

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "E", MUMBAI  
BEFORE SHRI R. C. SHARMA, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.3754/Mum/2017 (Assessment Year- 2008-09)

ITA No.3755/Mum/2017 (Assessment Year- 2009-10)

ITA No.3756/Mum/2017 (Assessment Year- 2012-13)

Income Tax Officer,13(2)(3), 1 <sup>st</sup> Floor, Room No.,1146B, Aayakar Bhavan, M.K. Road Mumbai-400020	<b>Vs.</b>	M/s Shreedham Construction Pvt Ltd, 105/106,Vijay Industrial Estate, New Link Road, Chincholi Bunder,Malad (W), Mumbai-400064 PAN:AAACS8662H
(Appellant)		(Respondent)
<b>ITA No.2948/Mum/2017 (Assessment Year- 212-13)</b>		
M/s Shreedham Construction Pvt Ltd, 105/106, Vijay Industrial Estate, New Link Road, Chincholi Bunder, Malad (W), Mumbai-400064 PAN:AAACS8662H	<b>Vs.</b>	Income Tax Officer,13(2)(3), 1 <sup>st</sup> Floor, Room No.,1146B, Aayakar Bhavan, M.K. Road Mumbai-400020
(Appellant)		(Respondent)

Assessee represented by –Sh. Neelkanth Khandelwal-Advocate

Revenue Represented by-- Sh. V. Justine –DR

Date of hearing: 17.10.2017

Date of Order: 14.11.2017

**Order Under Section 254(1) of Income Tax Act**

**Per Pawan Singh, Judicial Member:**

1. This group of four appeals are directed against different orders of Commissioner (Appeals)-21, Mumbai, dated 20.03.2017 for assessment years (AY) 2008-09, 2009-10 and 2012-13. Out of which three appeals by revenue for AY 2008-09, 2009-10 and 2012-13 and one cross appeal by assessee for assessment year 2012-13. In all appeals the revenue has raised identical grounds of appeal except variation of figures in additions, thus, all the appeals were clubbed together, heard and are decided by consolidated order. For appreciation of facts first we are taking appeal for assessment year 2008 -09. The revenue has raised following grounds of appeal;

*(1) Whether on the facts and circumstances of the case and in law, the learned Commissioner (Appeals) was correct in deleting the addition of Rs.1,50,00,000/- on account of share premium/share application money/unexplained cash credit under section 68 without appreciating the fact that Shri Praveen Kumar Jain was proved to be one of the leading entry providers operating in Mumbai who could not be produced by the assessee as his witness during the assessment proceeding before the assessing officer.*

*(2) The appellant prays that the order of Commissioner (Appeals) on the grounds be set aside and that of assessing officer be restored.*

2. Brief facts of the case are that Assessee Company is engaged in the construction business. The assessee filed its return of income for relevant assessment year on 29 September 2008 declaring total income of Rs.1,13,354/-. The return was processed and accepted under section 143(1) of the Income tax Act. Subsequently, the assessment was reopened on 18

March 2015 under section 147 after recording the reasons of reopening. Notice under section 148 dated 18 March 2015 was served on the assessee. Assessee contested the reopening of the assessment. The assessing officer completed the assessment on 03.03.2016 under section 143(3) read with section 147 of the Act. The assessing officer while completing assessment made the addition of Rs. 1.5 Crore as unexplained cash credit under section 68 of the Act. The assessing officer concluded that the assessee received the share application money from the investor whose identity, creditworthy and genuineness is not proved. The creditworthiness of the investors is dubious. On appeal before Commissioner (Appeals) the entire addition was deleted. Thus, aggrieved by the order of Commissioner (Appeals) the revenue has filed the present appeal before us.

3. We have heard the ld. DR for the revenue and the ld. AR for the assessee and have perused the record of the case. The ld. DR for the revenue argued that the during the relevant financial year the assessee received share application money from several person. The investigation wing of the department made a search on one Praveen Kumar Jain who was engaged in providing accommodation entry. During the search Praveen Kumar Jain accepted that he had provided accommodation entry to various parties. From the record seized during the search, the name of assessee was found in the details contained in the 'Pen drive' of Praveen Kumar Jain (P.K.Jain). Notice under section 131 was sent to Praveen Kumar Jain, who

did not appeared before assessing officer. The allegation of assessee before Commissioner (Appeals) that no opportunity for cross examination of P.K. Jain was given to the assessee was wrong. P.K. Jain was the witness of the assessee. There was sufficient circumstantial evidence against the assessee. In support of his submission the ld DR for the revenue relied on the decision of Hon'ble Apex Court in CIT Vs P. Mohankala [2007] 161 Taxman 169 (SC)/ [2007] 291 ITR 278 (SC)/ (291 ITR 278), CIT Vs Divine leasing and Finance Ltd [2008] 299 ITR 68(SC), decision of Mumbai Tribunal in Royal Rich Developer Vs DCIT ITA No. 1836/M/2014 dated 24.08.2016, Disha N. Lalwani Vs ITO in ITA No.6398/M/2012, decision of Hon'ble Calcutta High Court in Rajmandir Estate Pvt Ltd Vs PCIT in ITA No.113 of 2016, Delhi High Court in CIT Vs Jansamparak Advertising and Marketing (P) Ltd in ITA 525/2014 and in CIT Vs N.R. Portfolio ITA No.134/2012. The ld. DR prayed that the order of ld Commissioner (Appeals) be set-aside and the order of assessing officer be restored.

4. On the other hand the ld. AR for the assessee strongly objected the submission of the ld. DR and supported the order of the ld. Commissioner (Appeals). It was argued that the assessee received share application money from thirteen people during the relevant financial year. All the parties were genuine. The share application money was received by the assessee through account payee cheques or by RTGS. All payments were

credited in the bank account of the assessee. The assessee allotted equity share of the company to the share applicants after passing a resolution. All the details of the share applicants along with their ITR acknowledgement, Audited accounts report, PAN cards and relevant extract of bank account of share applications were given to the assessing officer. The assessee proved the identity, capacity of the parties and the genuineness of the transaction. All the share applicants were responded to the notices issued by assessing officer under section 133(6) of the Income tax Act. All applicants complied and filed the required detailed required by assessing officer. The copy of the documents filed by assessee consisting copy of Income tax Returns for AY 2008-09, copy of PAN Cards, Copy of Audited Annual reports, copy of confirmation, copy of bank statements. Copies of all those documents are placed on record in the form of paper book (page No. 1 to 347). The assessing officer relied upon the third-party information and the statement recorded at the back of the assessee. The copy of statement of Praveen Kumar Jain allegedly recorded by the investigation party was not supplied to the assessee. The assessing officer not provided opportunity to the assessee for cross examination of Praveen Kumar Jain. Though, the assessee provided all necessary information to discharge its primary onus during the re-assessment proceeding. The assessing officer not refereed even a single document in his order while passing the assessment order. The assessing officer solely relied upon the statement of

Praveen Kumar Jain. As per information of the assessee, said Praveen Kumar Jain had already retracted from the statement on 15.05.2014, before passing the assessment order. The assessee was not informed or disclosed or shared as what was the circumstantial evidence against the assessee. No inquiry was made against the assessee. The learned Commissioner (Appeals) considered the documentary evidence and the written submission furnished by assessee. On the submission of assessee, learned Commissioner (Appeals) referred the submission of assessee to the assessing officer for his comment in writing. The Id. assessing officer furnished his submission/ report before the learned Commissioner (Appeals). After considering the remand report of the assessing officer the learned Commissioner (Appeals) granted relief to the assessee. In support of his submission the landed AR of the assessee relied upon the following decision;

(a) On the issue of cross examination;

- (i) Kishin Chand Chellaram Vs CIT 125 ITR 713(SC)
- (ii) Anand Ram Timber Industries Vs CCE ,Civil Appeal No.4228 of 2006 (SC)
- (iii) H.R. Mehta Vs ACIT 378 ITR 561(Bom)
- (iv) Sunil Prakash Vs ACIT ITA No. 6494/M/2014

(b) On addition under section 68 of Act

- (i) CIT Vs Gagandeep Infrastructure (P) Ltd 349 ITR 680(Bombay),
- (ii) CIT Vs Orchard industries Private Ltd ITA 1433 of 2014(Bom),
- (iii) CIT Vs Laxman Industrial Resources Ltd ITA No. 169 of 2017(Del),

- (iv) CIT Vs Supertech Diamonds Tools (P) limited 44 taxman.com 460 (Raj)
- (v) CIT Vs Ashish International ITA No 4299 of 2009 (Bombay)
- (vi) ACIT Vs Paradise Inland Shipping Private Ltd ITA No. 327/PNJ/2015
- (vii) PCIT Vs Paradise Inland Shipping Private Ltd 84 taxman.com 58(Bombay),
- (viii) Anil C. Jain Vs ACIT ITA No. 369&370/M/2017,
- (ix) Maruti Impex Vs JCIT ITA 3823/M/2014,
- (x) Nathuram Premchand Vs CIT 49 ITR 561(All).

5. In the rejoinder arguments the learned DR for the revenue argued that the retraction of Praveen Kumar Jain was without supporting material. It was further argued that matter may be remanded back to the file of assessing officer for verification of the documentary evidences furnished by assessee and for cross examination of the parties. The learned AR of the assessee strongly objected to the submission of the DR for revenue and would submit that the matter cannot be kept open for ever, when the learned Commissioner (Appeals) has already considered the documentary evidences furnished by assessee and the assessing officer has also given his remand report during first appellate stage.

6. We have considered the rival submission of the parties and have gone through the orders of authorities below. During the re-assessment preceding the assessing officer opined that the assessee has received share application money from 13 parties, all these parties belongs to Praveen Kumar Jain Group of Company. The assessing officer further noted that a

search action was conducted on the premises of Praveen Kumar Jain who was involved in providing accommodation entry of share application money and that he had admitted about his involvement in providing accommodation entries. The assessing officer issued summon under section 131 to Praveen Kumar Jain. The summons was served. The assessing officer recorded that despite service of summons Praveen Kumar Jain not appeared before him. The assessing officer issued show cause notice to the assessee as to why the amount received by them should not treated as deemed income of the assessee under section 68 of the Income tax Act. The assessee filed return its reply vide reply dated 23<sup>rd</sup> February 2016. In reply the assessee also contended that in response to the notice under section 133(6) all the investor has duly complied and filed their details replied called for. The assessing officer did not accept the submission of the assessee holding that the summons was issued to the investor; the investor is the witnesses of the assessee and not the witness of Department. The assessing officer rejecting the contention of the assessee made the addition of aggregate of share application money as unexplained cash credit under section 68 of the Act. The assessee urged the similar contention and filed all documentary evidences before the Commissioner (Appeals). The assessee also made the submission that the assessing officer disregarded the evidences furnished by assessee had made addition of the money received against share applications. The assessing officer made

addition without bringing any incriminating evidence against the assessee. The assessing officer is relying on the statement of Praveen Kumar Jain. The assessee specifically contended before Commissioner (Appeals) that assessee vide its application dated 22<sup>nd</sup> Mach 2016 prayed to the assessing officer to allow the opportunity of cross examination of witnesses, on which the assessing officer was relying, however, no such opportunity of cross examination was provided to the assessee. We have further seen that the assessee has given its detailed reply to the comments of assessing officer which have been recorded by learned Commissioner (Appeals) in para 8 of his order. We have further noted that on the submission of assessee, the learned Commissioner (Appeals) vide his order dated 07 November 2016 sought the remand report from assessing officer. The assessing officer furnished interim remand report on 9<sup>th</sup> November 2016. And final remand report on 6 January 2017. In the report dated 6 January 2017 the assessing officer contended that summons under section 131 were issued to the assessee and its investor. Neither the assessee nor any other person attended the office of assessing officer. The assessee did not appear to avail the opportunity given to them to cross examine the witnesses. The assessee was informed by learned Commissioner (Appeals) on 17 January 2017 about the report of assessing officer and to explain for non-compliance of the summon under section 131 issued by assessing officer. The assessee disputed the report of the assessing officer. The assessee

contended that they were present in response to the notice of assessing officer but the witness summoned by assessing officer did not attend. The assessee left the office of assessing officer on that day with his permission. The assessee specifically contended that their presence can be verified from the CCTV footage in the office of assessing officer. After considering the evidences on record and the contention of both the parties and the learned Commissioner (Appeals) passed the following order:

“15. I have examined the contentions of the appellant as well as the assessment order and the remand report carefully. A perusal of the assessment order shows that though the conclusions of the investigation wing has been referred to in the assessment order, **there are no specific reference to the appellant company.** There are no evidences brought on record to show that there is any cash trail in respect of the amounts received by the appellant company from the investors. Though the AO was specifically asked to furnish specific incriminating evidences, it is noted that the AO has not been able to pin point the specific evidences relating to appellant company which would clearly show that the share application money has been received in lieu of cash. In the assessment order the assessing officer has referred to the statement of Shri Pravin Jain recorded at the time of search but has not considered the retraction thereafter in which it was stated that statement recorded at the time of search was under undue pressure and that such statements had been retracted.

16. The facts remains that investor companies are assessed to tax and have filed their returns of income. The parties have responded to the notices u/s 133(6). The appellant has filed audited accounts of the investors and contended that they have genuine business activity. The

appellant has submitted that notices were served on the investors in all cases. Therefore it cannot be said that the parties did not exist at their addresses. Documentary evidences were already filed by the appellant earlier in the assessment proceedings. Confirmation letters with copy of PAN and address, bank statements of applicants, Income Tax return acknowledgement, and audited accounts balance sheet and P&L account of the investor companies have been filed before the assessing officer and also in the appellate proceedings.

17. I do not find any merit in the contention of the appellant that the investment being a share capital is a capital receipt and therefore cannot be considered as income in the hands of the appellant. The credits fall within the scope of section 68 which is a deeming provision. Several case laws including those of the Apex Court and High Court have considered credits made to capital account of the assessee's to be covered under the provisions of section 68 and therefore deemed income. The rule for application of section 68 is that the identity and credit worthiness of the investor/lender / creditor has to be established and the genuineness of the transaction has to be established. I also do not find merit in the argument that merely because there is a specific amendment to section 68 in respect of credit in the form of share capital or share application money in the case of private company, requiring the person in whose name such credit is there to explain the nature and source of such sum, which is brought on statute w.e.f . 01.04.2013, hence no such addition u/s 68 can be made in earlier years. The amendment only makes the onus more severe in such cases but it is incorrect to read it as if no such additions could be made u/s 68 in respect of share application money in the earlier assessment years.

18. The Apex Court upheld the addition u/s 68 in the case of credits as share capital in the case of N. Tarika Property Invest. (P.) Ltd. v.

Commissioner of Income-tax [2014] 51 taxmann.com 387 (SC) by dismissing the SLP filed by the appellant.

19. Section 68 casts the initial burden of proof on the assessee to show prima facie and to explain the nature and source of credit found in its books. When the statute places the burden of proof in income tax cases on the tax payer, it is understood to be only the initial burden. When the tax payer explains the credit by providing evidence of identity, confirmation and credit worthiness, the burden shifts on the revenue to show that the explanation is not satisfactory or incorrect. In the case of credit as share capital by corporate entity, whose existence is shown by its registration with Registrar of companies and its filing of tax returns, adverse conclusion is not justified merely because its directors are not produced personally before the assessing officer by the tax payer.

20. In the remand proceedings only the legal requirement was indicated that if any statements of third parties are to be relied upon, opportunity for cross examination must be provided. Further, instead of and other than generalities, the assessing officer was given an opportunity to put together appellant specific evidence justifying the addition.

21. It can be seen from the observation of the Assessing Officer that he has only referred to the information related to the outcome of search in the case of Shri Pravin Kumar Jain Group who were allegedly providing accommodation entries but the Ld. Assessing Officer has failed to demonstrate any such specific evidence that the appellant has in reality obtained any accommodation entries. There is no direct specific mention of the appellant by the director or key persons of the investor companies. There is no evidence of cash deposits linked to the investors. The assessing officer did not bring specific incriminating evidence linking the investor to the appellant. The only link is that the investors have invested in appellant company. That the appellant has given cash to the investors in lieu of entry is merely alleged but not demonstrated. Layering of

transactions is alleged but not demonstrated. Opportunity for cross examination is not provided to the appellant. Papers/evidence found in the search action raises presumption but the same is available in the case of person searched but not in the case of third parties unless proved and corroborated. Similarly, retraction may be rejected as motivated, but the same can be considered only against the person who has retracted in his assessment. Such statement in the case of another person loses its sanctity unless opportunity of cross examination is granted and / or is corroborated with other evidences. When the investor company is filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possession. Over such issue there are plethora of judgements to support the appellant. Some of them are discussed here below:-

**“(i) The Hon'ble Supreme Court in the case of CIT V/s Lovely Exports 6 DTR 308 has held as under:**

"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company".

**(ii) The Hon'ble Bombay High Court in the case of CIT v/s Creative World Telefilms Ltd 333 ITR 100 has held as under:**

"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department can always proceed against them and if necessary reopen their individual assessments.

*Held, dismissing the appeal, that there was no dispute that the assessee had given the details of names and addresses of the shareholders, their PAN/ GIR numbers and had also given the cheque numbers, name of the bankers. The Assessing Officer ought to have found out their details through PAN cards, bank statements. Thus, the view taken by the Tribunal could not be faulted.*

**(iii) The Hon'ble Supreme Court of India in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC) has held as under:**

"That in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessee's. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they are creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the Respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence".

Reliance is also placed on the following decisions:

- i. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s Value Capital Services P.Ltd. (2008) 307 ITR 334 (Delhi).
- ii. Hon'ble Punjab and Haryana High Court in the case of Commissioner of Income Tax v/so GP International Ltd. (2010) 325 ITR 25 (P&H).

- iii.* Hon'ble Madras High Court in the case of Commissioner of Income Tax v/so Electro Polychem Ltd (2007) 294 ITR 661 (Mad).
- iv.* Hon'ble Rajasthan High Court in case of Commissioner of Income Tax v/so AKJ Granites P. Ltd. (2008) 301 ITR 298 (Raj.)
- v.* Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s Oasis Hospitalities (Pvt.) Ltd. (2011) 51 DTR 74 (Delhi).

Sec. 69 places the burden of proof on the tax payer to explain the nature and source of any credit found in the books. But, when assessee proves or submit the basic information like identification, genuineness of transactions and creditworthiness of the creditors, onus is discharged by him and if Assessing Officer disbelieve the genuineness of the same, he has to prove otherwise, merely, doubting or pointing out some discrepancy is not the foundation for discarding the genuineness of the deposit or share money or substance of the matter, held by the Hon'ble Supreme Court in the case of CIT v. Gujarat Heavy Chemicals Ltd. (2002) 256 ITR 795 (SC).

In view of the above the question of making any addition u/s. 68 of the Act does not arise.”

22. Further, Hon'ble jurisdictional ITAT in the case of ITO-10(2)(3) vs. M/s J.J. Multitrade Pvt. Ltd. ITA No.2158 & 2159/Mum/2014 order dated 11.03.2015 has deleted additions on similar facts. Further, the Hon'ble jurisdictional ITAT in the case of M/s S.D.B. Estate Pvt. Ltd. vs ITO-5(3)(2) ITA No.584/M/2015 has deleted similar addition made u/s 68 of the I.T. Act. The Hon'ble ITAT (Jaipur Bench) in the case of Bharti Syntex Ltd. vs. DCIT ITA Nos.172 & 173/Jp/2010 has held in para 24.4 as under:-

"24.4 In this case also no cross examination was allowed to the assessee. Therefore, adverse inference cannot be drawn only on the statement of Shri Mukesh Choksi. We further noted that all other

necessary details have been filed before AG. Amounts were received through account payee cheque. Both the companies are assessed to tax in Mumbai. Confirmation along with copies of share certificate, bank statement, memorandum of articles, copy of share application money, audited balance sheet and P&L a/c of these parties were filed. These are similar details as were filed in case of three other companies for asst. yr. 2005-06. We have already disposed of the appeal for asst. yr. 2005-06 whereby we have held that the assessee has discharged its onus by filing necessary details and further have relied on the decisions of Hon'ble Supreme Court and Hon 'ble Delhi High Court along with various other decisions of Tribunal and have held that addition cannot be made under S.68 in the hands of the assessee company. Therefore, in view of the same reasoning, we cancel the entire addition made and confirmed by the lower authorities here also.

The above decision of ITAT also related to Mr.Mukesh Choksi's case of investment in share application money. On perusal of above case it is clear that if a bogus shareholder has invested the money and if appellant receives such money as share application money and appellant during assessment proceedings provides the details like name & address of the corporate entity, PAN No., ROC No., then ITAT held that this may be referred to the concerned A.O. for proceeding against such bogus shareholders instead of adding the amount u/s. 68 of the IT Act in the name of the company.”

23. It is noted that no specific incriminating material linking investor to the appellant or showing the investment to be bogus is provided. Also opportunity for cross examination also was not provided to the appellant. The assessing officer has not been able to bring on record any direct or corroborative evidence that the share application money received is unexplained as covered u/s 68 even after opportunity was given in the remand proceedings. The original statement of Shri Praveen Jain does

not name the appellant specifically. He has subsequently retracted even that original statement. In any case, it is cardinal principle of natural justice, that before conclusions are drawn against a person based on statement of a third party, he must be allowed an opportunity for cross examination. This has not been provided. There is a limit to the capacity or responsibility expected of an assessee to prove facts. The assessing officer has" not inquired into or reported on assessment in the case of the investor companies. If the statements recorded of Shri Pravin Jain and others (which were retracted) are ignored, there is no specific evidence cited by the assessing officer in respect of the investor companies and the appellant which would shift the burden back on the appellant u/s 68. The assessing officer has stated that the appellant has not disproved the findings of the department. Now the question is what are the appellant specific findings that has to be disproved is not spelt out. In this fact matrix, and the judicial decisions covering the scope of section 68, the addition made of Rs 1,50,00,000/- u/s 68 in the case of the appellant is deleted. The grounds of appeal in this regard are allowed as above."

7. The Hon'ble Bombay High Court in a recent decision in PCIT Vs Paradise Inland Shipping (P) Ltd (supra) on similar issues held as under;

*"5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus :*

*"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :*

*1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-*

*Date of Registration 09/05/1995*

- (a) Memorandum of Association and Article of Association,*
- (b) Certificate of Incorporation,*
- (c) Certificate of Commencement of Business,*
- (d) Acknowledgment of the Return of Income AY 08-09,*
- (e) Affidavit of the Director confirming the investment,*
- (f) Application for allotment of shares,*
- (g) Photocopy of the share certificate*
- (h) Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009,*
- (i) Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010,*
- (j) The Bank Statement highlighting receipt of the amount by way of RTGS,*
- (k) Banks certificate certifying the receipt of the amount through Banking channels*

*6. On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies.*

*7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary*

*evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot re-appreciate the evidence to come to any contrary evidence. Considering that the authorities have rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial question of law which arises in the present Appeal for consideration.*

*8. The Apex Court in the case of Orissa Corpn. (P.) Ltd. (supra), has observed at Para 13 thus :*

"13. In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income- tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under S. 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

*9. This Court in the Judgments relied upon by the learned Counsel appearing for the Respondents, have come to the conclusion that once the Assessee has produced documentary evidence to establish the existence of such Companies, the burden would shift on the Revenue-Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two*

*persons who have admittedly not been subjected to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons, would not at all be justified. The Assessing Officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents.*

*10. We find no infirmity in the findings arrived at by the ITAT as well as CIT Appeals on the contentions raised by the Appellants-Revenue in the present case and, as such, the question of interference by this Court in the present proceedings under Section 260A of the Income Tax Act would not at all be justified. Apart from that, as rightly pointed out by the learned Counsel appearing for the Respondents, the CIT Appeals had also noted that proceedings under Section 147 of the Income Tax Act cannot lead to re- verification of the records. These findings of the CIT Appeals have not been assailed before the Income Tax Appellate Court.”*

8. In view of the above factual and legal discussion and considering the latest decision of Hon’ble Jurisdictional High Court referred above, we have noted that the Id Commissioner (Appeals) passed the order after considering the entire material available before him. We have seen that the order passed by Id. Commissioner (Appeals) is reasoned one and does not require any further interference at our end. The facts of various decision relied by Id. DR in Rajmandir Estate Pvt Ltd (supra), in CIT Vs Jansamparak Advertising and Marketing (P) Ltd (supra) in CIT Vs N.R.

Portfolio (supra), though is at variance on facts and is of non jurisdictional High Court. The decision of jurisdictional High Court in PCIT Vs Paradise Inland Shipping (P) Ltd (supra) is binding precedent on this Tribunal. In the result the grounds of appeal raised by the revenue is dismissed.

9. In the result the appeal by revenue for AY 2008-09 is dismissed.

**ITA No. 3755/M/2017 for AY 2009-10 by revenue.**

10. The revenue has raised identical grounds of appeal as raised in appeal for AY 2008-09. The facts for the year under consideration is at little variance. The assessment order for the year under consideration was passed on similar lines by the assessing officer, making the similar additions under section 68 for Rs.1,50,00,000/-. The Id Commissioner (Appeals) deleted the similar additions by the order of same date.

11. The Id. DR for the revenue argued on the similar lines as argued the appeal for earlier year i.e. for AY 2008-09. On the other hand the Id. AR for the assessee specifically pointed out that during the relevant period the assessee received share application money for Rs.50,00,000/-. The assessee also received advance money Rs. 1,00,00,000/- against the sale of units from three parties. The assessee provided all details required by assessing officer to prove their contention. The Id AR for assessee argued that the assessee has already returned the advance money which was duly shown to the assessing officer in the books of account. The assessing officer has not given any finding on the submissions and the documentary evidences

furnished by assessee. The assessing officer made additions without considering the submissions and the evidences furnished before him. The Id Commissioner (Appeals) passed the order after careful consideration of the facts and the evidences. The Id. AR made reliance on all decisions which are relied in appeal for assessment year for 2008-09.

12. We have considered the rival submissions of the parties and perused the record and the orders of the authorities below. We have noted that the assessing officer passed the assessment order on the similar lines as made for earlier year. The assessing officer has not given specific finding on the documentary evidences furnished by the assessee. We have further noted that similar contentions were made before Id Commissioner (Appeals) by assessee, which were considered the him. We have seen that the Id Commissioner (Appeals) passed the following order;

“18. I have examined the contentions of the appellant as well as the assessment order and the remand report carefully. A perusal of the assessment order shows that though the conclusions of the investigation wing has been referred to in the assessment order, there are no specific reference to the appellant company. There are no evidences brought on record to show that there is any cash trail in respect of the amounts received by the appellant company from the investors. Though the AO was specifically asked to furnish specific incriminating evidences, it is noted that the AO has not been able to pin point the specific evidences relating to appellant company which would clearly show that the share application money has been received in lieu of cash. In the assessment order the assessing officer has referred to the statement of Shri Pravin Jain recorded at the time of search but has not considered the retraction thereafter in which it was stated that statement recorded at the time of search was under undue pressure and that such statements had been retracted. It is further noted from details called and submitted by the appellant that the advances were repaid as follows:

Sr. No.	Name of the company	Amount	Date of repayment
1.	Lexus Infotech Ltd.	30,00,000	13/14.3.2013
2.	Raghunandan Rayons Ltd.	35,00,000	13.3.2012
3.	Sanjivani Enviro Protection Ltd.	35,00,000	14.3.2012
	Total	1,00,00,000	

19. The fact remains that the investor companies are assessed to tax and have filed their returns of income. The parties have responded to the notices u/s 133(6). The appellant has filed audited accounts of the investors and contended that they have genuine business activity. The appellant has submitted that notices were served on the investors in all cases. Therefore it cannot be said that the parties did not exist at their addresses. Documentary evidences were already filed by the appellant earlier in the assessment proceedings. Confirmation letters with copy of PAN and address, bank statements of applicants, Income Tax return acknowledgement, and audited accounts balance sheet and P 86 L account of the investor companies have been filed before the assessing officer and also in the appellate proceedings.

20. I do not find any merit in the contention of the appellant that the investment being a share capital is a capital receipt and therefore cannot be considered as income in the hands of the appellant. The credits fall within the scope of section 68 which is a deeming provision. Several case laws including those of the Apex Court and High Court have considered credits made to capital account of the assessee's to be covered under the provisions of section 68 and therefore deemed income. The rule for application of section 68 is that the identity and credit worthiness of the investor/lender/creditor has to be established and the genuineness of the transaction has to be established. I also do not find merit in the argument that merely because there is a specific amendment to section 68 in respect of credit in the form of share capital or share application money in the case of private company, requiring the person in whose name such credit is there to explain the nature and source of such sum, which is brought on statute w.e.f. 1.4.2013, hence no such addition u/s 68 can be made in earlier years. The amendment only makes the onus more severe in such cases but it is incorrect to read it as if no such additions could be made u/s 68 in respect of share application money in the earlier assessment years.

21. The Apex Court upheld the addition u/s 68 in the case of credits as share capital in the case of N. Tarika Property Invest. (P.) Ltd. V. Commissioner of Income-tax [2014] 51 [taxmann.com](http://taxmann.com) 387 (SC) by dismissing the SLP filed by the appellant.

22. Section 68 casts the initial burden of proof on the assessee to show prima facie and to explain the nature and source of credit found in its books. When the statute places the burden of proof in income tax cases on the tax

payer, it is understood to be only the initial burden. When the tax payer explains We credit by providing evidence of identity, confirmation and credit worthiness, the burden shifts on the revenue to show that the explanation is not satisfactory or incorrect. In the case of credit as share capital by corporate entity, whose existence is shown by its registration with Registrar of companies and its filing of tax returns, adverse conclusion is not justified merely. because its directors are not produced personally before the assessing officer by the tax payer.

23. In the remand proceedings only the legal requirement was indicated that if any *statements of third parties* are to be relied upon, opportunity for cross examination must be provided. Further, instead of and other than generalities the assessing officer was given an opportunity to put together appellants specific evidence justifying the addition.

24. It can be seen from the observation of the Assessing Officer that he has only referred to the information related to the outcome of search in the case of Shri Pravin Kumar Jain Group who were allegedly providing accommodation entries but the Ld. Assessing Officer has failed to demonstrate any such specific evidence that the appellant has in reality obtained any accommodation entries. There is no direct specific mention of the appellant by the director or key persons of the investor companies. There is no evidence of cash deposits linked to the investors. The assessing officer did not bring specific incriminating evidence linking the investor to the appellant. The only link is that the investors have invested in appellants company. That the appellant has given cash to the investors in lieu of entry is merely alleged but not demonstrated. Layering of transactions is alleged but not demonstrated. Opportunity for cross examination is not provided to the appellant. Papers/evidence found in the search action raises presumption but the same is available in the case of person searched but not in the case of third parties unless proved and corroborated. Similarly, retraction may be rejected as motivated, but the same can be considered only against the person who has retracted in his assessment. Such Statement in the case of another person loses its sanctity unless opportunity of cross examination is granted and/or is corroborated with other evidences. When the investor company is filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possession. Over such issue there are plethora of judgments to support the appellant. Some of them are discussed here below.

**"(i)The Hon'ble Supreme Court in the case of CIT vs Lovely Export 6 DTR 308 has held as under:-**

*"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company".*

**(ii) The Hon'ble Bombay High Court in the case of CIT v/s Creative**

***World Telefilms Ltd 333 ITR 100 has held as under:***

*"If the share application money is received by the assessee company from alleged bogus share holders whose names are given to the Assessing Officer then the department can always proceed against them and if necessary reopen their individual assessments.*

*Held, dismissing the appeal, that there was no dispute that the assessee had given the details of names and addresses of the shareholders, their PAN/ GIR numbers and had also given the cheque numbers, name of the bankers. The Assessing Officer ought to have found out their details through PAN cards, bank statements. Thus, the view taken by the Tribunal could not be faulted.*

***The Hon'ble Supreme Court of India in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC) has held as under***

*"That in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessee's. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they are creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal reached the conclusion that the Respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence".*

Reliance is also placed on the following following decisions:

- i. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Valu Capital Services P.Ltd. (2008) 307 ITR 334 'Delhi).***
- ii. Hon'ble Punjab and Haryana High Court in the case of Commissioner of Income Tax v/s. GP International Ltd. (2010) 325 ITR 25 IP&H).***
- iii. Hon'ble Madras High Court in the case of Commissioner of Income Tax v/s. Electro Polychem Ltd (2007) 294 ITR 661 (Mad).***
- iv. Hon'ble Rajasthan High Court in case of Commissioner of Income Tax v/s. AKJ Granites P.Ltd. (2008) 301 ITR 298 (Raj.)***
- v. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Oasis Hospitalities (Put.) Ltd. (2011) 51 DTR 74 Delhi).***

*Sec. 69 places the burden of proof on the tax payer to explain the nature and source of any credit found in the books. But, when assessee proves or submit the basic information like identification, genuineness of transactions and creditworthiness of the creditors, onus is discharged by him and if Assessing Officer disbelieve the genuineness of the same, he has to prove*

*otherwise, merely, doubting or pointing out some discrepancy is not the foundation for discarding the genuineness of the deposit or share money or substance of the matter, held by the Hon'ble Supreme Court in the case of CIT v. Gujarat Heavy Chemicals Ltd. (2002) 256 ITR 795 (SC). In view of the above the question of making any addition u/ s. 68 of the Act does not arise."*

25. Further the Hon'ble jurisdictional ITAT in the case of ITO-10(2)(3) vs. M/s J.J. Multitrade Pvt. Ltd. ITA No.2158 & 2159/Mum/2014 order dated 11.03.2015 has decided additions on similar facts. Further, the Hon'ble jurisdictional ITAT in the case of M/s S.D.B. Estate Pvt. Ltd. vs ITO-5(3)(2) ITA No.584/M/2015 has deleted similar addition made u/s 68 of the I.T. Act. The Hon'ble ITAT (Jaipur Bench)In the case of Bharti Syntex Ltd. vs. DCIT ITA Nos.172 & 173/Jp/2010 has held in para 24.4 as under:-

*"24.4 In this case also no cross examination was allowed to the assessee. Therefore, adverse inference cannot be drawn only on the statement of Shri Mukesh Choksi. We further noted that all other necessary details have been filed before AG. Amounts were received through account payee cheque. Both the companies are assessed to tax in Mumbai. Confirmation along with copies of share certificate, bank statement, memorandum of articles, copy of share application money, audited balance sheet and P&L a/c of these parties were filed. These are similar details as were filed in case of three other companies for asst. yr. 2005-06. We have already disposed of the appeal for asst. yr. 2005-06 whereby we have held that the assessee has discharged its onus by filing necessary details and further have relied on the decisions of Hon'ble Supreme Court and Hon'ble Delhi High Court along with various other decisions of Tribunal and have held that addition cannot be made under S.68 in the hands of the assessee company. Therefore, in view of the same reasoning, we cancel the entire addition made and confirmed by the lower authorities here also.*

*The above decision of ITAT also related to Mr.Mukesh Choksi's case of investment in share application money. On perusal of above case it is clear that if a bogus shareholder has invested the money and if appellant receives such money as share application money and appellant during assessment proceedings provides the details like name & address of the corporate entity, PAN No., ROC No., then ITAT held that this May be referred to the concerned A.O. for proceeding against such bogus shareholders instead of adding the amount u/ s. 68 of the I.T. Act in the name of the company."*

26. It is noted that no specific incriminating material linking investor to the appellant or showing the investment to be bogus is provided. Also opportunity for cross examination also was not provided to the appellant. The assessing officer has not been able to bring on record any direct or corroborative evidence that the share application money received/ advances received is unexplained as covered u/s 68 even after opportunity was given in the remand proceedings. The original statement of Shri Praveen Jain does name the appellant specifically. He has subsequently retracted even that original

statement. In any case, it is cardinal principle of natural justice, that before conclusions are drawn against a person based on statement of a third party, he must be allowed an opportunity for cross examination. This has not been provided. There is a limit to the capacity or responsibility expected of an assessee to prove facts. The assessing officer has not inquired into or reported on assessment in the case of the investor companies. If the statements recorded of Shri Pravin Jain and others (which were retracted) are ignored, there is no specific evidence cited by the assessing officer in respect of the investor companies and the appellant which would shift the burden back on the appellant u/s 68. The assessing officer has stated that the appellant has not disproved the findings of the department. Now the question is what are the appellant specific findings that has to be disproved is not spelt out. In this fact matrix, and the judicial decisions covering the scope of section 68, the addition made of Rs 50,00,000/- in respect of share capital and Rs 1,00,00,300 in respect of advances u/s 68 in the case of the appellant is deleted.”

13. In view of the above factual and legal discussion and considering the facts that we have dismissed the appeal for AY 2008-09 and the grounds of appeal are identically worded except variation of figure. We have seen that the order passed by Id. Commissioner (Appeals) is reasoned one and does not require any further interference at our end. In the result the grounds of appeal raised by the revenue is dismissed.

**ITA No. 3756/M/2017 for AY 2012-13 by revenue.**

14. The revenue has raised identical grounds of appeal as raised in appeal for AY 2008-09 and in 2009-10, except variation of figure of addition under section 68 of the Act. The facts for the year under consideration are also at variance. The assessment order for the year under consideration was passed on similar lines by the assessing officer, making the similar additions under section 68 of the Act for Rs.2,46,00,000/- The Id. Commissioner (Appeals) has deleted the entire additions by the order of same date.

15. The Id. DR for the revenue argued on the similar lines as argued the appeal for earlier year and relied on all those decisions which were relied by him for AY 2008-09 & 2009-10. On the other hand the Id. AR for the assessee submitted that the assessment for the year under consideration was completed under section 143(3) on 31.03.2015. The Id AR for the assessee specifically pointed out that during the relevant period the assessee has availed loan from five parties. The assessee provided all details required by assessing officer to prove the genuineness of the loan transaction. The Id. AR for assessee argued that the assessee has paid interest on such loan. The assessee deducted TDS on the interest payment. The loan availed by assessee is duly shown to the assessing officer in the books of account. The assessee provided all the information and the evidences required by the assessing officer during the assessment proceedings. The assessing officer has not given any finding on the submissions and the documentary evidences furnished by assessee. The assessing officer made additions without considering the submissions and the evidences furnished before him. The findings of the assessing officer are perverse. The Id. Commissioner (Appeals) passed the order after careful consideration of the facts and the evidences. The Id AR relied on all the decision relied for earlier years.

16. We have considered the rival submissions of the parties and have gone through the material and the orders of the authorities below. We have

noted that the assessing officer passed the assessment order on the similar lines as made for earlier year. The assessing officer has not given specific finding on the documentary evidences furnished by the assessee. The assessing officer while passing the assessment order has not given different finding though the facts for the year under consideration were at variance. The assessee specifically contented that they have paid interest on the loan availed and deducted TDS. The Id Commissioner (Appeals) while considering the facts noted that the assessing officer has not correctly appreciated the loan amount from Raghuveer Sales nor its share capital and reserve funds. Similar, other discrepancies were pointed out about Viraj Merchantile P. Ltd, Park Tools Ltd and Utakantha Trading & Properties Ltd. The Id Commissioner (Appeals) also noted that the assessment order was passed in a hurriedly manner. After appreciating the facts and the evidences the Id Commissioner (Appeals) passed the following order:-

“9.18. I have examined the contention of the appellant as well as the assessment order and the remand report carefully. It is noted that the assessing officer has incorrectly considered the loan from Raghuveer Sales Ltd. at ₹.6,00,000/- whereas, it is actually ₹.60,00,000/- and thus the total loans are ₹.3,00,00,000/- and not ₹.2,46,00,000/- considered but the assessing officer. Further that the appellant is correct in pointing out that the share capital and reserves of this company is positive and the assessing officer has incorrectly referred to it as negative In the case of Viraj Mercantile P. Ltd., the current year loss is mainly 'n so1rLt of exchange loss of Rs 3.35 crores. The capital and reserves of Park Tools Ltd. is Rs 43,54,392/- and not 34,29,392/- The capital and reserves of Utakantha Trading & Properties Ltd. is Rs.2,50,31,098/- and not 24,31,098/- as mentioned by the assessing officer. This does indicate that the assessing officer has passed the assessment order in a hurry without confronting the appellant with a show cause notice.

9.19. A perusal of the assessment order shows that though the conclusions of the investigation wing has been referred to in the assessment order, there are no specific reference to the appellant company. There are no evidences brought on record to show that there is any cash trail in respect of the amounts received by the appellant company from the investors. Though the AO was specifically asked to furnish specific incriminating evidences, it is noted that the AO has not been able to pin point the specific evidences relating to appellant company which would clearly show that the share application money has been received in lieu of cash. In the assessment order the assessing officer has referred to the statement of Shri Pravin Jam recorded at the time of search but has not considered the retraction thereafter in which it was stated that statement recorded at the time of search was under undue pressure and that such statements had been retracted. Further, apart from Viraj Mercantile Pvt. Ltd. none of the other four companies are listed as Praveen Jain company but has been considered as parties who have given bogus entries by the assessing officer.

9.20. It is further noted from details called and submitted by the appellant that the advances were repaid as follows.

Sr. No.	Name of the Company	Amount	Date of repayment
1.	Viraj Mercantile Pvt. ltd.	5000000 2500000	11.3.2013 24.10.2013
2.	Raghuveer Sales Pvt. Ltd.	600000	21.8.2013
3.	Park Tools Ltd.	2500000	24.7.2012
4.	Real Stone Exports Ltd.	3500000	25.7.2012
5.	Utkantha Trading and properties Pvt. Ltd.	65,00,000 20,00,000 20,00,000	4.6.2012 24.7.2012 25.7.2012
	<b>Total</b>	<b>24600000</b>	

9.21. The fact remains that the investor companies are assessed to tax and have filed their returns of income. The parties have responded to the notices u/s 133(6). The appellant has filed audited accounts of the investors and contended that they have genuine business activity. The appellant has submitted that notices were served on the investors in all cases. Therefore it cannot be said that the parties did not exist at their addresses. Documentary evidences were already filed by the appellant earlier in the assessment proceedings. Confirmation letters with copy of PAN and address, bank statements of applicants, Income Tax return acknowledgement, and audited accounts balance sheet and P& L account of the investor companies have been filed before the assessing officer and also in the appellate proceedings.

9.22. Section 68 casts the initial 'burden of proof on the assessee to show prima facie and to explain the nature and source of credit found in its books. When the statute places the burden of proof in income tax cases on the tax payer, it is understood to be only the initial burden. When the tax payer explains the credit by providing evidence of identity, confirmation and credit worthiness, the burden shifts on the revenue to show that the explanation is not satisfactory or incorrect. In the case of credit as loans by corporate entity, whose existence is shown by its registration with Registrar of companies and its filing of tax returns, adverse conclusion is not justified merely because its directors are not produced personally before the assessing officer by the tax payer.

9.23. In the remand proceedings only the legal requirement was indicated that if any statements of third parties are to be relied upon, opportunity for cross examination must be provided. Further, instead of and other than generalities, the assessing officer was given an opportunity to put together appellant specific evidence justifying the addition.

9.24. It can be seen from the observation of the Assessing Officer that he has only referred to the information related to the outcome of search in the case of Shri Pravin Kumar Jain Group who were allegedly providing accommodation entries but the Ld. Assessing Officer has failed to demonstrate any such specific evidence that the appellant has in reality obtained any accommodation entries. There is no direct specific mention of the appellant by the director or key persons of the investor companies. There is no evidence of cash deposits linked to the investors. The assessing officer did not bring specific incriminating evidence linking the investor to the appellant. The only link is that the investors have lent to the appellant company. That the appellant has given cash to the investors in lieu of entry is merely alleged but not demonstrated. Layering of transactions is alleged but not demonstrated. Opportunity for cross examination is not provided to the appellant. Papers/evidence found in the search action raises presumption but the same is available in the case of person searched but not in the case of third parties unless proved and corroborated. Similarly, retraction may be rejected as motivated, but the same can be considered only against the person who has retracted in his assessment. Such statement in the case of another person loses its sanctity unless opportunity of cross examination is granted and /or is corroborated with other evidences When the investor company is filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possession. Over such issue there are plethora of judgments to support the appellant. Some of them are discussed here below:-

"(i) *The Hon'ble Supreme Court in the case of CIT Vs Lovely Exports 6*

*DTR 308 has held as under:-*

*"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company".*

(ii) *The Hon'ble Bombay High Court in the case of CIT v/s Creative World Telefilms Ltd 333 ITR 100 has held as under:-*

*"If the share application money is received by the assessee company from alleged bogus share holders who's name are given to the Assessing Officer then the department can always proceed against them and if necessary reopen their individual assessments.*

*Held, dismissing the appeal, that there was no dispute that the assessee had given the details of names and addresses of the shareholders, their PAN/ GIR numbers and had also given the cheque numbers, name of the through PAN cards, bank statements. Thus, the view taken by the Tribunal could not be faulted.*

(iii) *The Hon'ble Supreme Court of India in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC) has held as under:*

*"That in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the avenue that the said creditors were income-tax assessee's. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they are creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the Respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence". Reliance is also placed on the following decisions:*

- i. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Value Capital Services P. Ltd. (2008) 307 ITR 334 (Delhi).*
- ii. Hon'ble Punjab and Haryana High Court in the case of Commissioner of Income Tax v/s. GP International Ltd. (2010) 325 ITR 25 (P&H).*
- iii. Hon'ble Madras High Court in the case of Commissioner of income Tax v/s. Ectro Polychem Ltd (2007) 294 ITR 661 (Mad).*
- iv. Hon'ble Rajasthan High Court in case of Commissioner of Income Tax vs AKJ Granites P. Ltd. (2008) 301 ITR 298 (Raj.)*
- v. V. Hon'ble Delhi High Court in case of Commissioner of Income Tax v/s. Oasis Hospitalities (Pvt.) L W. (2011) 51*

*DTR 74 (Delhi).*

*Sec. 69 places the burden of proof on the taxpayer to explain the nature and source of any credit found in the books. But, when assessee proves or submit the basic information like identification, genuineness of transactions and creditworthiness of the creditors, onus is discharged by him and if Assessing Officer disbelieve the genuineness of the same, he has to prove otherwise, merely, doubting or pointing out some discrepancy is not the foundation for discarding the genuineness of the deposit or share money or substance of the matter, held by the Hon'ble Supreme Court in the case of CIT v. Gujarat Heavy Chemicals Ltd. (2002) 256 JTR 795 (SC).*

*In view of the above the question of making any addition u/s. 68 of the Act does not arise."*

9.25. Further, Hon'ble jurisdictional ITAT in the case of IT0-10(2)(3) vs. M/s J.J. Multitrade Pvt. Ltd. ITA No.2158 & 2159/Mum/2014 order dated 11.03.2015 has deleted additions on similar facts. Further, the Hon'ble jurisdictional ITAT in the case of, M, s S.D.B. Estate Pvt. Ltd. vs ITO-5(3)(2) ITA No.584/M/2015 has deleted similar addition made u/s 68 of the I.T. Act. The Hon'ble ITAT (Jaipur Bench) In the case of Bharti Syntex Ltd. vs. DCIT ITA Nos. 172 & 173/Jp/2010 has held in para 24.4 as under:-

*"24.4 In this case also no cross examination was allowed to the assessee. Therefore, adverse inference cannot be drawn only on the statement of Shri Mukesh Choksi. We further noted that all other necessary details have been filed before AG. Amounts were received through account payee cheque. Both the companies are assessed to tax in Mumbai. Confirmation along with copies of share certificate, bank statement, memorandum of articles, copy of share application money, audited balance sheet and P&L a/c of these parties were filed. These are similar details as were filed in case of three other companies for asst. yr. 2005-06. We have already disposed of the appeal for asst. yr. 2005-06 whereby we have held that the assessee has discharged its onus by filing necessary details and further have relied on the decisions of Hon'ble Supreme Court and Hon'ble Delhi High Court along with various other decisions of Tribunal and have held that addition cannot be made under S.68 in the hands of the assessee company. Therefore, in view of the same reasoning, we cancel the entire addition made and confirmed by the lower*

*authorities here also.*

*The above decision of ITAT also related to Mr.Mukesh Choksi's case of investment in share application money. On perusal of above case it is clear that if a bogus shareholder has invested the money and if appellant receives such money as share application money and appellant during assessment proceedings provides the details like name & address of the corporate entity, PAN No., ROC No., then ITAT held that this may be referred to the concerned A.O. for proceeding against such bogus shareholders instead of adding the amount u/ s. 68 of the I.T. Act in the name of the company."*

9.26. It is noted that no specific incriminating material linking investor to the appellant or showing the lending to be bogus is provided. Also opportunity for cross examination also was not provided to the appellant. The assessing officer has not been able to bring on record any direct or corroborative evidence that the share application money received/ advances received is unexplained as covered u/s 68 even after opportunity was given in the remand proceedings. The original statement of Shri Praveen Jain does not name the appellant specifically. He has subsequently retracted even that original statement. In any case, it is cardinal principle of natural justice, that before conclusions are drawn against a person based on statement of a third party, he must be allowed an opportunity for cross examination. This has not been provided. There is a limit to the capacity or responsibility expected of an assessee to prove facts. The assessing officer has not inquired into or reported on assessment in the case of the investor companies. If the statements recorded of Shri Pravin Jain and others (which were retracted) ignored, there *is* no specific evidence cited by the assessing officer in respect of the investor companies and the appellant which would shift the burden back on the appellant u/s 68. The assessing officer has stated the appellant has not disproved the findings of the department. Now the question is what are the appellant specific findings that has to be disproved is not spelt out. Four of the five lenders are not even in the list of Praveen Jain as per the assessing officer's details. It has already been noted that the assessing officer has hurriedly drawn incorrect conclusions from the audited accounts of the lenders. The borrowings carry interest and interest has been paid after TDS. All the loans have been subsequently repaid through banking channels. In this fact matrix, and the judicial decisions covering the scope of section 68, the addition made of Rs 2,46,00,000/- in respect of unsecured loans / advances u/s 68 in the case of the appellant is deleted. The grounds of appeal no 6 in this regard are allowed as above."

17. In view of the above discussion we do not find any infirmity and illegality and we have already confirmed the order passed by Id CIT(A) for AY

2008-09 and 2009-10, hence, the appeal for the year consideration is also dismissed with similar observation.

**ITA No. 2948/M/2017 for AY 2012-13 by assessee**

18. The assessee has raised following grounds of appeals;

*(1) The Commissioner (Appeals) erred in upholding the action of assessing officer in reducing transportation charges Rs. 52,000/- from work in progress on the ground that the said charges do not pertain to the relevant assessment year.*

*The appellants contend that on the facts and in the circumstances of the case and in law, the Commissioner (Appeals) ought not to have upheld the action of assessing officer in as much as the impugned charges have been correctly recorded in the books of account of the year under reference and the Commissioner (Appeals) has not correctly appreciated the facts of the case; as such the charges ought not to have been reduced from the work in progress.*

*(2) The Commissioner (Appeals) erred in upholding the action of assessing officer in reducing purchase of goods Rs.45215/- from work in progress on the ground that the said purchases were made from the dealers which was declared as 'suspicious' as per the information posted on the website of Maharashtra Sale tax Department and was involved in providing accommodation entries.*

*The appellants contend that on the facts and in the circumstances of the case and in law, the Commissioner (Appeals) ought not to have upheld the action of assessing officer inasmuch as the assessing officer has not brought any material on record to support the impugned reduction from work in progress and that the Commissioner (Appeals) is not correctly appreciated the facts of the case and hence, the reduction of the purchases from work in progress is untenable in law.*

(3) *The Commissioner (Appeals) erred in upholding the action of assessing officer in reducing compensation paid on cancellation of flat booking Rs. 1,00,000/- from work in progress in view of section 40(a)(ia) of the Act on the ground that the payment is in nature of penal interest and that the payments is made without deduction of tax at source.*

*The appellants contend that on the facts and in the circumstances of the case and in law the Commissioner (Appeals) ought not to have upheld the action of assessing officer inasmuch as the impugned payment, being in the nature of compensation for consideration of flat booking, is not exigible to the provisions of the TDS and hence, the invocation of the provisions of section 40(a)(ia) of the Act is not warranted and consequently, the reduction of the said payment from the work in progress is untenable in law.*

(4) *The Commissioner (Appeals) erred in upholding the action of assessing officer in reducing rent paid to slum dwellers Rs. 30,35,000/-from work in progress on the ground that the slum dwellers were not eligible and the appellant were not required to pay such rent.*

*The appellants contend that on the facts and in the circumstances of the case and in law the Commissioner (Appeals) ought not to have upheld the action of assessing officer inasmuch as the date is paid wholly and exclusively in the pursuit of the business and that the commission appeal has not correctly appreciated the facts of the case; and as such, the reduction of the said payment from work in progress is untenable in law.*

(5) *The commissioner (Appeals) erred in upholding the action of assessing officer in reducing cash payment made to slum dwellers Rs.25,89,156/- from work in progress in view of the provisions of section 40A(3) of the Act.*

*The appellants contend that on the facts and in the circumstances of the case and in law the Commissioner (Appeals) ought not to have upheld the action of assessing officer inasmuch Commissioner*

*(Appeals) has not correctly appreciated the facts of the case and hence, the impugned reduction of the said payments from work in progress is untenable in law.*

19. At the outset of hearing of the appeal the learned AR of the assessee submits that the assessee has filed an application for admission of additional evidence; vide application dated 26 September 2017. We have perused the application filed by assessee for admission of additional evidence. In the application the assessee has contended that they have filed a paper book containing page No. 117 to 172. It is also contended in the application that these evidence were sent to their Chartered Accountant who were attending proceedings before first appellate authority. The required documents were compiled by Mr. Anjan Bhavsar Chartered Accountants (CA) to send to their Authorised representative. The said CA Mr. Anjan Bhavsar remained under a genuine belief that all the documents have been send by him to their representative. However, inadvertently, certain parts of papers and documents were not sent due to bona fides mistake and due to lake of coordination between him and the authorised representative, hence, those document could not be filed before Commissioner (Appeals). In support of the application the assessee has filed affidavit of Anjan Bhavsar CA of the assessee company.
20. It was argued by learned AR of the assessee that all these documents have direct bearings on the grounds No.1 to 5 of grounds of appeal raised by the assessee. It was further prayed that the assessee would suffer prejudice if

the document is not considered for adjudication of the grounds of appeal raised by assessee. On the other hand learned DR for the revenue opposed the admission of additional ground of appeal at this stage. The learned DR for the revenue further contended that if the documents are admitted, will require verification at the end of assessing officer. And in case this Tribunal arrives at a conclusion to admit the additional evidences, all the grounds of appeal may be restored to the file of assessing officer for verification of the evidence furnished by assessee and to decide the claims in the grounds of appeal raised by assessee accordingly.

21. We have considered the rival submission of the parties and have gone through the evidences furnished by assessee. The learned AR of assessee has furnished the documentary evidences related with the grounds of appeal No. 1 to 5 has raised in the present appeal.

22. The documents filed by the assessee along with the application for admission of additional evidence consist of voucher dated 12.04.2011 together with transport bill of Sona Transport of Rs.52,000/- ( in support of Ground No.1), Copy of voucher dated 31.12.2011 with purchase bill of Amar Trading Corporation( supporting ground No.2), ledger account of Manjula Deepak Narkar for payment of Rs. 1,00,000/- ( supporting ground No.3), details of the statement of payments to slum dwellers (supporting ground No.4) and copy of the bank statement showing the payments to slum dwellers by cheques (supporting ground No.5)

23. In our view all these document furnished by assessee are relevant and have material bearings on the grounds of appeals raised by assessee and required proper verification at the end of assessing officer. Considering the relevancy of additional evidence filed before us, qua ground No.1 to 5 of the grounds of appeal, we admit all the evidences furnished by assessee and further deem it appropriate to restore all the grounds of appeal to the file of assessing officer to consider the evidences and decided the issue afresh, after taking into consideration the evidences furnished by assessee. The assessing officer is directed to consider the documentary evidences furnished by assessee and pass the order afresh in accordance with law. Needless to say that assessing officer shall provide sufficient and adequate opportunity before deciding the claims/ issues raised by assessee. The assessee is also directed to fully cooperate and provide necessary information and documents to the assessing officer. With these observations the grounds of appeal raised by assessee in ground No. 1 to 5 are allowed for statistical purpose.

24. In the result appeal filed by assessee is allowed for statistical purpose.

Order pronounced in the Open Court on 14.11.2017.

**Sd/-**  
**R.C.SHARMA**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 14.11.2017**

Copy of the order forwarded to:

1. *The Assessee;*
  2. *The Revenue;*
  3. *The CIT(A);*
  4. *The CIT, Mumbai City concerned;*
  5. *The DR, ITAT, Mumbai;*
  6. *Guard file.*
- sk  
*Private Secretary*

By Order

(Dy./Asstt. Registrar)

ITAT, Mumbai