in the present case the assessing officer has conclusively proved that the transactions of allotment of shares of Rs. 10 Lacs each to the 5 private limited companies is completely bogus. He further referred to the various confirmation submitted by those companies and stated that all those confirmations are on computer printed letterhead and no copy of account from the books of those companies was submitted, therefore, it is not known that whether these bank account submitted by the assessee had been recorded in the books of accounts of those companies or not. He further stated that as depositors of the money have deposited cash in the bank account prior to the issue of cheque to the assessee company. It is apparent that these companies do not have any money with them but the assessee has given these money to the depositors who in turn have deposited the cash into the bank account and then issued the cheque to the assessee. He stated that the assessee has failed to show that these companies was having such a huge cash in their books of accounts. The assessee has failed to prove by producing the cashbook and the books of accounts of those depositors before the assessee officer. He further referred to the submission dated 27/2/2008 which is placed at paper book filed by the assessee at page No. I-23 and submitted that assessee has simply submitted the permanent account number photo copies of those parties and has not submitted the return filed by those companies before the assessing officer. He submitted that these are also not available in the paper book filed by the assessee before tribunal. Therefore it is a wrong statement made by the assessee that they have

filed the income tax returns filed by those companies before the assessing officer. He submitted that merely obtaining the permanent account number does not show that they are regularly assessed to income tax unless the copies of the income tax return with complete supporting documents of the computation of the total income, nature of the business carried on by these companies coupled with the balance sheets and the annual accounts of these companies are submitted. He further referred to the various paragraphs of the order of the Ld. CIT (A) wherein the Ld. CIT (A) in para No. 6.10 has specifically stated that the assessee has not submitted any income tax returns by those companies and therefore the claim of the assessee that they are assessed to the income tax is completely false. He further referred to para No. 6.12 of the order of the Ld. CIT (A) wherein it has been found that the amount of money has been invested in the assessee company by those depositors without return even after lapse of 3 years. He further stated that this leads to a situation where some persons having invested a sum of Rs. 50 Lacs in the assessee company and simply vanished from the scene without any claim of any dividend or even the principal amount. He submitted this itself proves that the money belonged to the assessee and it cannot be believed that a person who has invested such a huge sum with the assessee company and forgets it and closes its business and not traceable. With respect to the proving of the "source of source" by the assessee, he submitted that "source of source" is not to be proved it the assessee is an honest taxpayer. He submitted that in all the decisions where it has been held by the various courts the "source of source" is not to be proved by assessee in case of provisions of section 68 of the Income Tax Act if the assessee is a honest taxpayer. In the present case is submitted that the Ld. assessing officer has completely proved that the deposit made by the assessee unexplained chargeable to tax under section 68 of the income tax act and the assessee has tried to prove the creditworthiness of the parties by submitting the forged documents and

not submitting the copies of the confirmatory accounts of the depositors. Therefore, in the present situation the assessee is required to prove the source of money of shareholders with the assessee company which assessee has miserably failed. Therefore, he submitted that there is no infirmity in the orders of the lower authorities in making and confirming the above addition under section 68 of the income tax act.

11. We have carefully considered the rival contentions and also the orders of the lower authorities. Looking to the fact of the case we have also called for the assessment records which has been produced by the ld CIT DR.

12. Brief facts shows that the assessee has received share application money from five companies of Rs. 10 lakhs each towards issue of 10000 shares of face value of Rs. 10 each at a premium of Rs. 90 per share to each of the company. Before the ld Assessing Officer the assessee submitted a confirmation, copy of the income tax return, copy of share application form, copy of bank statement, copy of PAN and copy of memorandum of articles and association. The ld Assessing Officer issued notice u/s 133(6) and calling for the bank statement from the five parties vide order sheet entry dated 14.11.2008. The ld Assessing Officer further issued notices to the banks of the five companies to provide their bank statement. The bank statement provided by the assessee showed that before the issue of cheques to the assessee company there were transfer entries in the bank account of those company, however, when the bank statements are received from the banks by the Assessing Officer it was found that instead of cheques or transfer entries in their bank account there was deposit of cash. In the 133(6) reply filed by the parties also similar forged bank accounts were submitted therefore, apparently the issue was that bank accounts of the depositors as per the banker showed that cash was deposited in their bank accounts prior to issue of cheques whereas the assessee and the depositors showed that there were clearing or transfer entries prior to the issue of the cheque. The ld CIT(A) has dealt with the whole issue confirming the addition u/s 68 of the Act as under:-

"6.3 I have gone through the rival submissions. The appellant admittedly received share capita/ share premium five companies of Rs. 1000000/- each totaling Rs. 5000000/-. It has been established through the enquiry that all such companies before advancing fund for share capital/ share premium received identical amount in cash their bank account and only thereafter cheque was issued in favour of the appellant company. The matter was brought to the notice of appellant on several occasions further vide a letter dated 12/12/08 the appellant was asked to explain such mater. Neither anybody neither appeared nor was such thing explained before the AO till the date of framing of the assessment order. Before me also the Ld AR could not produce any evidence which can establish that the observation made by the AO was wrong. In fact the case was remanded to the AO for the benefit of the appellant itself. The appellant was free to furnish such evidence which according to it would establish the creditworthiness of the companies. The record reveals that inspite of repeated opportunities at the remand stage, the appellant had chosen not to appear or not to furnish detail. One of the Directors of one of the five companies appeared before the AO but he could not explain the cash deposit of identical amount before advancing loan. The Ld AR stated that the AO has lost the golden opportunity of causing enquiry at the assessment stage but unfortunately there was no reciprocation by way of compliance on part of the appellant before the AO either at the assessment stage or at the remand stage. I further do not agree with the observation of the Ld AR that the AO has no authority to cause enquiry when the case was remanded to him with specific direction. The crux of the issue is that the appellant has not cooperated with the AO at the assessment stage and on the specific direction of the Department, the appellant again failed to comply with the requisitions of the AO at remand stage. This leads to an inescapable conclusion that the appellant was not interested to comply with the direction of the Department rather it wants to base its argument only on Court decision but not on factual grounds.

6.4 The issue and the short question of law to be answered in the present contest as to whether in the facts and in the circumstances of the case, the AO was justified in treating Rs.50,00,000/- as unexplained cash credit u/s 68 in the hands of the appellant.

6.5 The AO has disallowed the entire amount of Rs.50,00,000/- u/s 68 of the Act. The fact remains, as per own admission of the appellant that it has received share capital/ share premium money of Rs. 5000000/- and neither the names of the Directors nor the addresses nor PAN nor the ledger copy of the account of any of these companies from whom such amount was received could be produced before me. It goes without saying that such details were never produced before the AO on which ground he has added the entire amount u/s 68 of the Act.

6.6 Before proceedings further it appears to me that true import of section 68 of the Act is in question in the present circumstances. The aforesaid section warrants an assessee to prove the credit in his books as to the nature and source of such amount credited so that if explanation is not satisfactory, the AO could treat it as income of the assessee (as done in the present case) but whether an inference as to explanation is satisfactory in a particular case is essentially one of fact. It is not open

to the tax payer for avoiding the burden of the proof regarding the genuineness of the credit in his books by merely introducing an intermediary. It is an admitted fact that repeated opportunities were allowed by the AO. Regarding the identity ofthe creditors who have alleged to have invested Rs.50,00,000/- as share capital/premium with the appellant and in spite of repeated opportunities, no details of the names, address, PAN of the persons who have invested through cash could be filed.

6.7 The essential question before me is a question of establishment of the identity, credit worthiness of the subscriber and the genuineness of the transaction. The identity of the subscriber, in this case has not been established, yet let us examine the next point i.e. the creditworthiness of the investor and also the last one with regard to the establishment of genuineness of the transaction.

6.8 In the present case, in order to establish the creditworthiness, it was shown that Rs.50,00,000/- has been received from five persons by way of cheque. When the identity of the persons fails, it will be impractical at this stage to go for other two criteria i.e. creditworthiness of the investor and also one with regard to the establishment of the genuineness of transaction.

6.9 On these materials, no one can form an opinion that these applicants had any income exigible to tax under Income Tax laws. Since, it is not known whether all such investors did have any source of income or business which could be derived and which could help them to invest Rs.50,00,000/- by way of share capital/premium. Therefore, on the basis of material produced, it was not just possible for any reasonable man to form an opinion with regard to creditworthiness of the investor. There is no material evidence on record to establish that the amount was held by the investors to prove their creditworthiness. It is once again placed on record that repeated opportunities failed to urge the appellant to file the name, postal address, PAN and ledger copy of all these persons (companies). In one case although one of the Directors appeared but he could not explain the details of the transaction made with the appellant.

6.10 It is admitted that the identity of the subscriber (barring one case) was not established and also the genuineness of the transaction could not be established, neither the creditworthiness nor financial strength could be established. No PAN of all such persons was given and whether the said persons are filing the return on regular basis could not be stated by the Ld AR before me and with this submission no fruitful enquiry could be caused by the Department. As since the Department has established that such person (who's PAN was also not given) does not have sufficient creditworthiness as such identity itself (barring one case) remains to be verified, the onus automatically shifts from the Department to the appellant and now it is the appellant to establish before the Department such creditworthiness of investors who have invested such fund. Non furnishing of current Income tax return, failure of the appellant to produce necessary evidence before the AO and also before the Appellate authority, furnishing of doctored bank statements before AO which are peculiar to the case in hand.

6.11 'In order to decide as to whether the impugned share application money/share capital in the present case is genuine or not, one has to look not only at the documents produced but also at the surrounding circumstances. In this connection, it is worth while to reproduce the following observations made by the Hon'ble Supreme court in

CIT Vs. Duron Prnsnd Mnre f 19711 82 ITR F540

> *"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case fo the present kind a party relied on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinders while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."*
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> *According to section 3 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Section 114 of the Evidence Act provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. The aforesaid provisions are nothing but recognition of broad principles of common law governing the issue under consideration.*
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> *In the case of Gordhandas Hargovandas <5t Another Vs. CIT (126 ITR 560) (Bom.) the Hon'ble High Court observed as under:-*
>
> > *"Though in isolation each piece of evidence may appear to be of little weight, on an overall appreciation it would be permissible to consider their cumulative effect and decide one way or the other."*
>
> *Genuineness of transaction has to be gathered on the parameters spelt out in S.3 of the Evidence Act, which provides as to when a fact should be treated as proved. The observations of Hon'ble Supreme Court made in the case of Director of Income Tax Vs Bharat Diamond Bourse (259 ITR 280) which are relevant and as under:*
>
> > *"The story rings false from beginning to end, and yet, the Tribunal accepted it by saying, 'as regards the bonafides of the transaction, in our opinion, there is nothing to suspect the same.' The Tribunal says,*

> *'there is a transparency about the entire transaction which nullifies any attempt to make out the transaction as something unusual and out of the ordinary.' That diamonds are not transparent, that they dazzle with a brilliance that blinds the eye, seems to have escaped the notice of the Tribunal, it un-discerningiy accepted the glib explanation of the assessee, though seeming with improbabilities and strenuous on credulity."*

The aforesaid observations emphasize the importance that a glib explanation tendered by the assessee, teeming with improbabilities and strenuous on credulity cannot be accepted.

In the case of M/s Gold Leaf Capital Corporation India Ltd Vs. JCIT, the Hon'ble ITAT, New Delhi vide order dated 11-01-2008 in ITAT No. 237(Del)/2002 for Asstt. Year 1995-96 observed as under with regard to genuineness of transactions u/s 68.

6.12 It is further stated that the said persons have neither received any dividend nor derived any income of whatsoever nature by investment of the said amount. At the time of framing of the order, after a lapse of three years the entire fund of Rs.50,00,000/- still remains invested in the hands of the appellant. This leads to a situation where some persons have invested their fund of Rs.50,00,000/- and simply vanished from the scene without any claim of any dividend or even the Principle amount. Now the question occurs whether any prudent businessman will do the same and if so what benefit has been derived to the investing companies. It is also not known how these investors came into contact with the appellant company and why they became so generous to invest the fund with the appellant and thereafter went out of scene leaving the fund for the utilization of the appellant for any number of years to come. It is not known whether shares were at all allotted to such investors, what remains to be looked into as to what has happened with those shares which were allegedly allotted by the appellant company? I am of the opinion that the circumstantial evidence gathered in the instant case and the factual evidence brought on record shows that in reality no shares were effectively allotted to the investing company and such alleged share capjtqrf/premium money was retained by the appellant company for the past three years. Thus it should be treated as unsecured cash credit and not as share capital/premium monev. In the case of Indus Vally Promoters (P) Ltd Vs CIT 305 ITR 202. Hon'ble Delhi High Court observed as under:-

> *.. . . It is well settled that the assessee must discharge the burden of proving the identity of the creditors and also to give the source of the deposits. In other words, the creditworthiness of the depositors must be established to the satisfaction of the AO. Where there is an unexplained cash credits, it is open to the AO to hold that it is income of the assessee and no further burden lies on the AO to show that income in question comes from any particular source."*

It was observed by the Hon'ble Sujrat High Court in the case of Gujco Carriers Vs CIT (256 ITR 50) that startling facts could not be ignored.

6.13. It is a settled proposition of law that the appellant has a legal obligation to explain the nature and source of credit as held in the case of Shriiekha Banerjee Vs CIT (1963) 49 ITR SC 112. In order to prove the transaction is not hit by section 68, the appellant has to establish first to identity, second the creditworthiness of the creditor and third the genuineness of transaction. It is to be mentioned that not one or two of the ingredients are to be proved to the satisfaction of the AO, all the three ingredients are to be established to make out a case that the assessee's case will not fall under the aforesaid criteria. Only when all these ingredients are established, prima facie the onus shifts on the Department. In the instant case not even the identity (barring one) could be established, neither the creditworthiness nor the genuineness of the transaction could be established beyond any iota of doubt. This view was taken in the case of Shanker Industries Vs CIT (1978) 114 ITR 678 (Cal). The onus is stated to be shifted only when there is evidence to sufficiently establish a prima facie case in favour of the party on whom onus lies.

6.14 Now let us go through the latest case laws. The appellant company has relied upon a latest judgement of Lovely Exports Pvt Ltd (2008) 216 CTR (Supreme Court) 195 where the case of the revenue was lost on the issue of section 68. But before discussing the case, let us examine the facts of the particular case where such judgement was passed by the Hon'ble High Court of Delhi which was later on vetted by the Hon'ble Supreme Court. The case of Lovely Export (Supra) was decided alongwith Divine Leasing and Finance Ltd (2007) 207 CTR 38 (Del) by the Delhi High Court. In the latter case, the capital was received by way of a public issue. In that case the said assessee filed a revised return taking advantage of the amnesty scheme and which is again not the fact in the present case. As the Hon'ble Court mentioned here:-

> *….in these fresh assessment proceedings, the Assessing Officer issued summons u/s 131 of the Income tax Act and thereafter impounded the share holders' register, share application forms and share transfer register. The assessee contended that because these materials were in the custody of the Department it was unable to furnish any further details pertaining to the subscribers*

Certainly these are not the facts of the case under review. Neither the appellant nor the five investing companies are public Ltd company and hence the matter is not covered by the decision of Divine Leasing (Supra). Under any stretch of imagination it can never be alleged (against the AO) that any document was in his custody for which the applicant could not give reply. Further in case of Divine Leasing (Supra) the shares were allotted in consonance with the provisions of the Securities Contracts (Regulation) Act, 1956 as also in accordance with the rules and regulations of the Delhi Stock Exchange. Hence the present case is clearly, distinguishable as none of the aforesaid criteria was satisfied in the case under review. In case of a public issue, the company concerned cannot be expected to know other details pertaining to the identity as well as financial worth of each of its subscriber, yet there

cannot be any reason not to give the details of such investors which run to the extent of Rs.50,00,000/-. The rigor of proof in such cases is more stringent.

6.15 It is admitted that the identity of the subscriber (barring one) was not established and also the genuineness of the transaction could not be established, neither the creditworthiness nor financial strength could be established. No PAN of such investor was given and also whether the said person is at all filing the return on > regular basis could not be stated by the Ld AR before me and with this submission no fruitful enquiry could be caused by the Department. Again when PAN was not given, it go, ts without saying that such persons have not sufficient creditworthiness as such identity (barring one) itself remains to be verified, the onus automatically shifts from the Department to the appellant and now it is the appellant to establish before the Department, creditworthiness of such investors who have invested fund. All such material evidence never brought on record in the case of Lovely Exports Pvt. Ltd (Supra) or Divine Leasing and Finance Ltd (Supra) and hence such cases are distinguishable for the limited purpose of adjudicating the present case.

6.16 In the case of Lovely Exports (Supra) the decision of the Hon'ble High Court Delhi was affirmed by the Hon'ble Supreme Court. But certain distinguishable facts of the said case are placed on record. It will not be out of place to give extract of the order of Lovely Exports (Supra).

> *……..In the present case, the details had been furnished to the AO much before March, 1999, but he failed to react to the shifting of the burden to investigate Into the creditworthiness of the share applicants. Therefore, the appeal is dismissed……*

Much contrary to the facts of the case of Lovely Exports (Supra), in the present case no such detail was furnished before the AO and there was no such failure as contemplated in that order and to that extent also the case under appeal is quite distinguishable.

6.17 I am of the opinion that in the present case, the AO has brought all positive material or evidence on record that would establish that the amount introduced by way of alleged share capital/premium to the extent of Rs.50,00,000/- in the names of five investors are nothing but unexplained unsecured amount and not to be treated as share capital/premium money, and all the parameters of section 68 have been fully satisfied in the instant case. It is reiterated that assessment details of the investing persons were not supplied by the appellant.

Applying the above test in the present case, it appears to me that there cannot be any two opinions, having regard to the material produced with regard to identity, the '"'creditworthiness of the subscriber as well as to the question of genuineness of transaction, the same could not be established by the appellant and hence the AO has rightly added Rs.50,00,000/- and such decision of the AO is sustained.

6.18 It is further established that the appellant has furnished details before the Department by way of bank statement which was patently wrong and was doctored

document. The matter could be successfully established by the AO by seeking reports from the individual banks and comparing the same with the data supplied to the AO.

This is a very serious lapse on part of the appellant and a deliberate attempt to furnish false evidence to defraud the revenue and also to deflect the attention of the revenue authority from the proper enquiry. As an Appellate Authority, the matter was brought before me and the AO is hereby directed to invoke necessary provisions of the law so that the matter could be examined and taken to its logical conclusion and decided by the Competent Court of Law.

10.0 Gist of the order:- In light of above facts and circumstances the gist of my order is given below:-

With this the appeal of the appellant is dismissed.

That addition of Rs.50,00,000/- u/s 68 is correct and the action of the AO is sustained. (Ground NO. 1 to 5 dismissed.)

13. We have also perused the bank statement submitted by the assessee as well as the depositors and compared it with the bank account received by the AO from the bankers and our observations are as under:-

a) In account NO. 6920200000471 of Development Credit Bank of Transactions India Pvt. Ltd, the depositor, has shown that on 27.02.2006 a sum of Rs. 625000/- was credited in the bank account of the assessee. Further on 28.02.2006 a sum of Rs. 4 lacs have been credited. Both are transfer entries. On looking at the bank statement provided by the Development Credit Bank, these entries are not found in the bank statement of the party from 26.02.2006 upto 28.02.2006. Furthermore, there are several entries in the bank statement of cash deposits and transfer clearing given to others upto 01.03.2006, however, same did not appear in the bank statement submitted by the parties. The bank statement submitted by the banker in all together is different format whereas the bank statement submitted by the assessee and the depositor is altogether in a different format. Therefore, it is apparent the bank statement submitted by the assessee and by the depositor are completely forged. The bank statement has been prepared on

computer in such a manner to give it a semblance of the real bank statement.

b) Similarly in case of Huba Services Pvt. Ltd the assessee has submitted A/c No. 65003224129. The bank statement submitted by the assessee shows that before issue cheque to the assessee on 28.02.2006 there were credit entries of cheque deposit on 27.02.2006 of Rs. 4.5 lacs and Rs. 5.6 laks each. However, the bank statement supplied by State Bank of Patiala shows many entries which were not there in bank statement submitted by assessee. The bank statement was also prepared on the computer which is altogether different from the bank statements supplied by the State Bank of Patiala. Furthermore, instead of clearing of Rs. 4.5 and 5.6 lacs on the respective dates as stated in the bank statement supplied by the assessee, the cash deposit is made of Rs. 9.47 lacs in the bank account as supplied by State Bank of Patiala.

c) The bank account supplied by Micro Space Systems Pvt. Ltd with State Bank of Patiala of A/c No. 65003229263 also speaks similar story. The bank account of the depositor as supplied by the assessee shows cheque deposits whereas, the bank account supplied by State Bank of Patiala shows cash deposit. The bank account is also prepared on computer which is not the normal system of submitting the bank account by the bank.

d) Similar is the story of the bank account No. 337700019 of M/s. Glitz Media Pvt. Ltd the depositor has shown the transfer entries of Rs. 4.78 lacs and Rs. 4 lac prior to issue of cheque of Rs. 10 lacs to the assessee whereas, the bank account of the Deutshe Bank shows the entries of cash deposits. Even the bank account is also printed in a forged manner.

e) In case of the Columns Net Channels Pvt. Ltd in A/c NO. 06920200000745 with Development Credit Bank also shows cash deposit prior to the issue of cheque to the assessee as per bank

statement furnished by the bank directly to the AO whereas, the bank statement submitted by the depositor and the assessee shows clearing amounts prior to the issue of cheques. The bank statement is also prepared on computer in a different manner then submitted by the bank.

14. It is evident that all these bank accounts submitted by the assessee along with the confirmation of the depositor are forged and not correct statements. In these circumstances the claim of the assessee that it is not required to prove "source of the source" of the credit is nothing but trying to take a shelter under a feeble legal argument. The bank account of the depositor companies shows a clear picture that cash is deposited of huge amounts and simultaneously cheques are issued to parties. We do not have any hesitation to say that they are entry providers.

15. All the bankers have stated to the ld Assessing Officer that bank accounts submitted before him are forged one and not supplied by the bank.

16. Furthermore, the balance sheets supplied by the assessee of the depositor company as well as the income tax return do not inspire any confidence in the whole transaction. For example, the Micro Space Systems has invested Rs. 10 lacs in the assessee company, however, the investment shown by that company in balance sheet is only Rs. 8 lacs. Further, the balance sheet of Transaction India Ltd shows opening investment of Rs. 8.5 lacs and closing investment of Rs. 15.5 lacs which does not show the fresh investment of Rs. 10 lacs in assessee. Further, the income shown by that company is merely Rs. 72000/-. This company has also received share application money of Rs. 24.7 lacs from others. The balance sheet of Glitz Media Pvt. Ltd does not have any investment in shares of other companies. Even the loans and advances do not include the above sum. Therefore, there are many discrepancies in the balance sheet and amounts of deposits compared with the claim of the assessee.

17. The several decisions relied upon by the ld AR does not merit our attention at all as in none of the decisions cited before us the forged

documents in the form of bank statement were submitted. It was also not the fact in those cases that amount of investment shown are not reflected in the balance sheet of the investor companies. Hence, reliance on those decisions of Hon'ble Delhi High Court is misplaced, hence, rejected.

18. The statement of one of the Director Shri Sajjan Singh is of no relevance, as when the money was accepted by the assessee he was not director at all. Even otherwise, it is very interesting to note that though he was not a director at the time of deposit made by those company with the assessee, he was aware of the fact that one Chartered Accountant Mr. Kumar Tyagi introduced him and also induced the company for investment in the assessee company.

19. Before parting we are of the view that the whole exercise carried out by the assessee is simply a devise to introduce unaccounted money through various shell companies in the form of share capital at a premium. The manner of issue of the shares through these companies, the manner of providing confirmation on the letter pad, the manner of maintaining the annual accounts and the manner of submitting the bank accounts on the letter pad or on a computerized print out to give it a semblance of originality to defraud the revenue, proves much more than what is under challenge before us. It shows the whole picture how the accommodation entries are routed through shell companies as share capital to evade the taxes. The whole façade created by assessee shows the real purpose of introducing the unaccounted money of the assessee without payment of taxes. The finding of the ld CIT(A) also demonstrates this fact.

20. In view of this facts and looking at the detailed findings of the ld CIT(A) and ld Assessing Officer we do not want to interfere in the findings of the lower authorities in confirming the above addition of Rs. 50 lacs. Therefore, the findings of the lower authorities are confirmed the ground No. 4 to 10 of the appeal of the assessee are dismissed.

21. In the result ITA No. 4520/Del/2009 of the assessee is dismissed.

22. Now we come to the appeal of the assessee in ITA No. 613/Del/2013 for Assessment Year 2006-07 against the order of the ld CIT(A)-XI, New Delhi dated 31.12.2012, wherein the penalty of Rs. 16.83 lacs levied by the ld Assessing Officer vide order dated 31.03.2011 passed u/s 271(1)(c) of the Act is confirmed. The assessee has raised the following grounds of appeal in ITA No. 613/Del/2013 for the Assessment Year 2006-07:-

1. *That on the facts and in law CIT(A) was wrong in confirming the penalty of Rs. 16,83,000/- u/s 271(l)(c) of the Income Tax Act, 1961 merely based on the additions made by the Assessing officer.*
2. *That on the facts and circumstances of the case the Id. A.O. as well as CIT(A) failed to appreciate that assessee has successfully discharged the burden of proving identity of the creditors genuiness of transaction and creditworthiness in question with confirmation of the creditors.*
3. *The findings of the CIT(A) sustaining the addition is based on conjectures , surmises as assessment proceedings and penalty proceedings are independent of each other.*
4. *That the Ld. A.O. in the penalty proceedings has not given proper and adequate opportunity to appellants and examine the transactions with confirmations, passed the order in due haste without any independent enquiry in penalty proceedings. The observations and reasons recorded does not show any act of concealment of income or furnishing of incorrect particulars of income.*
5. *That in view of the entire material on record Ld. A.O. as well as CIT (A) failed to issue notice u/s 133(6) to verify the veracity of the assessee's claim.*
6. *That on the facts and circumstances of the case CIT(A) was wrong in not accepting the explanation of the appellants and the law placed by the appellants on more addition of income on the merits, which is subject matter of appeal, no penalty can be sustained."*

23. The brief facts shows that with respect to the addition of Rs. 50 lacs u/s 68 of the Act the AO issued a notice initiating penalty u/s 271(1)(C) of the Act for submitting inaccurate particulars of income. On appeal before the ld CIT(A) he confirmed the penalty giving a finding that in facts of the case appellant could not prove the creditworthiness of the parties to whom the share capital of Rs. 50 lacs was issued. According to him the

assessee could not explain the nature and source of credit and therefore, assessee has furnished inaccurate particulars of income. Hence, he confirmed the penalty.

24. Before us the assessee submitted that the assessee has submitted complete details and assessee is not involved in any of the forged documents which were submitted by the depositors to the assessee. It is stated that assessee has received the share application money through the registered companies by banking channel and AO should not have asked the source of the funds. He further relied on the decision of the Hon'ble Supreme Court in case of CIT Vs Reliance Petro Products Pvt. Ltd 321 ITR 158. In the end he pressed into the service the decision of the Hon'ble Supreme Court in Sree Krishna Electricals Vs. State of Tamil Nadu 23 VST 249 (SC), where it is held that when the claim of the assessee is rejected as sales are incorporated in account books penalty cannot be imposed.

25. The ld Departmental Representative vehemently supported the order of the ld Assessing Officer and further relied on the decision of the Hon'ble Supreme Court in case of Makdata and Zoom Communications.

26. We have carefully considered the rival contentions and also perused the orders of the lower authorities with respect to the quantum proceedings as well as penalty proceedings. The assessee has issued share capital of Rs. 50 lacs to five companies and has submitted forged bank accounts of those companies before the ld Assessing Officer. The forged bank statements, the balance sheets of those companies as well as the financial capacity shown in the return of those companies adequately proves that the assessee has camouflaged its income in the form of share capital issued at the premium to those companies. Therefore, it is apparent that explanation furnished by the assessee is not bona fide. The decision relied upon by the ld Authorised Representative of Hon'ble Supreme Court in case of Sree Krisha Electricals Vs. State of Tamil Nadu and other 23 VST 249 does not apply to the facts of the case. In the case

before the Hon'ble Supreme Court the question of penalty was with respect to the items which were not included in the turnover, were found incorporated in the appellant's account books and therefore, the Hon'ble Supreme Court held that penalty cannot be levied. The issue before us is of furnishing forged bank accounts to whom the assessee has issued the share capital.

27. The ld CIT(A) has dealt with the whole issue as under:-

Findings:

After considering all documents on record, I shall now take up the various grounds of appeal. All the grounds of appeal are in respect of penalty u/s 271(l)(c) imposed vide order dated 31.03.2011.

Additions in this case were made as the appellant had failed to establish the genuineness of the credits of Rs. 50 lacs. The AO had held the amount of Rs. 50 lacs to be unexplained cash credit u/s 68. The views of the AO were fortified by the inquiries from the bank which informed that the bank a/c submitted by the appellant had totally different entries as compared to the copy received from the bank.

The Ld. CIT(A) in his order further strengthened the contentions of the AO stating as under:-

"The identity of the subscriber (barring one) was not established and also the genuineness of the transaction could not be established, neither the creditworthiness nor financial strength could be established. No PAN of such investor was given and also whether the said person is at all filing the return on regular basis could not be stated by the Ld AR before me and with this submission no fruitful enquiry could be caused by the Department."

" I am of the opinion that in the present case, the AO has brought all positive material or evidence on record that would establish that the amount introduced by way of alleged share capital/premium to the extent of Rs.50,00,000/- in the names of five investors are nothing but unexplained unsecured amount and not to be treated as share capital/premium money, and all the parameters of section 68 have been fully satisfied in the instant case. It is reiterated that assessment details of the investing persons were not supplied by the appellant.

Applying the above test in the present case, it appears to me that there cannot be any two opinions, having regard to the material produced with regard to identity, the creditworthiness of the subscriber as well as to the question of genuineness of transaction, the same could not be established by the appellant and hence the AO has rightly added Rs.50,00,000/- and such decision of the AO is sustained.

It is further established that the appellant has furnished details before the Department by way of bank statement which was patently wrong and was doctored document. The matter could be successfully established by the AO by seeking reports from the individual banks and comparing the same with the data supplied to the AO. This is a very

serious lapse on part of the appellant and a deliberate attempt to furnish false evidence to defraud the revenue and also to deflect the attention of the revenue authority from the proper enquiry. As an Appellate Authority, the matter was brought before me and the AO is hereby directed to invoke necessary provisions of the law so that the matter could be examined and taken to its logical conclusion and decided by

I shall now discuss the issue on merits.

The submissions given by the appellant have been duly considered.

I have also perused the judgments quoted by the appellant. The case of Kanbay Software India Pvt. (Ltd) vs. DCIT Pune was quoted by the appellant. The AO in the order u/s 271(l)(c) has stated that the appellant had furnished inaccurate particulars of its income and was therefore, liable for penalty u/s 271(l)(c). Therefore, the facts of this case are different from the case of Kanbay.

In the first instance I shall quote Sec. 68:-

> *"Where any sum is found credited in the books,of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the AO, satisfactory, the sum so credited maybe charged to income tax as the income of the assessee of that previous year."*

Thus from the plain reading of the section it is seen that if there is any amount which is found credited in the books of the appellant and the appellant does not offer any explanation about the nature and source of the amount so credited or the explanation offered by the appellant is not satisfactory in the eyes of the AO, the sum so credited may be charged to income tax as income for that year.

Section 68 is very widely worded and the AO is not precluded from making an enquiry as to the nature and source of a sum credited in the books of account of the appellant company even if the same is credited as receipt of share application money. Where, therefore, an appellant company represents that it has issued shares on receipt of share application money, then the amount so received would be credited in the books of account of the appellant. In such a case, the AO would be entitled to enquire, and it would indeed be his duty to do so, whether the alleged shareholders do in fact exist or not.

The latest judgement of the Hon'ble Delhi High Court in the case of CIT vs Oasis Hospitalities Pvt Ltd. dated 31st January, 2011 has dealt with the issue at length and after examining the various judgments has settled certain parameters to decide an issue like this. After analyzing the provisions of the Companies Act, Section & Finance Ltd. 299 ITR 268 (Del), CIT vs. Sophia Finance Ltd. (1994) 205 ITR 98 (Del)(FB), CIT vs. Dolphin Canpack Ltd. 283 ITR 190, CIT vs. Lovely Exports Pvt Ltd. 216 CTR 195 it was held that the initial burden is upon the appellant to explain the nature and source of share application money received by the appellant. If the creditor/subscriber is a company then the details in the form of resolution or PAN identity, etc. can be furnished. As regards the genuineness of the transaction to be demonstrated, the Court held that by showing that the appellant had in fact received money from the said shareholder and the money came from the corpus of that

very shareholder the genuineness was duly established. The Division Bench also held that when the money is received by cheque and is transacted through banking or other undisputable channel, the genuineness of the transaction would be proved. Other documents showing the genuineness of the transaction could be copies of the shareholder's register, share application form, share transfer'register, etc. As far as creditworthiness or the financial strength of the creditor or subscriber is concerned that can be proved by producing bank statement of the creditor/subscriber showing that it had sufficient balance in its account to enable it to subscribe to the share capital.

Various case laws given below clearly go towards establishing that any cash credit must be explained by the person in whose books the credits are appearing.

1. *Bhartesh Jain v DCIT(Del.) 483 CTR : Vol. 201 : DTD 07/04/06 - Cash credits - could not be satisfactorily explained by the assessee which means that onus u/s 68 has not been discharged. Hence addition u/s 68 is valid.*

2. *CIT v Biju Patnaik 160 ITR 674 (SC) - It has been held that evidences to prove creditworthiness to donor/creditor is very vital and that the assessee is required to prove even the source of the source.*

3. *Kale Khan Mohammad Hanif v CIT (1963) 50 ITR 1 (SC) - Asstt of unexplained cash credits in the a/c of business assessable as income from undisclosed sources. Cash credits appearing in accounts relating to business remaining unexplained.*

4. *CIT v P. Mohanakala (2007) 291 ITR 278 (SC)it is stated that:*

   "It is true that even after rejecting the explanation given by the assessee if found unacceptable, the crucial aspect whether on the facts and circumstances of the case it should be inferred the sums credited in the books of the assessee constituted income where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of the previous year if the explanation offered by the assessees about the nature and source of such sums found credited in the books of the assessees is in the opinion of the AO not satisfactory. Such opinion found itself constitutes a prima facie evidence against the assessees, viz., the receipt of money, and if the assessees fail to rebut the said evidence the same can be used against the assessee by holding that it was a receipt of an income nature. In the case in hand the authorities concurrently found the explanation offered by the assessee unacceptable.

5. *Indus Valley Promoters Ltd v CIT (2008) 305 ITR 202 (Delhi) it is stated that:*

   It is well settled that the assessee must discharge the burden of proving the identity of the creditors and also to give the source of the deposits. In other words, the credit worthiness of the depositors must be established to the satisfaction of the AO. Where there is an unexplained cash credit, it is open to the AO to hold that it is income of the assessee and no further burden lies on the AO to show that income in question comes from any particular source.

The ratio of the judgement in the case of Nova Promoters and Finance (P) Ltd (Delhi Court) can be applied to this case as the facts are similar. Extracts of the judgement are given below:-

> *"For the assessment year 2000-01, the assessee-company filed a return of loss which was processed under section 143(1) accepting the loss. Subsequently, based on a letter from the Director of Income-tax (Investigation) regarding entry operators/accommodation providers, informing the Assessing Officer that there were 16 entry operators who had given accommodation entries to several persons of which the assessee was one, that there were statements recorded from persons confirming the facts, that the assessee had obtained accommodation entries of Rs. 1,18,50,000 from these persons in the garb of share application monies during the relevant year, the Assessing Officer issued notice under section 148 of the Act reopening the assessment of the assessee. In the course of the reassessment proceedings, the Assessing Officer issued a questionnaire to the assessee. The assessee sought copies of the documents/material in the possession of the Assessing Officer and opportunity to cross-examine the person in charge of the 16 companies with regard to the contents of the statements recorded from them. The Assessing Officer issued summons to two individuals and to the companies, some of which were received back un-served and the other summons remained un-complied with. The Assessing Officer sent an Inspector to the addresses to which summons were issued. The Inspector reported that no such person or company was available or existing at the addresses to which summons were issued. On the basis of the report of the Inspector, the Assessing Officer issued notice to the assessee to produce the persons and companies from whom it had received share applications monies. This also was not complied with by the assessee. The assessee later filed affidavits of the two individuals, R and M, in which both stated that the transactions with the assessee were genuine and the earlier statements recorded from them by the investigation wing were given under pressure. The Assessing Officer came to the conclusion that the independent enquiries carried out by him disclosed that the assessee was unable to prove the genuineness of the transactions with the companies and that it also proved that the assessee-company had introduced its own monies through non¬existing companies using the banking channel in the shape of share application monies. He accordingly invoked section 68 of the Act and added the amount of Rs. 1,18,50,000 to the income of the assessee and a sum of Rs. 2,96,250 representing commission. On appeal the Commissioner (Appeals) rejected the assessee's contention against the validity of the reopening of the assessment but, taking note of the statement of the assessee that the affidavits from R and M, who were directors in the three companies as well as the affidavits of the directors in transactions. The Assessing Officer submitted a remand report to the effect that the transactions had not been proved genuine and were only instruments used by the assessee to mislead the income-tax authorities. The Commissioner (Appeals) concluded that the Assessing Officer was not justified in making the addition of Rs. 1,18,50,000 under section 68 of the Act. Consequently, he also deleted the addition of Rs. 2,96,250 made for commission paid to the entry providers for obtaining the entries, which had been added under section 68. The Tribunal confirmed the deletion of the additions made under section 68 of the Act. On appeal by the Department:*

Held, that the assessment was reopened on the basis of information received from the investigation wing of the Department about the existence of accommodation entry providers and their modus operandi in which the assessee was also found to be involved. The Tribunal had recorded, while dealing with the assessee's cross¬objections challenging the jurisdiction of the Assessing Officer to reopen the assessment, that the information was specific, not general or vague, and referred to transactions entered into by the assessee during the year under consideration, that as per the information of the investigation wing, the names of the persons issuing the cheques, the cheque amounts, dates, etc., were also mentioned providing a link between the entry providers and the assessee. In the statements recorded from R and M by the investigation wing, they had implicated the assessee-company also, inter alia. A perusal of the names of the entities from whom the assessee had received share application monies showed that 15 names appeared in the list of 22 companies mentioned in the letter of M and R to the Additional Commissioner. This established the link between the material which was present before the Assessing Officer both at the time when reasons for reopening the assessment were recorded and when the reassessment proceedings were made. In finding fault with the Assessing Officer for not accepting the identically worded affidavits of R and M to the effect that the transactions of giving cheques to the assessee- company were genuine and that the cheques were issued to the assessee-company for share application money for allotment of shares and subsequently shares were also issued, both the Commissioner (Appeals) as well as the Tribunal had committed a serious error in appreciating the evidence. The Assessing Officer in his remand report stated that despite repeated opportunities the deponents of the affidavits were not produced before him for examination and that summons issued to all the deponents of the affidavits remained un-complied with and none of the persons attended before him. The assessee had nothing to say as to why the deponents of the affidavits, which were all in its favour, could not present themselves before the Assessing Officer for being examined on the affidavits. In the light of the facts, the evidentiary value of the affidavits was open to serious doubt. The affidavits retracting their earlier statements, filed by M and R were filed more than three years after they wrote letters admitting to their role as entry providers. No reason had been advanced by the assessee for such long delay in retracting the earlier letters. The observation of the Commissioner (Appeals) that if summons had been served it would mean that the parties were present at the addresses and even if they were not found by the Inspector at the addresses furnished by the assessee, it was for the Assessing Officer to have made enquiries from the post office regarding the whereabouts of the addressees was not proper. There was, in this case, no such duty cast on the Assessing Officer. The assessee had been blocking any enquiry by the Assessing Officer at every stage on some plea or the other, including a frivolous plea that no cross-examination was allowed, overlooking that once they filed the affidavits retracting from their earlier statements the plea lost force. The findings of the Tribunal were based on irrelevant material or had been entered ignoring relevant material. The finding that the share application monies had come through account payee cheques was, at best, neutral. The question required a thorough examination and not a superficial examination. The fact that the companies which subscribed to the shares were borne on the file of the Registrar of Companies was again a neutral

fact. That these companies were complying with such formalities did not add any credibility or evidentiary value. In any case, it did not ipso facto prove that the transactions were genuine. Material was gathered by the investigation wing and made available to the Assessing Officer, who in turn had made it available to the assessee. The Tribunal had ignored relevant material. The Tribunal also erred in law in holding that the Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee-company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. Even if one were to hold that the Assessing Officer was bound to show that the source of the unaccounted monies was the coffers of the assessee, in the facts of the present case such proof had been brought - out by the Assessing Officer. The statements of the entry providers referred to the practice of taking cash and of the assessee-company.

The appellant has quoted various case laws. However, the recent judgement of the Hon. ITAT Indore Bench in the case of M/s Agarwal Coal Corporation P. Ltd, Indore v Addl. CIT, Range-5 states:-

> *The case of Lovely Exports will be applicable only after the identity of the share applicant is established. Since in the instant appeals before us the identity itself has not been established there is no justification to apply the ratio laid down by the Supreme court in the case of Lovely Exports."*
>
> *"Even if the cases relied upon by the Id. Counsel for the assessee, as mentioned/cited/ discussed in the preceding paras of this order like Divine Leasing & Finance Limited, Dwarkadheesh Investment Private Limited, Gangor Investment Limited, K.C. Fibres Limited, Dolphin Canpack Limited, Shree Barkha Synthetics (Raj.), Down Town Hospitals Private Limited, ILLAC Investments Private Limited, Rohini Builders and Shree Barkha Synthetics (Raj.) (supra) are considered, the Hon'ble Courts have clearly held that at least the assessee has to prove the identity/existence of the person in whose names share applications are received meaning thereby the burden lies on the assessee is to establish the identity/existence of such share holdings and once it is established, the assessee is not required to prove anything further. Therefore, these judicial pronouncements are in favour of the revenue and may not help the assessee because the assessee ha§ not proved the identity of such share applicants."*

In the recent judgment of CIT Vs. M/s Neelkanth Ispat Udhyog Pvt Ltd (Delhi High Court ITA No. 427/2012), the court has given its decision in favour of the revenue in respect of addition made u/s 68 of the IT Act. The Court observed as under:-

> *"It would be clear that the nature of enquiry undertaken by the income tax authorities would vary from case to case, depending on the nature of the material furnished to them by the assessee, when called upon to do so. In this case, the material in the form of addresses and documents pertaining to the share applicants*

of the assessee were enquired into thoroughly by the AO. He found a pattern in the way funds were moved into the accounts of those investors. The pattern was common to each of them; the amounts were received within a few days or weeks before the shares were allotted; there was no material to show how they knew that shares could be purchased. Furthermore, the AO's efforts to get them involved, through summons were unsuccessful. The applicant made no attempt to assist the AO in these proceedings. While it is true that the AO did look into the investigation report and did not allow cross examination of the individuals who made the statement under Section 131 of the Act, that alone cannot be termed as a fatal infirmity in his order. Even if that material were to be ignored, the pattern of share money infusion was the same; amounts were usually deposited in the account of the share applicants a few days before the issue of the shares. Moreover, the material provided about the share applicants' financial and fiscal standing was sketchy; they did not respond to summons under Section 131. Under these circumstances, the inferences drawn by the AO were justified and warranted. The Appellate Commissioner and the Tribunal fell into error in directing their deletion. .For the above reasons, this Court is of opinion that the revenue's appeal has to succeed. The ..mtsctiftau framed are answered in the affirmative, in favour of the revenue; the impugned order (and that of the appellate commissioner, are hereby set aside and the order of the AO is restored. The appeal is therefore allowed.

The facts of this case clearly show that the appellant has not been able to prove the credit worthiness of the said creditors with respect to the cash credits in question. The identity of the persons, except one, was not established. The genuineness of the transaction was also in doubt.

The appellant has not able to prove the identity or creditworthiness of the creditor and the genuineness of the transaction. A sum of Rs. 50 lakhs was found credited in the books of the appellant as share application money and no explanation was given by the appellant about the nature and source thereof. In view thereof the amount credited was considered to be unexplained."

It was established that the appellant had furnished wrong particulars. In view thereof, it is clear that the appellant had furnished inaccurate particulars of its income with a view of concealment of income. The explanations given by the appellant are not bonafide. The appellant is liable for penalty u/s 271(l)(c). Penalty of Rs. 16,83.000/- levied is therefore, upheld.

The grounds of appeal are ruled against the appellant.

As a result, the appeal of the appellant is dismissed."

28. We do not find any infirmity in the order of the ld CIT(A) in confirming the penalty u/s 271(1)(c) of the Act. The facts of the present case are similar to the issue decided by the Hon'ble Supreme Court in case of Makdata Pvt. Ltd vs. CIT in 358 ITR 593 wherein, when certain documents with respect to the share applicants were found and the assessee surrendered that amount even then Hon'ble Supreme Court confirmed the penalty u/s

271(1)(c) of the Act. In the present case before us the assessee has submitted the forged bank statement of the depositors before the ld Assessing Officer to prove the creditworthiness and genuineness of the transaction. Therefore, the case of the assessee was in much worse situation then the issue before Hon'ble Supreme Court, therefore, we confirm the orders of the ld CIT(A) confirming the penalty u/s 271(1)(c) levied by the ld Assessing Officer of Rs. 1683000/-.

29. In the result appeal of the assessee is dismissed.

Order pronounced in the open court on 28/03/2018.

-Sd/-	-Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated:28/03/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi