IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Vikas Awasthy (Judicial Member)]

ITA No. 1313/Mum/20
Assessment year: 2011-12

Deputy Commissioner of Income Tax
Circle 15(1)(2), Mumbai ……..……Appellant

Vs

Leena Power Tech Engineers Pvt Ltd ……Respondent
13/14, Sai Chambers, Saroval Vihar Road
Sector 11, CBD Belapur, Navi Mumbai 4006 414
[PAN: AAACL4054E]

Appearances by
Brajendra Kumar *for the appellant*
Devendra Jain *for the respondent*

Date of concluding the hearing: : September 9, 2021
Date of pronouncement : September 21, 2021

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 29th November 2019, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 *(hereinafter referred to as 'the Act')*, for the assessment year 2011-12.

2. Grievance of the appellant, as set out in the memorandum of appeal, is as follows:

> "**On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the addition of share application money received during the year under consideration, amounting to Rs 8,13,29,600 under section 68 of the Act, as per grounds contained in the assessment order, or otherwise**".

Facts of the case:

3. Briefly stated, the relevant material facts are like this. The assessee before us is a private limited company stated to be engaged in the business as 'investment company' in column 10, page 1, of the impugned assessment order. Its assessment under section 143(3)

was completed on 27th February 2014 at Rs 4,64,80,490. On 28th March 2018, however, the assessment was reopened on the basis of certain information flowing in from the investigation wing. The information so received indicated that the assessee has received monies, in the form of share application money, from an entity by the name of Rohini Vyapar Pvt Ltd but that money, though subjected to routing through several layers, ultimately has its source in of huge cash deposits in one of the branches of ICICI Bank. It was found that high value cash deposits, just below Rs 10,00,000, were regularly deposited in 19 different bank accounts maintained with ICICI Bank. This is what was referred to as 'Layer 1' accounts, and the amount so deposited in cash, in ICIC Bank alone, aggregated to Rs 241.50 crores. There were certain addition bank accounts also where cash was deposited regularly, and those amounts also ultimately found their way to these accounts. These accounts were closed within a very short span of time after making high value cash transactions, and the amounts therein, were transferred to other bank accounts through RTGS/TRF to the accounts of Maxworth Vinimay Pvt Ltd (Karnataka Bank) , Zedco Corporation, Jagdamba Enterprises and Janki Trading Co (Central Bank of India) Srijan Vyapaar Pvt Ltd and Scope Vyapar Pvt Ltd (Axis Bank), Mani Shankar Tradecom Ltd (Union Bank of India), and Scope Vyapar Pvt Ltd (ICICI Bank). It was then found that the amounts deposited in Central Bank of India, in three different accounts named above, were then transferred to, in Central Bank of India itself, nine other entities (namely Smart Investments, Dreamline Investments, Rupa Stock Dealers, Arihant Stocks, Goodluck Holdings, Bahirav Securities, Saha Traders, BMG Securities, and Topline Securities). These accounts are treated as Layer A1 accounts. On a perusal of bank statements of Layer A1 companies it was found that part of the monies received were rotated in the Layer A1 accounts itself, and rest amounts were transferred to ten other bank accounts, all the accounts once again in the Central Bank of India itself, in the name of 10 different entities- namely Campus Impex Pvt Ltd, Zed Dealcomm Pvt Ltd, Manorath Commercial Pvt Ltd, Force Agency Pvt Ltd, Goodluck Holdings, Rupa Stock, Unicorn Management Pvt Ltd, Nexcare Agency, Amco Agents and Advent Dealcom Pvt Ltd- collectively referred to as Layer A2 accounts). The aggregate of the amounts in these 10 entities came to Rs 326.86 crores. The funds so credited into Layer A2 accounts were transferred to the bank accounts of beneficiaries of this money laundering racket, or to some other bank accounts (collectively referred to as Layer A3 or B3 accounts). Apart from transfers to four beneficiaries, these transfers included Anudeep Consultants Pvt Ltd, Trincass Vyapar Pvt Ltd, Rohini Vyapaar Pvt Ltd, Punsini Agents Pvt Ltd, Manorath Commercial Pvt Ltd, Ramnik Commercial Pvt Ltd, and Ashok Kumar Kayan. When bank accounts of these Layer A3/B3 companies were examined further, it was found that these amounts were finally credited to the accounts of Layer A 4 or B4 companies- all of which were ultimate beneficiaries, and one of these beneficiary, at item no. 8 of that list, is the assessee before us. What was thus deposited in cash in an ICICI Bank branch, or found its way through the said ICICI Bank branch, ultimately found its way, though through at least four layering covering its tracks, to the assessee company. It was in this backdrop that the assessment was reopened and the assessee was asked to "**prove identity, capacity and genuineness** *(of its share application money)* **even if confirmations are filed and the**

persons are assessed to tax". The Assessing Officer also issued notice under section 133(6) to Rohini Vyapar Pvt Ltd. The assessee was then asked as to why the amounts so received from Rohini Vyapar Pvt Ltd not be brought to tax, in his hands, under section 68 of the Act. In reply, the assessee made elaborate submissions, and submitted, inter alia, as follows:

> **1. As per the show cause notice dated 14.12.2018, your goodselves had stated share application money from Rohini Vyapar Private Limited to the tune of Rs. 3,78,29,600/- by issuing 378296 share at Rs. 100 per share (Pace Value Rs. 10 and Rs. 90 as Securities Premium) During the search action conducted at the investigation wing Kolkata it is found that several beneficiaries brought back unaccounted money in their books of accounts through bank account of inexistence entity and Shell Company. Wherein is found that the company has received alleged funds amount of Rs7,90,03,000/ through shell company. After analyzed the data of shell companies it has been revealed that large Value of cash has been introduced in the books of beneficiaries account as share application money or unsecured loan.**
>
> **2. First of all we would like to inform your goodselves that assessee is engaged in the business of electrification projects, undertaking development of power supply infrastructure with various government entities. The assessee has filed its return of income for AY 2011-12 on 29/09/2011 declaring total income of Rs. 4,64, 18,810/-. A questionnaire dated 30/09/ 2O13 was issued the assessee by the AO seeking details and documents as a part of the assessment proceedings. One such detail sought was with respect to**
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> > **4) Please furnish details of Share premium received during the year a Rs. 7.58 Crores, please name and address of subscribers, premium charged and justify the premium charged vis-a-vis the book value of the company.**
> >
> > **5) Please furnish details of increase in paid up capital, their sources and subscribers source may also be furnished with complete evidence.**
>
> **The assessee replied to the questionnaire on 20/11/2013 and submitted the details of subscribers of the share capital and share premium alongwith bank statement. Further on 28/01/2014 the assessee submitted details of justification of share premium, share valuation by cash flow method, ledger confirmation from subscribers.**
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> **Further notice u/s 133(6) was issued on 16/12/2013, to the subscribers of share capital and share premium at their respective registered addresses. The notices were duly served and reply was duly submitted on 07/01/2014 alongwith details transaction with Assessee Company, ledger account, Return of income, Audited Balance sheet, designation of their assessing officers.**
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> **The assessment order however did not contain any discussion in respect of the share application money. It thus appeared that the AO accepted the information furnished by the assessee and raised no further doubt of queries in respect of the same.**
>
> **3. Your goodselves in the reasons for reopening has stated that information has been received from credible sources that "Large value cash was deposited into the several bank accounts maintained with ICICI bank followed by immediate transfer to other bank account. Your goodselves has provided the details of cash deposited into various**

layers i.e. Layer- 1 account, Layer – II Account, Layer A 1 account, Layer A2 account, Layer A3 account, Layer B3 account and Layer B4 account containing details of 66 entitles/ companies i.e Name of Company, Bank

Account No., Nane of bank, Cash Deposited and remarks. After providing the said details your goodselves has made general statement that all the intermediate companies are shell companies and concluded that money received by them is nothing but unexplained cash credit. Our good selves not demonstrated that how cash deposited by Layer-1 are related to the assessee company.

4. Further we would like to inform your goodselves that there was no failure on the part of the assessee to disclose fully and truly all material facts during the assessment proceedings. The assessee had candidly disclosed the name of all two companies, the share amount received from them and also the share premium amount received. The fact that the assessee was specifically served with a questionnaire seeking these details and that the same were submitted to the AO clearly points to the satisfaction of the AO during the course of assessment proceedings. The assessee did not merely Submitted details of said two companies but also submitted relevant documents including ledger confirmation. Further details were requisition by issuing notice u/s 133(6), which were duly complied with both the Subscriber companies are assessed to tax and hence, t was quiet easy for your goodselves to cross verify if the need was felt.

5. The order under section 143(3) of the act having been passed in the assessee's case for the relevant AY and the notice under section 147 having been issued after the expiry of four years from the end the relevant AY, the first proviso to Section 147 is squarely attracted. The power under section 147 have to be exercised after a period of four years only if there was failure to disclose fully and truly all material facts and formation by the assessee. Your goodselves has merely related upon the information received from an investigation carried out by DDIT (Inv) Unit, Kolkata. The reasons to believe per se do not refer to any investigation report of DDIT (Inv) and even such a report existed, a copy thereof was not furnished to the assessee

6. The assessment proceedings, especially those under Section 143 (3) of the Act, have to be accorded sanctity and any reopening of the same has to be on a strong and sound legal basis is well settled that a mere conjecture or surmise is no sufficient. There have to be reasons to believe and not merely reasons to suspect that income has escaped assessment in this case, the reason failed to mention what facts or information report that transaction is not genuine, by itself, is insufficient to reopen the assessment, unless your goodselves had further information that these companies were in-genuine after making further inquiries into the matter. It is clear that your goodselves did not make any inquiry or investigation. No effort has been made establish the connection between the investigation. No effort has been made to establish the connection between the investigation report and assessee company. The crucial link between the information available with your goodselves and formation of believe is absent.

7 Your goodselves had issued notice u/s 133(6) to Rohini Vyapar Private Limited to verify the creditworthiness and genuineness of the Rs. 3,52,29,678/- out of total of Rs. 7,87,29,6781-However your goodselves are not even aware of the second subscribing company i.e. Manbhawan Commercial Private Limited, not mentioned it in ether in the reason for reopening nor in the show cause notice from whom RS. 435,00,000/ is received as share capital and share premium. In the show cause notice you have stated that your goodselves have analyze the data of shell companies, but even does not know from whom such money is received by the assessee company, which shows there is no

credible material to have live linkage and directly making addition, which is not accordance with the provisions Income Tax Act.

8. Further we would like to inform your goodselves that notice u/s. 133(6) Was issued to Rohini Vyapar Private Limited to verify the creditworthiness and genuineness is received by it on 18/ 12/2018 and reply n response to the same have been submitted to your goodselves on 19/12/2018. The copy of the same is enclosed herewith vide "ANNEXURE 1".

9. ROHINI VYAPAR PRIVATE LIMITED

9.1. The subscriber company Rohini Vyapar Private Limited is a private Limited company having business of trading in shares. The pan card of the company is provided which proves the identity of the company. The company during the year under consideration was duly registered with ROC Kolkata having CIN-U51109WB2006PTC111076. Further the ret worth of the company as on 31.03.2010 was Rs. 10,00,18,763/- and as on 31.03.2011 was Rs 10,00,04,092/ which is sufficient to subscribe the shares of assessee company o RS. 3,52,29,678/-. Further the source of the said share application money was from sale of investments held by the company which proves the creditworthiness of the Company.

9.2. The entire Share application money received of RS. 3,52,29,678/- from Rohini Vyapar Private Limited has being received through banking channel and no material was found during the course of assessment proceedings to prove that money came from the coffers of the appellant company. The financial statements of RVPL shows that Share have been subscribed of Assessee Company, which proves the genuineness of the transaction. There was no basis to make any suspicion against the assessee company.

9.3. Further we would like to inform your goodselves that in the case of Rohini Vyapar Private Limited, scrutiny assessment proceedings u/s 143(3) for AY 2007-08 were also carried out by the income tax Officer - Ward 4(1), Kolkata and order was passed 143(3), vide its order dated 05/03/2009, which proves the identity, creditworthiness and genuineness of the company. Also Scrutiny assessment u/s 143(3) for AY 2014-15 and AY 2015-10 were also carried out by Income Tax officer -Ward 15(3)(1) Mumbai vide its order dated 28/12/2016 and 20/12/2017 which also prove the genuineness of the company. The copy of assessment order of AY 2007-08 is enclosed herewith vide ANNEXURE 2 for your kind reference. Further copy of assessment order for AY 2014-15 and AY 2015-16 is already submitted to your goodselves vide letter dated 17/ 12/2018.

10. MANBHAWAN COMMERCIAL PRIVATE LIMITED:

10.1. The subscriber company Manbhawan Commercial Private Limited is a private Limited company having business of trading in shares. The pan card of the company is provided which proves the identity of the company. The Company during the year under consideration was duly registered with ROC Kolkata having CIN-U51109WB2006PTC111078. Further the net worth of the company as on 31.03.2010 was Rs. 5,20,26,310/- and as on 31.03.2011 was Rs. 5,19,95,522/- which is sufficient to subscribe the shares of assessee company of RS 4,35,00,000/- Further the source of the said share application money was from sale of investments held by the company which proves the Creditworthiness of the Company,

10.2. The entire Share application money received of Rs. 4,35,00,000/- from Manbhawan commercial Private Limited has being received through banking channel and no maternal was found during the course of assessments proceedings to prove that money came from the coffers of the MCPL appellant company. The financial statements of RVPE shows that Share have been subscribed of assessee company, which proves that genuineness of the transaction. There was no basis to make any suspicion against the assessee company

10.3. Further we would like to inform your goodselves that in the case of Manbhawan Commercial Private Limited, scrutiny assessment proceedings u/s 143(3) for AY 2007-08 were also carried out by the Income tax Officer-Ward 4(2), Kolkata and order was passed 143(3) vide its order dated 26/03/2009, which proves the identity, creditworthiness and genuineness of the company.

11. Further we would like to inform your goodselves that earlier n our objection against reopening and row again we are requesting to provide all the incriminating documents /information on which your goodselves shave placed reliance, provide the statements of the persons recorded by the DDIT-Kolkata and also provide the opportunity to Cross verification and physical hearing of the persons which has alleged that the cash deposited by Layer-I companies belong to the assessee company.

12. Further the appellant company place reliance on the following Judgments which are similar to the case of the appellant as follows:-

12.1. The Honorable Delhi High Court in the case of Sabh Infrastructure Ltd Vs. ACIT W.P. (C) No. 1357/2016 order dated 25/09/2017 has provided the detailed guidelines for reopening of assessment u/s. 147 and the department is required to follow the same, however the same is done in our case. The relevant extract of the order is reproduced below:

13. Before parting with the case, the Court would like to observe that on a routine basis, a large number of writ petitions are filed challenging the reopening of assessments by the Revenue under Sections 147 and 148 of the Act and despite numerous Judgments on this issue, the same errors are repeated by the concerned Revenue authorities. In this background, the Court would like the revenue to adhere to the following guidelines in matters of reopening of assessments:

(i) while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the assessce. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided;

(ii) the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment especially in those cases where the first proviso to Section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AO on the same and if so, the conclusions thereof;

(iii) where the reasons make a reference to another document, whether as a letter or report, such document and/or relevant portions of such report should be enclosed along with the reasons"

4. None of these submissions, however, impressed the Assessing Officer. It was noted that the contention of the assessee to the effect that everything was examined in the original

scrutiny assessment proceedings and details of investigations conducted by the investigation wing are not furnished to the assessee. It was noted that the money was routed through a large number of intermediate shell companies but given the limited time and resources available to the Assessing Officer for completing these reassessment proceedings, it is not possible to prove the same but then "the assessee has failed to disclose all true and fair transaction before the AO and it was his primary duty to disclose all transactions truly and fairly". The Assessing Officer further observed that "the assessee has not made true and full disclosure before the AO at the time of original assessment as the assessee itself states that it has disclosed only the primary facts". The Assessing Officer further observed that "Hon'ble Bombay High Court, dismissing the writ petition in the case of Om Vinyl Pvt Ltd dated 24.12.2014 has held that 'A disclosure, even if full, may not be true, i.e. all information may be furnished as are necessary for assessment, yet if this disclosure is not true, it would not satisfy the test of true and full disclosure". As regards lack of proper investigation for 66 companies, as pointed out by the assessee, the Assessing Officer noted that "the undersigned has only nine months, after the case is reopened, to verify all details and the assessee has not cooperated fully in assessment also". It was then pointed out that the assessee has submitted his objections to reopening only after the show cause notice was noticed. Nothing, therefore, according to the Assessing Officer, turned on the layering of money not having been proved to the hilt. It was then submitted that just because money is received through banks does not prove its legitimacy. A reference was then made to the structuring of layering operation, as set out in the reasons for reopening the assessment, and judicial precedents in support of the proposition that if identity and creditworthiness of the subscriber companies and genuineness of transactions is not acceptable, the addition under section 68 in respect of share subscriptions can be upheld. A reference was made to the decisions in the cases of **CIT Vs Independent Media Pvt Ltd [(2012) 210 Taxman 14]**, **Suman Gupta Vs ITO [(2012) 25 txamnn.com 220 (Agra)], CIT Vs Orissa Corporation Pvt Ltd [(1986) 159 ITR 78 (SC)], CIT Vs Precision Finance Pvt Ltd [(1994) 208 ITR 465 (Cal)], Nemi Chand Kothari Vs CIT [(2003) 264 ITR 254 (Gau)], ITO Vs Diza Holdings Pvt Ltd [(2002) 255 ITR 573 (Ker)]**. A reference was then made to a decision of the Tribunal in the case of **Pawankumar M Sanghvi Vs ITO [(2017) 81 taxmann.com 308 (Ahd)]** and **Collector of Customs Vs D Bhoormull (AIR 1974 SC 859).** The Assessing Officer thus proceeded to treat the entire share capital subscription from Rohini Vyapar Pvt Ltd and Manbhawan Commercial Pvt Ltd, aggregating to Rs 8,13,29,600, as unexplained credit under section 68. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The stand of the Assessing Officer was reversed by the learned CIT(A), and, while doing so, learned CIT(A) observed as follows:

5.3 GROUND NO. 2: Addition of unexplained cash credit u/s.68 Rs.8,13,29,600/-.

5.3.1 The appellant has received share capital and share premium from M/S. Rohini Vyapar Pvt. Ltd. and Manbhawan Commercial Pvt. Ltd.

5.2.2 The appellant is engaged in the business of electrification projects, undertaking and development of power supply infrastructure with various government

entities. During the year under consideration, the appellant received share application money from Rohini Vyapar Pvt. Ltd. And Manbhawan Commercial Pvt. Ltd. amounting to Rs. 8,13,29,600/-. In the original assessment proceedings u/s.143(3), AO proceeded to make enquiries in order to verify the genuineness of the said share application money received during the year.

5.3.3 Documentary evidences were furnished by the appellant that the identity of the share subscribers are proved as seen from copy of ITR-V, audited financial statements, Pan Card. It is also seen that in the case of both the subscribers viz, Rohini Vyapar Private Limited and Manbhawan Commercial Pvt. Ltd. the assessment has been made u/s 143(3) for assessment year 2007-08. Further in the case of Ronini Vyapar Pvt. Ltd. scrutiny assessment u/s 143(3) has been made for assessment year 2014-15 and AY 2015-16 and no disallowance or addition has been made on account of equity share capital in the assessment orders. The balance sheet for the year ended on 31.03.2012 shows that the following share subscribing companies had sufficient funds as detailed below:

Sr.No	Name of Company	Equity Capital (in Rs.)	Reserves (in Rs.)	Share Application money (in Rs.)
1.	Ronini Vyapar Pvt. Ltd.	26,0000	9,75,00,000	4,35,00,000
2.	Manbhawan Commercial Pvt. Ltd.	14,00,000	5,07,00,000	3,78,29,678
Total				8,13,29,678

5.3.4 The above facts demonstrate that the subscribing companies had the capacity to lend funds to the appellant. No discrepancy has been pointed out in the assessment order of the instant appellant by the AO in respect of above documents submitted by the appellant during the assessment proceedings. As the Ld. AR argued, the financial statements of the above share subscribing companies are available on the public domain of Ministry of Corporate Affairs. The appellant has received the share application money from the aforesaid share subscribing companies through banking channels as reflected in the bank accounts of the appellant. Further it is observed that there is no material, which has been brought on record by the AO to point out that the sad transactions are accommodation entries. Also, no nexus is established that the funds have been circulated or that cash was paid by the appellant Company to the aforesaid share subscribing companies to obtain the cheques for share application money.

5.3.5 Further, from the perusal of the copies of share allotments forms i.e. Form 2, Justification of the premium on issue of shares, financial statements of appellant company, it is evident that the share application money is actually received from the aforesaid subscribing companies and also equity shares have been allotted alongwith share premium.

5.3.6 In light of the above facts, am or the opinion, the appellant has discharged the primary onus to prove the identity and credentials of the aforesaid two share subscribing companies and genuineness of the share application money received.

5.3.7 In the reassessment order u/s. 143(3) r.w.s. 147 under appeal, the Ld. AO has stressed upon the report of the investigation wing, to hold that the share application money received from Rohini Vyapar Private Limited and Manbhawan Commercial Pvt. Ltd. are not genuine. On perusal of the said investigation report it is observed that the AO has given details of cash name, cash deposited at various layers, given name of the entity, bank account no. bank name, cash deposited and at the last layer mentioned the name of the appellant company. In the concluding paragraphs the Ld. AO has observed that on perusal of the list of shell company declared by the government it is seen that most of the above intermediate companies whose bank accounts are used for the purpose of rotating the funds has been declared as Shell company and thus the amount received by the above appellant is nothing but unexplained cash credit u/s. 68 of the I.T Act. However the AO has not carried out any investigation or inquiry to verify the said facts and directly relied upon the information received from Investigation wing. The AO has not established the connection between the investigation report and the appellant company. The crucial link between the information available with AO and formation of belief was totally misplaced. The AO has observed in the assessment order itself that to crack the nexus between cash deposit and appellant company is not possible due to limited resources and time barring scrutiny.

5.3.8 Further the appellant has submitted that neither the subscribing companies i.e. Rohini Vyapar Pvt. Ltd. and Manbhawan Commercial Pvt. Ltd. nor the companies from whom proceeds of investments received by subscribing companies i.e. Bliss Dealcomm Pvt. Ltd., Campus Impex Pvt. Ltd. Nexcare Agency Pvt. Ltd. and Unicorn Management Pvt. Ltd., none of these companies have deposited cash. It is fact on record that they have submitted the Acknowledgment of Return of Income, Annual Audited Balance sheet, ledger confirmation, bank statement and filing status on Ministry of Corporate Affairs. Therefore, in view of above facts, it cannot be concluded that the s amounting to Rs. 81329600/- are non-genuine. Therefore the contention of the AO is not sustainable.

5.9 Further in support of its contention, the appellant has relied upon the following case laws:

(i) PCIT Vs. Aditya Birla Telecom Pvt. Ltd. (Bom) (ITA. No. 102 or 2010 (Order date 26.03.2019)

(ii) DCIT Vs. M/s. Gladioulus Property & Inv. Pvt. Ltd. (ITA No.2924/Mum/2017) (Order dated 16.05.2019) ITAT, Mumbai

(iii) ITO Vs. Ambika Metalchem Impex Pvt. Ld. (1TA. No. 1676/Mum/2017) (Order dated 31.05.2019) ITAT, Mumbai

(iv) ITO Vs. Realstone Entertainment Pvt. Ltd. (1TA. No. 1271/Mum/2017) (Order dated 24.07.2019) ITAT, Mumbai

v) ITO Vs. Mayuresh Logistics Pvt. Ltd. (1TA. No. 6691/Mum/2017) (Order dated 24.06.2019) ITAT, Mumbai

vi) M/S. Bla Power Holding Pvt. Ltd. Vs. ITO (ITA. No. 217/M/2017) (Order dated 10.07.2019) ITAT, Mumbai

vii) ACIT Vs. Shri Satyendra Kumar Goyal (ITA. No. 5562/Mum/2017) (order dated 11.06.2019) ITAT, Mumbai

vii) Shri Rathi Steel Ltd. Vs. ACIT (TA. No. 7971/del/2018) (Order Dated 31.05.2019) ITAT, Delhi

ix) ACIT Vs. Bhadani Financiers Pvt. Ltd. (1TA. No. 175/Del/2017) (Order dated 30.04.2019) ITAT, Delhi

x) M/s. Seven Heaven Constructions Pvit. LId. Vs. ITO (ITA. No. 6676/Del/2018) 1TAT, Delhi

xi) DCIT Vs. Senonta Enterprises Pvt. Ltd. (TA. No. 5388/De/2015) (Order dated 26.07.2019) 1TAT, Delhi

xii) M/s. Baba Bhootnath Trade & Commerce Ltd Vs. ITO (ITA. No. 1494/Kol/2017) (Order Dated 05.04.2019) 1TAT, Kokata

xiii) ITO Vs. M/s. Axisline Investment Consulants Pvt Ltd. (1TA. No.408/Kol/2017) (Order dated 01.07.2019) 1TAT, Kolkata

5.3.10 The contention of the appellant finds support in the following cases of the Hon'ble Courts in the following case laws.

i) The Hon'ble Supreme Court in the case or Commissioner of Income Tax vs. Lovely Exports (P) Ltd. f2008] 216 CTR 195 has held as,

"if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in according with law but this amount of Share money cannot be regarded as undisclosed income under section 68 or the assessee company.

ii) PCIT vs. Paradise Inland shipping Pvt. Ltd. 84 Taxmann.com 58 (Bombay HC):

"where reassessment resorted to on ground that companies which had purchased shares or assessee-company were not in existence, once assessee had produced documentary evidence to establish existence of companies, burden would shift on to revenue to establish initiation of reassessment and, thus, reassessment be set aside."

iii) CIT vs. Orchid Industries Pvt. Ltd. 88 Taxmann.com 502 (Bombay HC):

"Held that the assessee had produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of snare application money. The assessee had also produced the entire record regarding issuance or shares, i.e, allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profits and loss accounts of those persons disclosed that they had sufficient funds in their accounts for investing in the shares of the assessee. In view of these voluminous documentary those persons had not appeared before the Assessing Officer would not negate the case of the assessee. Therefore, the addition was liable to be deleted.

iv) CIT vs. Creative World Telefilms Ltd 333 ITR 100 (Bombay HC):

"In the case in hand, it was not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. it was expected on the part of the Assessing to make proper investigation and reach the shareholders. The Assessing Officer did

nothing except issuing summons which were ultimately returned back with an endorsement 'not traceable'. The Assessing Officer ought to have found out their details through PAN Cards, bank account details or from their bankers so as to reach their details shareholders since all the relevant material details and particulars were given by assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal could not be faulted. No substantial question of law was involved in the appeal. In the result, the revenue's appeal was to be dismissed *in limine*. (Para 2)"

v) Further, a change of opinion by the AO when the original assessment was completed, assessment. This has been s passed could not court in the case of Bharti Infratel recent decision by the Hon'ble Court in the case of Bharti Infratel Limited Vs DCIT (Delhi High Court)

5.3.11 Hence, it is concluded that the AO has not been able to demonstrate the subscription received by appellant from the two aforesaid share subscribing companies aggregating to Rs. 8,13,29,600/- as unexplained. In light of the above legal position and the facts of the case, I am of the considered view that the provisions of section 68 of the Act are not applicable to the appellant and accordingly, the addition is not warranted. This ground of appeal is allowed.

5. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before us.

Rival contentions:

6. The basic thrust of learned Departmental Representative's submission, besides vehement reliance on the order of the Assessing Officer, is that the assessee has failed to prove the bonafides of the share application money received by the assessee. In essence, his arguments can be summed up as follows. His basic submission is that it is not a bonafide transaction, and the surrounding circumstances clearly demonstrate that. He submits that the reasons of reopening the assessment eloquently demonstrate that the assessee was beneficiary of a sophisticated money-laundering racket wherein the monies deposited in cash in certain bank accounts of dummy entities, which are feeder accounts, through multiple layering of the accounts, to the accounts of the entities subscribing share capital of the assessee company. Learned Departmental Representative takes us through the assessment order, as also the reasons for reopening the assessment, and vehemently submits that the assessee was clearly a beneficiary of this money laundering racket. He submits that given this factual backdrop, the assessee had an even greater responsibility for showing genuineness of the share application monies received by the assessee. The fact that the share applicants have a PAN number, that they have filed the income tax returns and that they have produced the financial statements, does not, by itself, does not prove that transaction is bonafide. He submits that the financial statements of the companies subscribing to the shares, as also the bank statements of these entities, hardy inspire any confidence about genuineness. It is pointed out that there are hardly any overnight balances in the bank accounts of the companies subscribing these shares of the assessee company, and all this indicates that these companies, subscribing in the shares

of the company, are merely conduit companies. Learned Departmental Representatives then points out that there is hardly any substantive business activities pursued by the company which have invested in the shares of the assessee company. He submits the onus is on the assessee to demonstrate that the transaction is bonafide, and the assessee has miserably failed to do so. Learned Departmental Representative then invites our attention to a SMC decision in the case of **Pawankumar M Sanghavi Vs Income Tax Officer [(2017) 81 taxmann,com 308 (Ahd-Trib)]**, which is specifically referred to and relied upon by the Assessing Officer, and submits that when the same line of reasoning is adopted in this case, it will be clear that the share application monies received by the assessee company, from certain companies- which are no more than typical shell companies, lack bonafides. Learned Departmental Representative then submits that given the limited time of nine months available to the Assessing Officer, it is not really possible for the Assessing Officer to prove the case of the revenue to the hilt, but given the facts brought to light by the Assessing Officer, it is the duty of the assessee to show reasonable bonafides of the entities subscribing to the shares in the assessee company. It is then submitted that the computation of share premium clearly shows that it is based on a very optimistic estimation of the revenues of the assessee company, based on projections rather than realities, and these computations hardly show any sound basis. It is also submitted that on the facts and circumstances of the case, it is clear that the companies investing in the capital of the companies are companies of dubious means and that the evidence brought on record by the assessee does not substantiate the bonafides of these entities. It is submitted that the onus of proving the genuineness of the receipts is on the assessee, and the assessee has failed to discharge the same. Learned Departmental Representative then takes us through the assessment order and relies upon each and every observation made therein. It is then contended that the relief granted by the CIT(A) proceeds on sweeping generalisations and the presumption as if it is the responsibility of the Assessing Officer that the receipts by the assessee are bogus, whereas the correct legal position is that the onus is on the assessee to demonstrate the genuineness of transactions. It is then submitted that none can be expected to prove the negative, i.e to prove that the receipts by the assessee are not bonafide. The Assessing Officer, according to the learned Departmental Representative, has been blamed for not proving a negative which is inherently impossible. It was then submitted that the relief granted by the CIT(A) is on the basis of a superficial approach to the whole issue. He submits that the bank accounts of the companies subscribing to the capital of the assessee company, and their financial statements, hardly inspire any confidence about their genuineness. We are urged to examine the papers so filed by the assessee. It is then submitted that whether it is a conduit company or not, the company will have a PAN number, a bank account and banking transactions. These factors, by itself, would not clothe the transaction with genuineness. We are thus urged to look at the larger picture in entirety rather than being swayed by a narrow and hyper-technical view of the matter, and vacate the impugned relief granted by the CIT(A). Learned counsel for the assessee, on the other hand, submits that while the Assessing Officer has repeatedly referred to the investigations having been carried out in this case, it is not clear as to who has conduced investigation, and the Assessing Officer has not shared any investigation report with the

assessee. It is then pointed out that there is no cash deposit in the bank account of the companies which have subscribed to the shares, at a premium, of the assessee company. It is submitted that there are, even going by the Assessing Officer, six layers of intermediate companies and no material has been brought on record to show the flow of funds through these intermediate companies to the companies subscribing to the assessee's share capital. It is then submitted that the share premium has been computed on a scientific basis, and all these details are placed before us in the paper book. Learned counsel then points out that the Assessing Officer was not even aware of share subscription by Manbhawan Commercial Pvt Ltd, and the information about the issuance of these shares has been shared, on its own, by the assessee. In both cases, the companies subscribing to the shares have submitted their PAN details, their income tax returns, their annual financial statements and copies of their bank accounts. There is nothing further that the assessee can be expected to do. By giving these details, the assessee has discharged the initial onus cast upon it, and it is now for the revenue authorities to prove otherwise. It is contended that both the companies subscribing to the shares in the assessee company are active companies as on today, and there are no adverse findings in this respect. It is submitted that one of these companies has huge land bank and it is a successful venture. None of these companies, according to the learned counsel, is listed as a shell company by the Government of India, or any official body. It is then submitted that so far as examination of the source of the source is concerned, the proviso to Section 68 requires that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless— (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory. However, this proviso has been inserted with effect from 1st April 2013. It is submitted that this amendment cannot have the retrospective operation as has been held by Hon'ble jurisdictional High Court in the case of **CIT Vs Gagandeep Infrastructure Pvt Ltd [(2017) 80 taxmann.com 172 (Bom)].** It is thus contended that even if entries in the books of accounts of the companies subscribing to the shares of the assessee company cannot be brought to tax in the hands of the assessee. Our attention is invited to page 30 of the paper book, which shows that a specific question was raised, in the course of the original scrutiny assessment proceedings, about the increase in paid-up capital, justification of premium and the related issues, and the assessee had submitted specific satisfactory replies to the same. Learned counsel submits that it was with full satisfaction of the Assessing Officer that the matter was not pursued any further, and that, without any reason for the deviation, this satisfaction cannot simply be discarded at the reassessment stage. There is no change, according to the learned counsel, in the circumstances, and there is thus no justification for deviating from the stand taken earlier in the original scrutiny assessment proceedings. Learned counsel then takes us through the order passed by the learned CIT(A) and justifies the same. It is thus contended that the impugned additions under section 68 are devoid of any

legally sustainable basis, and we must delete the same. As regards the decision of the Tribunal in the case of Pawankumar Sanghvi *(supra),* referred to and relied upon by the Assessing Officer as also by the learned Departmental Representative, learned counsel did not make any specific submissions about the same and stated that he is not even aware whether this decision has been challenged in appeals before the Hon'ble Courts above, and, if so, what is the outcome of such a challenge. Learned counsel submits that this is a case of a simple change of opinion which cannot be reason enough for the reassessment proceedings. It is then reiterated that apart from some investigation, referred to in the reasons for reopening, and no investigations whatsoever have been carried out by the Assessing Officer. The Assessing Officer has simply proceeded to treat these observations in recorded reasons as gospel truth. It is then submitted that the companies from which the assessee has received the share subscriptions are the companies with proper net worth and means, these companies are properly assessed to tax, these companies have not been declared to be shell companies and just because five levels below these companies, there are cash deposits in some bank accounts, the receipts cannot be rejected as lacking bonafides. Learned counsel then submits that in the reasons recorded for reopening, there is not even a suggestion about lapses on the part of the assessee, and the reassessment being after the end of four years from the end of the relevant assessment year, and the proviso to Section 147 coming into play, the reassessment could not have been validly initiated. Our attention is then invited to rule 27 of the Appellate Tribunal Rules, 1963, and Hon'ble Delhi High Court's judgment in the case of **Sanjay Sawhney Vs PCIT [(2020) 116 taxmann.701 (Del)]** in support of the proposition that even when the assessee is not in appeal against the order passed by the CIT(A), the assessee can still challenge, and challenge orally- without any petition, the issues decided against him by the CIT(A). We are thus urged to adjudicate on the validity of reassessment proceedings as well. A reference was also made to a rather recent judgment of Hon'ble Supreme Court in the case of **Saurav Jain Vs ABP Design & Another (Civil Appeal No. 4448 of 2021).** Learned Departmental Representative, in his brief rejoinder, points out that the assessee is not in appeal and he can not so raise the issue as to take him completely by surprise and wholly unprepared. In any case, he submits that the reasons recorded for reopening clearly show that the assessee has not made proper and complete disclosure. Reliance is placed on the observations in the assessment order in this regard. Learned Departmental Representative once again draws parity of the facts of this case with the case of Pawankumar M Sanghvi *(supra).* It is submitted that within the limited time available to the Assessing Officer it is not really possible to prove the money laundering racket to the hilt but there are clear uncontroverted facts on record which show clear lack of bonafides. It is pointed out that the replies submitted by the companies which have invested in the assessee company are not even signed by their functionaries. It is, according to the learned counsel, for the assessee to prove the bonafides and he has failed to establish the same. We are urged to take a call on the bonafides of the transaction in the light of the glaring facts of the case, and vacate the relief granted by the learned CIT(A). We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

Our analysis:

7. The fundamental question that we have to deal with is whether or not the learned CIT(A) was justified in deleting the addition of Rs 8,13,29,600 as unexplained credit under section 68 in the hands of the assessee, and the most critical thing to be examined in this regard is explanation of the assessee with respect to these credits. There is no, and there cannot be any, dispute on the fundamental legal position that the onus is on the assessee to prove 'bonafides' or 'genuineness' of the share application money credited in his books of accounts. This approach finds support from the scheme of Section 68, which provides that 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 Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of that assessee for that previous year. The burden is thus on the assessee to prove the nature and source thereof, to the satisfaction of the Assessing Officer. Everything thus hinges on the explanation given by the assessee and on how acceptable is the explanation so given by the assessee. The next question is as to what is the kind of explanation that the assessee is expected to give. As noted by Hon'ble Delhi High Court, in the context of issuance of share capital and in the case of **PCIT Vs Youth Construction Pvt Ltd [(2013) 357 ITR 197 (Del)],** "**it involves three ingredients, namely, the proof regarding the identity of the share applicants, their creditworthiness to purchase the shares and the genuineness of the transaction as a whole**". That is the approach adopted by Hon'ble Courts above all along. In the case of **CIT v. United Commercial and Industrial Co (P.) Ltd [1991] 187 ITR 596 (Cal)],** Hon'ble Calcutta High Court has held that under the scheme of Section 68 "**it was necessary for the assessee to prove prima facie the identity of creditors, the capacity of such creditors and lastly the genuineness of transactions**". Similarly, in the case of **CIT v. Precision Finance (P.) Ltd [1994] 208 ITR 465 (Cal)],** it was observed that **"it is for the assessee to prove the identity of creditors, their creditworthiness and genuineness of transactions"**. It is thus also a settled legal position that the onus of the assessee, of explaining nature and source of credit, does not get discharged merely by filing confirmatory letters, or demonstrating that the transactions are done through the banking channels or even by filing the income tax assessment particulars. The genuineness of the transaction as a whole is thus a very important and critical factor in the examination of explanation of the assessee, as required under section 68, with respect to the share application monies received by an assessee.

8. It would thus appear that the learned counsel for the assessee is not really right in approaching on the basis as if the onus is on the Assessing Officer to prove the alleged money laundering racket – an onus that may perhaps be relevant only when the money laundering racket is being prosecuted, but that is something we are not really concerned about. As far as we are concerned, we must remain confined to the narrow issue of onus on the assessee to prove 'bonafides' or 'genuineness' of the share application money credited in

his books of accounts, and that is the call we have to take in the light of facts before us and the ground realities of the commercial world. As we proceed to deal with the genuineness aspect, it is also important to bear in mind the fact that what is genuine and what is not genuine is a matter of perception based on facts of the case vis-à-vis the ground realities. The facts of the case cannot be considered in isolation from the ground realities. The allegation of the revenue is that the assessee has received share application money through a complex web of shell entities and multiple layering of the transfers from one company to another. It will, therefore, be useful to understand as to how the shell entities, which the share applicants are alleged to be, typically function, and then compare these characteristics with the facts of the case and in the light of well settled legal principles. A shell entity is generally an entity without any significant trading, manufacturing or service activity, or with high volume low margin transactions- to give it colour of a normal business entity, used as a vehicle for various financial manoeuvres. A shell entity, by itself, is not an illegal entity, but it is their act of abatement of, and being part of, financial manoeuvring to legitimise illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities have every semblance of a genuine business- its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial manoeuvring for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. Even laymen, much less Members of this specialized Tribunal, responsible public servants like IRS officers and very well educated and very well informed people like the learned counsel, cannot be oblivious of these ground realities.

9. It is also important that when we examine the genuineness of the transactions entered into by the assessee, we must also bear in mind Hon'ble Supreme Court's observation, in the case of **CIT v. Durga Prasad More [(1971) 82 ITR 540 (SC)]**, to the effect that "**Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities**". Similarly, in a later decision in the case of **Sumati Dayal v. CIT [(1995) 214 ITR 801 (SC)]**, Hon'ble Supreme Court rejected the theory that it is for alleger to prove that the apparent and not real, and observed that, "**This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities.....Similarly the observation .....that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available .....In our opinion, the majority opinion after considering surrounding**

circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably". We will be superficial in our approach in case we examine the claim of the assessee solely on the basis of documents filed by the assessee and overlook clear the unusual pattern in the documents filed by the assessee and pretend to be oblivious of the ground realities. As Hon'ble Supreme Court has observed, in the case of Durga Prasad More *(supra), ...* "**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 party who relies 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 blinkers 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**". As a final fact finding authority, this Tribunal cannot be superficial in its assessment of the genuineness of a transaction, and this call is to be taken not only in the light of the face value of the documents sighted before the Tribunal but also in the light of all the surrounding circumstances, the preponderance of human probabilities and ground realities. There may be a difference in subjective perception on such issues, on the same set of facts, but that cannot be a reason enough for the fact-finding authorities to avoid taking subjective calls on these aspects, and remain confined to the findings on the basis of irrefutable evidence. Hon'ble Supreme Court has, in the case of Durga Prasad More *(supra),* observed that "**human minds may differ as to the reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law**". This faith in the Tribunal by Hon'ble Courts above makes the job of the Tribunal even more onerous and demanding and, in our considered view, it does require the Tribunal to take a holistic view of the matter, in the light of surrounding circumstances, the preponderance of probabilities and ground realities, rather than being swayed by the not so convincing, but apparently in order, documents and examining them, in a pedantic manner, with the blinkers on.

10. We may also add that the phenomenon of shell entities being subjected to deep scrutiny by tax and enforcement officials is rather recent, and that, till recently, little was known, outside the underbelly of the financial world, about *modus operendi* of shell entities. There were, therefore, not many questions raised about the genuineness of transactions in respect of shell entities. That is not the case any longer. Just because these issues were not raised in the past does not mean that these issues cannot be raised now as well, and, to that extent, the earlier judicial precedents cannot have blanket application in the current situation

as well. As Hon'ble Supreme Court has observed in the case in **Mumbai Kamgar Sabha v. Abdulbahi Faizullabhai AIR 1976 SC 1455 "It is trite, going by Anglophonic principles that a ruling of a superior court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and *de hors* the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting the matters which may lurk in the dark"**. Genuineness of transactions thus cannot be decided on the basis of inferences drawn from the judicial precedents in the cases in which genuineness did come up for examination in a very limited perspective and in the times when shell entities were virtually non-existent.

11. The above approach has met the judicial approval as recently as 2018 when one of the decisions of this Tribunal, authored by one of us (i.e. the Vice President), in the case of Pawankumar M Singhvi *(supra)* came up for consideration before Hon'ble Gujarat High Court, and Their Lordships of Hon'ble Gujarat High Court, in the judgment reported as **Pawankumar M Sanghvi Vs ITO [(2018) 90 taxmann.com 386 (Guj)]** approved the said approach and declined to interfere in the matter by observing that **"the Tribunal has minutely examined the position of the lenders, the circumstances under which, the amounts were allegedly loaned to come to the conclusion that the transactions were not genuine".** The genuineness of the transactions and examination of circumstances in which money was received was thus approved to be the determinative factor. The matter did not end there. The assessee brought the matter before Hon'ble Supreme Court in a special leave petition, and Their Lordships of Hon'ble Supreme Court, in the judgment reported as **Pawankumar M Sanghvi Vs ITO [(2018) 97 taxmann.com 398 (SC)],** dismissed the special leave petition and declined to interfere as well. What essentially follows is that genuineness of a transaction is one of the most important, foundational and critical factors in determining whether explanation given by the assessee is acceptable or not is its genuineness and this genuineness is to be examined in the light of ground realities, rather than random extracts from judicial precedents isolated from their true context as an exposition of law on a standalone basis. Undoubtedly, that is a subjective exercise, but that cannot be excuse enough to fight shy of this call of duty and not to probe the matter properly for taking a well-considered call on whether the impugned share application monies received, in this case, a genuine transaction or not. We cannot, as we have noted earlier as well, afford to be rather superficial in this respect. Being superficial in approach is not only against the ethos of the judiciary, but certainly an antithesis for justification of the specialized Tribunals like this Tribunal. Unlike in a court of law, this Tribunal has the benefit of expertise of technical members, from accountancy and revenue service background, and the least expected of them is to ensure that the facts are properly analyzed, in the light of expert domain knowledge they have or they are legitimately expected to have, and set out the same before application of the legal principles on those facts. That is the approach that has been upheld right upto Hon’ble

Supreme Court in the case of Pawankumar M Sanghvi *(supra).* On a somewhat similar note, and particularly in the context of issuance of shares at high premium to the companies which are seemingly shell companies, Hon'ble Supreme Court has, in the case of **PCIT Vs NRA Iron and Steel Pvt Ltd [(2019) 412 ITR 161 (SC)]** observed that "**The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee. The assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee".** When we take into account these words of guidance of Their Lordships, clearly a superficial and pedantic approach would not suffice, and the approach so adopted in Pawankumar M Sanghvi's case *(supra)* will be all the more justified. We have no reasons to deviate from this path. It is in this backdrop that we proceed to examine the facts of the case and take a call on the genuineness of these transactions.

12. Let us, in this light, revert to the actual facts of this case. The assessee has received share application monies from Rohan Vyapar Private Limited (RVPL) and Manbhawan Commercial Pvt Ltd (MCPL). These equity shares are issued at 900% premium on the face value of Rs 10 each, i.e. at Rs 90 per share. The assessee has issued 3,78,290 equity shares to RVPL, and the amounts received from the RVPL thus are Rs 37,82,960 for the face value of shares and Rs 3,40,46,640 for the share premium, aggregating to Rs 3,78,29,600.

13. Undoubtedly, the legal existence of the share applicant is not in doubt. The assessee has produced sufficient evidences about its existence.

14. The next question is whether this entity had the means to enter into this transaction and whether 'the transaction as a whole', to borrow the words of Hon'ble Delhi High Court in Youth Construction's case *(supra),* could be said to be genuine. When we look at the financial statements of RVPL, which are placed before us in the paper-book, we find that the entire share capital of the company is Rs 26 lakhs, and this amount, along with Rs 975 lakhs received on account of share premium, is invested, almost entirely into the share capital of other companies (Rs 614 lakhs) and share application monies in other companies (Rs 378.30 lakhs). The only other entries in the balance sheet are small amounts of Rs 3,03,666 as cash in hand, Rs 58,898 as bank balance, TDS Rs 17,850, advance given Rs 4,00,000 and sundry creditors for expenses at Rs 4,000. Effectively, thus, Rs 992.30 lakhs of the total funds of Rs 1001.00 lakhs received by the assessee has been passed to the other companies, which works out to more than 99% of the total funds received. It is also interesting to note that the assessee has not carried out much other activity during the relevant period. The only entry on the credit side of the profit and loss account is interest received amounting to Rs 1,13,356 from the bank. On the expense side, entire expenses add up to Rs 1,28,027 which includes Rs 58,500 on account of Salaries and Bonus and Rs 25,073 on account of bank charges. Not a

rupee of expenses on office, telephone or any office equipment of any nature whatsoever. This is difficult to believe that a company handling investments in excess of Rs 10 crores and making such aggressive investments as buying shares for Rs 3,78,29,600, at huge premium of nine times the face value of shares, in the private limited and wholly unconnected companies like the assessee company-without any management control, will operate in such a modest manner. The RVPL thus has thus primarily acted as a conduit company, raising Rs 1001.00 lakhs at high share premium and siphoning Rs 992 lakhs out of the same to other companies in similar manner by subscribing to shares at high premium, and has no independent business activities on its own.

15. In the scrutiny assessment orders of this company, as filed before us, at one place it is stated that the assessee is engaged in the business of 'trading in electrical wires and cables', and, at the other place, it is mentioned that 'the assessee company is engaged in the process of obtaining dealership of polycab wires and cables' (page 96 of paper-book), and that 'the assessee company is engaged in the business of investments' and that 'there is no material change in the nature of business of company" (page 101 of the paper-book). In an earlier year's scrutiny assessment order, it is stated that the assessee is engaged in the business of 'trading- others' (page 90 of the assessment order). Undoubtedly, these statements are made in the scrutiny assessment orders for three different assessment years but it shows fluctuating stand of the assessee even with respect to the business the assessee was engaged in.

16. Very interestingly, even when RVPL does not have any revenues, except for a bank interest of Rs 1,13,356, its annual report states, under the head 'operations' of the company, "*(t)*he performance of the company during the current year was satisfactory" and "*(h)*owever, your directors are hopeful that performance of the company in the coming years will be more satisfactory". What did the directors derive satisfaction from? There were no business operations during the year, unless, of course, routing the monies to other companies, or being a conduit company facilitating financial manoeuvrings, *per se* is treated as main operations of the company. In any case, it is difficult to understand what business can assessee carry on when it passes on 99% of its capital base in subscribing to shares in the other companies- and all these investments are in private limited companies, the investments are with huge premium as much as 900% of the face value, and in none of the companies the investing company has acquired any management participation.

17. There is not even whisper of an idea about who are the persons behind RVPL and other associated companies constituting this complex web of companies, in different tiers, and transferring monies from one company to another manner in almost a mechanical manner. There is complete opacity so far as the individuals behind this funding and the complex web of companies are concerned. The entities involved in the transactions only provide different layers to the transaction and *de facto* hide the true investor. Lets not forget

that the investments are in private companies, these investments are substantial vis-à-vis the size of the companies, are at huge premiums and without any management participation in the entities in which investments are made. These features are, by any standard, most unusual in real life business situations- and more so, as we will see a little later, when justifications for share premium are absolutely untenable.

18. Buying shares at a huge premium (900% of the face value) in as much as over 10% of the equity capital in nondescript small private limited companies, without a share in management and control, is something extremely unusual unless the investor is very well known or close associate of the company in which investment is being made. As we have noted earlier, the assessee has no clue about the actual beneficial investor in his company. here are tiers after tiers of the companies and there is nothing to show light on the actual owners. As a matter of fact, barring a small investment of Rs 1,00,000 at face value by two Howrah based ladies subscribing to memorandum of association- namely Sangeeta Agarwal and Asha Agarwal, other share capital of the RVPL seems to be issued at huge premium, once again to shell entities which are similarly funded by other shell entities- constituting a different layer of this multi-layer transaction, and, as evident from share premium reserve of Rs 975 lakhs- as against share capital of Rs 25 lakhs. Once again, the shares are issued at premium that too in a company which has no other activity except for routing the funds to another company, i.e. the assessee, by making investments therein at a huge premium. That defies logic, and such transactions donot take place in the real life world. The assessee company is stated to be not connected with Rohini Vyapar Pvt Ltd in any manner, and yet the share subscriber had such a faith in the assessee company that it subscribed to the shares at 900% premium. That is something quite unusual.

19. The assessee has sought to justify the same on the basis of discounted cash flow method on the basis of assumption that sale will grow @ 10% p.a., the net profit after tax will be constant at 4.25% and that discounting rate is taken at 15%. A copy of this valuation report is placed before us at pages 37 and 38 of the paper-book. The DCF valuation, at page 38, shows the figure of Rs 1,67,46,057 for the financial year ended 31st March 2010. This figure is arrived at by adding depreciation (Rs 16,96,610) to net profit after tax (Rs 15,04,94,427). Similarly, the net cash flow is computed for the subsequent years. Barring for the immediately succeeding financial period, wherein cash inflow is reduced by Rs 8 crores towards capital investments, no other adjustments are envisaged. That proceeds on the assumption that entire profit and depreciation will result in net positive cash flow, but this overlooks the increase in net current assets from Rs 5.36 crore (as on 31.3.2010) to Rs 22.48 crores (as on 31.3.2011) whereas the cash and bank balances have remained almost the same- at Rs 9.82 lakhs as on 31.3.2011 as against Rs 8.52 lakhs as on 31.3.2010. As against a net profit of Rs 3.11 crore and depreciation of Rs 16.96 lakhs, the net cash inflow is only Rs 1.30 lakhs which is less than 0.4% of the profit plus depreciation. Yet, in the computations of DCF value at page 38 of the paper-book, the net cash flow is taken at Rs 1,67,46,057 which is overstated, when compared with the actual financial statements, at pages 15-30 of the paper-

book before us, by almost 130 times i.e. around 13,000%, and the valuation computations are based on this highly exaggerated figure. It is only elementary that when value of a share is computed under the DCF method, the first variable is 'free cash flow' i.e. FCF and the FCF is arrived at "by reducing capital expenditure from cash flow from operating activities" which is qualitatively different from reducing capital expenditure from 'net profits plus depreciation' because that overlooks additional deployment of funds on account of increased current assets deployment. Any basic book on financial management or reference to academic material freely accessible on internet websites, will not leave anyone in doubt this approach. "Student's Referencer on Strategic Financial Management" by Sekar and Prasad (ISBN 978-93-91005-26-9; published by Commercial Law Publishers), at page 16.1, has this to say:

2. Explain the steps involved in Discounted Cash Flow (DCF) or Free Cash Flow (FCF) Method of valuation in an M&A.

The Discounted Cash Flow (DCF) /Free Cash Flow (FCF) Valuation takes into consideration the future earnings of the business. The Value of the Business depends on projected future revenues and costs, expected Capital Outflows, number of years of projection, Discounting Rate and Terminal Value of business. The steps involved are –

Step	Description
1	**Compute Free Cash Flow (FCF):** • Free Cash Flow to Firm (FCF_F) = Cash Flow available to all Investors (Equity and Debt) = Net Operating Profit after Tax + Depreciation and Amortization (–) (Capital Expenditure + Working Capital Investment). • Free Cash Flow to Firm (FCF_E) = Cash Flow available to only Equity Shareholders = EAT + + Depreciation and Amortization (–) (Capital Expenditure + Working Capital Investment). **Note:** 1. FCF is estimated as the most likely incremental Cash Flows to be generated by the Target Company with the Acquirer as owner (and not on as–is basis). 2. Financing Pattern is not incorporated in the Cash Flows, but is adjusted in the Discount Rate.
2	**Estimate appropriate Discount Rate for the Acquisition.** • The Acquirer can use its WACC based on its target capital structure, only if the acquisition will not affect the risk of the Acquirer. • If the Acquirer intends to change the capital structure of the Target Company, suitable adjustments for the Discount Rate should be made, since the Discount Rate should reflect the capital structure of the Target Company post–acquisition. • WACC is appropriate for discounting FCF_F, while Cost of Equity is appropriate for discounting FCF_E.
3	**Compute Present Value of Cash Flows.** Cash Flows of the Forecast Period (number of years) are discounted, to obtain their Present Value.
4	**Estimate the Terminal Value, and Compute its Present Value** • Terminal Value = Present Value of Cash Flows occurring after the Forecast Period. • Terminal Value may be determined using any of the assumptions / methods. **[See Q.No.21 below]**
5	**Compute Value of Company, and Value of Equity:** • Value of the Company = PV of Cash Flows during the Forecast Period + PV of Terminal Value. • Value of Equity = Value of Company **less** Value of Debt and Other Obligations assumed by the Acquirer.

20. What step 1 of the above mechanism shows is that the first thing to be worked out is free cash flow, which needs to be adjusted for, *inter alia*, working capital investment. That exercise has not been carried out, and, as the figures for the very first year would show, there is huge variations in the working capital investment so much so that the cash flow shown in the valuation report is overstated by 13,000% vis-à-vis the actual facts of the case. Clearly the premium valuation, under the DCF method, is incorrect and fallacious. The figure that should have been taken in the cash inflow ought to have been adjusted by any adjustment on account of increase in the working capital, and, as evident from the figures for the year ended

31st March 2011, that substantially vitiates the computations. When such figures are not taken into account, or are unknown, DCF valuation becomes meaningless.

20. That is, however, not the only incorrectness in the share premium valuation.

21. A plain look at the financial statements and the valuation computations will raise many red flags and must trigger investigations for any reasonable person. While the increase of debtors from Rs 7,01,26,264 (as on 31.3.2010) to Rs 61,45,13,889 (as on 31.3.2011), by almost 900%, should raise red flags, even the increase in creditors from Rs 6,00,34,819 (as on 31.3.2010) to Rs 40,69,01,328 (as on 31.3.2011), by almost 800%, is unusual. The turnover figure has gone up in this year from Rs 35.56 crores (as on 31.3.2010) to Rs 90.11 crores (as on 31.3.2011), i.e. by more than 250% which shows unusual spurt in the activity levels in this year. This increase in the activity level is to be taken with a pinch of salt. Any alarming increase in debtors and creditors *prima facie* point towards circular transactions which are purely on paper, and any unusual level of increase in turnover is to be examined whether is it from isolated transactions or whether this constitutes a lasting increase in the times of come as well. Such figures can only be taken as reliable after proper investigations, and not at the face value without further probe. Yet, in the valuation under DCF method, not only this turnover figure is taken as a base figure, but the valuation also assumes that this figure will further keep on growing by 10% each year, and that despite such an increase, the profit after tax will continue to be at 4.25% on the turnover which is exactly the same as in the financial year ending 31st March 2011. Except for a capital investment of Rs 8 crores in the financial year 2010-11, no increase in investments is provided for. It is also not clear as to on what basis does the valuer come to the conclusion that only additional investment required by the company is Rs 8 crores. By any standard these are very optimistic computations particularly when the shareholder has no control in the company even though its shareholding is 10%. The investment so made, in the usual course of business, does not make any sense at all. The share premium, at which the shares are issued, is wholly unrealistic.

22. The valuation report submitted before us does not inspire any faith and even a simple cross reference to the financial statements of the assessee company would show that cash inflows are exaggerated by 13,000% and then discounted accordingly. The assumption in the valuation report are unrealistic, and the base figure itself, being 250% increase over immediately preceding year, is doubtful.

23. The explanation for the share premium in the shares of the assessee company does not, for the detailed reasons set out above, meet our approval. As observed by Hon'ble Supreme Court, in the case of **NRA Iron and Steel Pvt Ltd** *(supra)*, "**The assessee is under**

a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee", and once his explanation for premium is rejected, for this reason alone, the addition under section 68 is justified. We have several additional reasons to uphold the impugned addition.

24. Undoubtedly, the company investing in the assessee company, i.e. RVPL, itself is owned by some other entities and the actual investors are thus not known in a transparent manner. The assessee does not throw any light beyond submitting the financial statements of the company investing shares. The genuineness of investment is far from established for this reason as well.

25. When we see the bank account of the Rohini Vyapar Pvt Ltd, we find that this company had paid amounts of Rs 30,60,203 and Rs 1,06,69,475 on 27th October 2010 but within a week prior thereto, the clearing cheques from different companies on 21st October (Rs 115 lakhs), 23rd October (Rs 50.67 lakhs) and 26th October (Rs 25 lakhs). Similarly, when payments were made to the assessee company on 7th February 2011 (Rs 100 lakhs), 15th February (Rs 100 lakhs) and 26th February (Rs 15 lakhs), immediately preceding transaction entries (on 7th January though) are for repayment credits. That leaves the net balance of Rs 45,755.07 and that is where it remains for a few weeks before another cycles of circular transactions begin. Similarly, before beginning of these circular transactions, as on 28th August 2010, the bank balance was Rs 2,573.40. These factors donot inspire any confidence about genuineness of the investing company in its own right, and, quite contrary thereto, it looks like a shell company acting as a conduit, in fact one of the several layers of conduit entities, acting for unknown beneficial owners. The explanation of the assessee for genuineness of transaction cannot be accepted for this reason also.

26. All these factors regarding analysis of financial statements, analysis of bank account transactions and analysis of the nature and price of investment, Rohini Vyapar's investments in the shares of the assessee company, at 900% of face value and by entering into circular transactions, does not seem to a bonafide transaction. In view of the detailed analysis above, we are unbale to accept the plea of the assessee that it is a genuine transaction.

27. The position about transaction of Manbhawan Commercial Pvt Ltd does not seem to be any better.

28. The MCPL does not have any income at all, and aggregate of entire expenses incurred by the company in the whole year is just Rs 30,787. Once again, no telephone expenses, not even salaries paid and no other major expenses. That's is quite unusual in the sense that a company practically without any business, except for investing in the assessee company at 900% premium, was also able to issue shares at such a huge premium. What business was the assessee involved in so as to fetch this kind of a premium. That is contrary to

preponderance of probabilities about a genuine transaction. The very foundation of the investment in the assessee company is itself out of the normal commercial world. We have, for the detailed reasons set out above, rejected the justification for premium of 900% even in the assessee company.

29. The equity share capital of this company is only Rs 14 lakhs, which is apparently issued at a premium of Rs 507 lakhs. Out of the funds so raised, Rs 474 lakhs are invested in the share application money and Rs 42.10 lakhs as advance. Once again, much more than 90% of funds are invested in the share application money with the assessee company- something typical of a conduit or shell company.

30. An analysis of bank statement shows that Manbhawan Commercial receives Rs 40 lakhs from one Nexcare Agency on 16 July 2010, Rs 55 lakhs from Campus Impex on 16th July 2010, and, on that very day pays, by bank transfer, Rs 95 lakhs to the assessee company. Similarly, on 23rd July and 24th July, Manbhawan Commercial receives Rs 55 lakhs and Rs 25 lakhs from Nexcare Aencies, and immediately thereafter, on 26th July 2010, pays Rs 80 lakhs to the assessee company. On 29th July, Manbhawan receives Rs 20 lakhs from Bliss Dealcom and on 29 July 2010, receives Rs 30 lakhs from Nexcare Agnecies on 30 July 2010, and immediately thereafter, on 30 July 2010, pays Rs 50 lakhs to the assessee company. On 12th August, Manhawan receives Rs 40 lakhs from Campus Impex and Rs 60 lakhs from Nexcare Agencies, and, on the very next day, i.e. 13 August 2010, pays over Rs 100 lakhs to the assessee company. The same is the position with respect to receipts of Rs 50 lakhs each from Nexcare Agencies and Campus Impex on 17th August, and subsequent payment of Rs 100 lakhs to the assessee company.

31. Clearly, all these transactions are circular transactions with opacity about the ultimate owners as evident from the fact that even the financial statements and bank statements of Nexcare Agencies and Campus Impex show similar features- negligible revenues, shares issued at high premium and almost entire fund available passed on to other entities, and predominantly circular transactions, with low independent balances. It is a complex web of companies through which the investments in question are made, issued at unrealistic premium justified by academic and patently incorrect calculations far divorced from the realities of commercial world, and the transactions are deceptive inasmuch as each layer of companies has the source of funds in some other layer of companies operating at another level. As we have noted earlier, the premium justification lacks merits and is already rejected. The premium calculations are based on such premises as no independent investor would ever adopt, and even the fundamental assumptions are incorrect and unreal. The movement of funds is not transparent and the ultimate beneficial owners of this investment in the assessee company are not even known, leave aside the reason for their making such a risky investment, at unjustified premiums and without any participation or management control despite huge size of investment vis-à-vis the size of the company in which investment

is made. The material on record does not reasonably evidence genuineness of the transactions.

32. In view of our this understanding of the situation, we are unable to accept the plea of the assessee that the transaction is a bonafide transaction. In view of these discussions, as bearing in mind peculiar facts of this case, we reject the explanation of the assessee with respect to genuineness of this transactions of investment by MCPL as well.

33. Learned counsel has contended that the companies from which the assessee has received the share subscription cannot be treated as shell companies or as lacking bonafides as the Government has not notified these companies as shell companies. That's not correct. A shell entity, as we have noted earlier, is generally an entity without any significant trading, manufacturing or service activity, or with high volume low margin transactions- to give it colour of a normal business entity, used as a vehicle for various financial manoeuvres. A shell entity, by itself, is not an illegal entity but it is their act of abatement of, and being part of, financial manoeuvring to legitimise illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities have every semblance of a genuine business- its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial manoeuvring for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. The two companies investing in the share capital of the assessee clearly fit this description. Given these facts, and given the ground realities of shell companies facilitating such manoeuvrings, the plea of the assessee cannot be accepted. We reject the same.

34. Let us now turn to the judicial precedents cited at the bar, and relied upon by the learned CIT(A).

35. Learned counsel has relied upon insertion of proviso to Section 68 being prospective in effect, and the decision of Hon'ble jurisdictional High Court in the case of **Gagandeep Infrastructure** *(supra).*

36. It is important to bear in mind that in the case of Gagandeep Infrastructure *(supra)*, the issue was not respect to genuineness of the transaction as Their Lordships had categorically noted that "**In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied**".

The situation thus was that even though the transaction was held to be genuine, the source of source was being sought to be examined on account of the amounts being 'big', and it was in this context that Their Lordships observed the proviso to Section 68 cannot be pressed into service in the years preceding the assessment year 2013-14. There cannot be, and there is no, quarrel with this proposition. In the present case, however, the genuineness itself is in doubt and it is for this reason that the matter has been examined with reference to further details about genuineness of the investor companies. What is being questioned is the bonafides of very investment, the stated share premium, the unusual pattern in the bank accounts and financial statements of the investor companies and all other related factors. We are, therefore, satisfied that this judicial precedent has no application on the facts of this case.

37. As regards the case of **Orchid Industries** *(supra),* that was a case in which the genuineness was rejected only for the reason that the assessee was unable to produce the persons investing in the share capital of the company and there was nothing else against the assessee so far as genuineness of the transaction was concerned, as evident from Their Lordship's observation to the effect that "**The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the assessee**". The situation before us materially different inasmuch as the analysis of balance sheet, as also other documents, shows lack of genuineness, and presence of the share applicants is not even an issue.

38. As regards the Hon'ble Supreme Court's judgment in the case of **Lovely Exports** *(supra),* Hon'ble Supreme Court has, after duly taking note of this decision and in the case of **NRA Iron and Steel Pvt Ltd** *(supra)*, observed that "**The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the Assessee. The assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee".** It cannot, therefore, be said that just because the assessee has received the share subscription monies from identified shareholders, the same cannot be taxed in the hands of the company itself- particularly when the placement of shares is private and the share premium is not justified. Nothing, therefore, turns on the reliance of Hon'ble Supreme Court's judgment in the case of Lovely Exports *(supra).*

39. So far as Hon'ble Bombay High Court's judgment in the case of **Creative World Telefilms** *(supra)* is concerned, that was a case in which the appeal was dismissed as no question of law arose for Their Lordship's consideration and genuineness of the transaction

was not even an issue before Their Lordships. The reliance on this decision is thus clearly misplaced.

40. In the case of **Paradise Inland Shipping** *(supra),* Hon'ble jurisdictional High Court had an occasion to deal with the question whether the companies investing in the assessee company could be said to be "fictitious Companies which are not existing" and the case of the revenue hinged on two witnesses which were not allowed to be cross examined by the assessee. The issue was thus confined to 'identity' and not 'genuineness' and the connotations of these expressions are quite different. Their Lordships categorically noted that "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" and held that "**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** *(emphasis supplied by us now)***, 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**". This issue has nothing to do with the fact situation that we are dealing with. It is genuineness of a transaction which is issue before us and it is not even the case of in the revenue that these companies, investing in share capital of the assessee company, did not exist. This decision is, therefore, not relevant in the present context.

41. A reference is then made to a large number of decisions by the coordinate bench. The approach adopted in these decisions may be slightly different from the approach adopted by us, but then, as we have noted earlier in our analysis, our approach has been approved by the Hon'ble Courts above, and we thus no reasons to deviate from the same. In any case, in none of these decisions, the related facts have not been analyzed in much detail and these decisions cannot be support to the proposition that such an analysis is uncalled for. Quite to the contrary thereto, Hon'ble Supreme Court, in the case of NRA Iron and Steel Ltd *(supra)*, have emphasized that the practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny, and that it would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee. Nothing, therefore, turns on the decisions of the coordinate benches which traverse a different path than the path so shown to us by Hon'ble Supreme Court. In any case, just because the coordinate benches, on inherently distinct facts that we were dealing with in respective cases,

did not see the necessity to go deep into the genuineness aspect and have taken certain things at face value, it does not mean that we have the liberty to decline to go into examining the genuineness aspect, when pattern of transactions, in our considered view, actually calls for such an examination in sufficient details- as is the guidance of Hon'ble Courts above, including the Hon'ble Supreme Court in NRA Iron & Steel Ltd *(supra).* The facts staring at us clearly warrant a thorough analysis of the material already on record, and undoubtedly we have powers to do so. As observed by a coordinate bench of this Tribunal, in the case of **Sabnis Ashok Anant v. ACIT [(2009) 29 SOT 29 (Pune)]**, "All the powers of someone holding a public office are powers held in trust for the good of the public at large. There is, therefore, no question of discretion to use or not to use these powers. It is so for the reason that when a public authority has the powers to do something, he has a corresponding duty to exercise these powers when circumstances so warrant or justify—a legal position which has the approval of Hon'ble Supreme Court".

42. Let us now move on to the plea taken up by the assessee against validity of reopening of the assessment, by invoking rule 27 of the Appellate Tribunal (Income Tax) Rules, 1963.

43. The basic case of the assessee is that since everything was examined in the original assessment proceedings, there was no justification for reopening the assessment. The assessee has further contended that since the Assessing Officer did not point out any lapses on the part of the assessee, in the reasons recorded for reopening the assessment, and since the assessment is reopened after four years from the end of the relevant previous year, the assessment could not have been validly reopened.

44. While we have reservations on the manner in which rule 27 is invoked, without even putting department to notice, since it raises a plea which is *ex facie* devoid of legal merits, er will deal with the plea on merits.

45. It is a case of reopened assessment and very specific and elaborate reasons for reopening the assessment, as set out in paragraph # 3 earlier in this order, but the assessee had objected to this reopening on the ground that "**on the facts and in the circumstances of the case and in law, the learned Assessing Officer erred in carrying reassessment proceedings under section 147, although the scrutiny assessment under section 143(3) was carried out in the case of the appellant and all the facts, including share application money received, were thoroughly verified by the Assessing Officer. As such, it is not a fit case for reassessment under section 147, the same may be quashed**".

46. Under rule 27, "**(t)he respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him**". Quite clearly, therefore, the scope of rule 27 is confined to a ground raised in the first appeal on any of the grounds which is decided against the assessee. There is a subtle distinction in the scope of rule 27 vis-s-vis scope of cross-objections inasmuch as while assessee can raise any ground,

including ground decided against him and a new or additional ground, in the cross-objections, the assessee can only take up the ground decided against him, by the CIT(A), under rule 27. The ground which is decided against the assessee is the ground as is noted above, and this ground is squarely covered, against the assessee, by Hon'ble Supreme Court's judgment in the case of **Phool Chand Bajrang Lal Vs ITO [(1993) 203 ITR 456 (SC)]**, wherein Their Lordships have, *inter alia*, observed as follows:

> ***Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be a disclosure of the 'true' and 'full' facts in the case and the ITO would have the jurisdiction to reopen the concluded assessment in such a case.*** *It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under section 147, on receipt of the information subsequently. The subsequent information on the basis of which the ITO acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific.*
>
> *16. It would in this connection be advantageous to take note of some of the other judgment of this Court wherein the position of law on this aspect has been clearly enunciated.*
>
> *17. In CIT v. T.S. PL. P. Chidambaram Chettiar [1971] 80 ITR 467 (SC), relied upon by Mr. Bhatnagar, the facts were quite similar to the facts in the present case.*
>
> *In that case, the father of the assessee, Palaniappa Chettiar, a money-lender had made various advances to one Nallathambi, a prominent landlord in Coimbatore District, on promissory notes. For the amounts due from him, Nallathambi had executed mortgage deed of some of his properties in favour of the assessee's father. On 14-12-1940, the mortgagee instituted a suit on the basis of the mortgage deed claiming a sum of Rs. 5,50,573, inclusive of principal and interest. On 19-9-1943, the claim was compromised and on 5-10-1943, a compromise decree for a sum of Rs. 3,50,000 in full and final satisfaction of the mortgagee's claim, was decreed. That debt was subsequently discharged. For the assessment year 1944-45, the assessee as karta of his Hindu undivided family, was assessed to income-tax on a total income of Rs. 78,556. While the assessment proceedings were pending before the ITO, Trichy, information was received by the assessing ITO from ITO, Erode, to the effect that the mortgagor had paid secretly to the mortgagee a sum of Rs. 1,50,000 during the year ending 9-4-1944 and that the said amount had not been included in the compromise decree. On enquiry by the ITO, Trichy, the assessee denied having received any such amount secretly. The assessment proceedings were then concluded accepting the statement of the assessee. The Assessing Officer, Trichy, however, made further enquiries into the matter and examined the party in the mortgage case, and came to the prima facie conclusion that a sum of Rs. 1,50,000 (secretly received) had escaped assessment by reason of the omission of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year 1944-45 during the original assessment proceedings. He, accordingly, issued a notice under section 34(1)(a) of the 1922 Act [corresponding to section 147] to the assessee. In reply to that notice, the assessee filed a return similar to the one filed earlier and denied having received Rs. 1,50,000 secretly from the mortgagor. That plea was not accepted by the ITO who included the additional sum of Rs. 1,50,000 in the income of the assessee, earlier determined for the assessment year 1944-45, and taxed him accordingly. On an appeal, the*

AAC set aside the order of the ITO and remanded the case for redoing the assessment after giving the assessee an opportunity to cross-examine the parties examined by the ITO, on the basis of whose statement he had come to the conclusion that a sum of Rs. 1,50,000 had been secretly paid to the mortgagee by the mortgagor. The ITO after giving the necessary opportunity to the assessee made fresh order of assessment including that the sum of Rs. 1,50,000, after holding that the said sum had escaped assessment on account of the omission of the assessee to disclose truly and fully the material facts at the time of original assessment.

The following three questions were referred for the opinion to the High Court:

"1. Whether assessment under section 34 was valid and proper?

2. Whether the Income-tax Officer rightly acted in giving effect to the order of the Appellate Assistant Commissioner setting aside the assessment to redo the same according to law after giving an opportunity to the appellant to place all his cards before the department ?

3. Whether Rs. 1,50,000 is taxable as income of the year of account ?"

The High Court answered the first two questions against the assessee and the third question against the department. Both the assessee and the revenue filed appeals.

18. On behalf of the assessee, it was urged before this Court, that since at the time when original assessment proceedings, for the relevant year, were pending before the ITO, he had before him information given to him by the ITO, Erode regarding the secret transaction and yet he did not choose to act on that information or conduct any further enquiry on investigation before concluding the assessment, it was not open to him thereafter to initiate proceedings under section 34. A Bench of three learned Judges of this Court repelled the contention and observed thus :

> *"... On the facts found by the Tribunal, it is established that the assessee's father had clearly suppressed the receipt of Rs. 1,50,000 from the mortgagor. The assessee had a duty to disclose fully and truly all material facts necessary for his assessment. Herein we are not dealing with a case corning under section 34(1)(b). All that we have to see is whether the requirements of section 34(1)(a) are satisfied. This Court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191, ruled that to confer jurisdiction on the Income-tax Officer to take action under section 34(1)(a) two conditions must be satisfied, viz., (1) he has reason to believe that there was under-assessment, and (2) that he must have reason to believe that the under-assessment has resulted from non-disclosure of material facts. On the facts found, under-assessment is established and it is also established that the under-assessment was due to non-disclosure of material facts. There can be no doubt that at the time he issued notice under section 34(1)(a) on the basis of the material before him, the Income-tax Officer could have formed the necessary belief. In the notice issued the says that he had formed that belief. In our opinion, the requirements of section 34(1)(a) are fully satisfied. The fact that there was some vague information before the Income-tax Officer that the assessee's father had secretly received a sum of Rs. 1,50,000 from the mortgagor was by itself not sufficient to bring to tax that amount particularly in view of the fact that the assessee had stoutly denied that fact and the Court records did not support that information. It is true that the Income-tax Officer could have made further enquiry into the matter but the fact that he did not make any further enquiry does not take the case out of section 34(1) (a) particularly when the assessee had failed to place truly and fully all the material facts before him. . . ." (p. 471)*

> *The above observations apply with full force to the facts of the present case and also go to show as to how the judgment in Burlop Dealers Ltd. 's case (supra) is required to be understood.*

19. Again, in A.L.A. Firm v. CIT [1991] 189 ITR 285, a three Judges Bench of this Court, to which one of us (S.C. Agrawal, J.) was a party, after an elaborate discussion of the subject opined that the jurisdiction of the ITO to reassess income arises if he has in consequence of specific and relevant information coming into his possession subsequent to the previous concluded assessment, reason to believe, that income chargeable to tax had escaped assessment. It was held that even if the information be such that it could have been obtained by the ITO during the previous assessment proceedings by conducting an investigation or an enquiry but was not in fact so obtained, it would not affect the jurisdiction of the ITO to initiate reassessment proceedings, if the twin conditions prescribed under section 147 are satisfied.

20. From a combined review of the judgments of this Court, it follows that ***an ITO acquires jurisdiction to reopen assessment under section 147(a) read with section 148 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income-tax has escaped assessment.*** *He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the ITO, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non specific information. To that limited extent, the Court may look into the conclusion arrived at by the ITO and examine whether there was any material available on the record from which the requisite belief could be formed by the ITO and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the ITO at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent Information, the ITO arrives at a conclusion, after satisfying the twin conditions prescribed in section 147(a) , that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. The High Courts which have interpreted Burlap Dealers Ltd. 's case (supra)as laying down law to the contrary fell in error and did not appreciate the import of that judgment correctly.*

21. ***We are not persuaded to accept the argument of Mr. Sharma that the question regarding truthfulness or falsehood of the transactions reflected in the return can only be examined during the original assessment proceedings and not at any stage subsequent thereto. The argument is too broad and general in nature and does violence to the plain phraseology of sections 147(a) and 148 and is against he settled law by this Court. We have to look to the purpose and intent of the provisions. One of the purposes of section 147, appears to us to be, to ensure that a party cannot get away by willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say 'you accepted my lie, now your hands are tied and you can do nothing'. It would be travesty of justice to allow the assessee that latitude.***

47. Quite clearly, therefore, merely because the matter has been examined in the original assessment proceedings, it cannot be said that the reassessment proceedings cannot be initiated because, as noted above, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be a disclosure of the 'true' and 'full' facts in the case and the Assessing Officer would have the jurisdiction to reopen the concluded assessment in such a case. It is also to be noted that even when the Assessing Officer the requirement of proviso to Section 147 stands fulfilled in the present case inasmuch as admittedly there was material with the Assessing Officer which *prima facie* indicated that the share capital issuance at huge premium was a bogus transaction and mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be a disclosure of the 'true' and 'full' facts in the case and the Assessing Officer would have the jurisdiction to reopen the concluded assessment in such a case. It is also important to bear in mind the fact that the requirement of proviso to Section 147 is that "where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, **unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee** to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or **to disclose fully and truly all material facts necessary for his assessment, for that assessment year**" but then when a transaction, on the basis of subsequent information is found to be a bogus transaction, as is judicially settled position, the mere fact that it was examined in the course of the original assessment proceedings would not come in the way of initiation of reassessment proceedings. A true and full disclosure is *sine qua non* for seeking the protection of proviso to Section 147 but every disclosure is not and cannot be treated to be a true and full disclosure. A disclosure may be a false one or true one. It may be a full disclosure or it may not be. A partial disclosure may very often be a misleading one. In **Shri Krishna (P.) Ltd. vs. ITO [(1996) 221 ITR 538 (SC)]**, Their Lordships have observed that "**Now, what needs to be emphasised is that the obligation on the assessee to disclose the material facts - or what are called, primary facts - is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full - 'fully and truly'. A false assertion, or statement, of material fact, therefore, attracts the jurisdiction of the ITO under section 34/ 147. …….It is necessary to remember that we are at the stage of re-opening only. The question is whether, in the above circumstances, the assessee can say, with any justification, that he had fully and truly disclosed the material facts necessary for his assessment for that year. …… Indubitably, whether a loan, alleged to have been taken by the assessee, is true or false, is a material fact - and not an inference, factual or legal, to be drawn from given facts. …….Does it not furnish a reasonable ground for the ITO to believe that on account of the failure - indeed not a mere failure but a positive design to mislead - of the assessee to disclose all material facts, fully and truly, necessary for his assessment for that year, income has escaped assessment ? We are of the firm opinion that it does. It is necessary to reiterate that we are now at the stage of the validity of the notice under section 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the ITO to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind**" . It has been thus held that what is required is a full and true disclosure of all material facts necessary for making assessment for that year.

Clearly, that was not the case. As noted by the Assessing Officer at para 2.9 of the assessment order, Hon'ble Bombay High Court's judgment dated 24th December 2014, in the case of **Om Vinyl Pvt Ltd**, "**A disclosure, even if full, may not be true. All information may be furnished which are necessary for assessment. Yet, if this disclosure is not true, it would not satisfy the test of true and full disclosure, and, therefore, assessee's contention that it has disclosed all the facts, during original assessment, cannot be considered as true**". Nothing has been brought on record to show inapplicability of these observation of Hon'ble jurisdictional High Court, which, in our considered view, directly apply to the facts of this case. The conclusions arrived at by the learned CIT(A), in rejecting the ground of appeal raised by the assessee with respect to validity of reassessment proceedings, was. therefore, correct and we approve the same.

48. Learned counsel, nevertheless, raises some more grounds with respect to reopening of the assessment. Such issues are beyond the scope of rule 27 and need not, therefore, be entertained. What rule 27 envisages is supporting the order even "**on any of the ground decided against him**", but that does not allow the respondent to raise the new grounds which were not raised earlier. As the law stands, the new grounds of appeal can be raised only by the appellant or by the cross-objector. The assessee is neither in appeal nor in cross-objections. We are therefore not inclined to admit any additional or new grounds in the inherently limited scope of rule 27. Be that as it may, even on merits or these arguments raised before us, the assessee has no case. We have noticed that the assessment is reopened specifically for the reason that the assessee company was found to be, based on the basis of 'information from credible sources' that Rohini Vyapar Pvt Ltd was recipient of funds from certain other companies which, through multiple layers of intervening companies, have its origin from certain cash deposits in ICICI Bank branches, and that the assessee company was a beneficiary of such multiple layer routing of the monies through a complex web of shell companies. This information is certainly a good basis for reopening the assessment and taking a relook at the whole thing. In a materially similar situation, Hon'ble Gujarat High Court, in the case of **Aradhana Estate Pvt Ltd Vs DCIT [(2018) 404 ITR 105 (Guj)]** and dealing with similar contentions, has observed as follows:

> *7. We have reproduced the reasons recorded by the Assessing Officer for reopening the assessment. In such reasons, he pointed out that the information was received from the investigation wing of the department at Calcutta regarding shell companies which had given accommodation entries for share premium to Surat based companies. A list of 114 Calcutta based companies was provided which had given accommodation entries to such Surat based companies. Statements of many entry operators and dummy Directors recorded during various search and seizure operation, survey operation and investigation were checked. The Assessing Officer thereupon proceeded to record that " On perusal of data so provided by the DDIT (Inv) Unit-3(1), Kolkatta, it is noticed that during the period under consideration, the assessee company has accepted share capital/share premium from the following entries/parties which have been proved to be shell companies based on the investigation conducted by the DDIT(Inv) Unit-3(1), Kolkatta". Underneath, he provided a list of 17 companies who had transacted with the assessee company during the year under consideration and were alloted equity shares by purported investment of sizeable share capital and share premium amounts. On verification of such materials, the Assessing Officer noted that the assessee had received share capital/share premium amount, amounting to Rs. 14.76 crores. Since the investor companies were found to be shell companies indulging in*

providing accommodation entries, the Assessing Officer was of the opinion that the share capital/share premium claimed to have been received from the company by the assessee was not genuine. Amount is nothing but assessee's own money introduced in the garb of share capital/share premium from the shell companies and therefore, such amount is liable to be taxed under section 68 of the Act. He therefore, recorded his satisfaction that the income to the tune of Rs. 14.76 crores had escaped assessment and that this was due to the assessee having failed to disclose truly and fully all facts.

8. Section 147 of the Act provides inter-alia that if the Assessing Officer has the reason to believe that any income chargeable to tax has escaped assessment, he may subject to the provisions of section 148 to 153 of the Act, assess or reassess such income. Proviso to section 147 of-course requires that where the assessment under sub-section (3) of section 143 of the Act has been made for the relevant assessment year, no action shall be taken under this section after the expiry of the four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on part of the assessee to make return under section 139 or in response to a notice issued under sub-section (1) of section 142 or 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. In this context, it is well settled that the requirement of full and true disclosure on part of the assessee is not confined to filing of return alone but would continue all through out during the assessment proceedings also. In this context, the materials on record would suggest that the Assessing Officer had received fresh information after the assessment was over prima facie suggesting that sizeable amount of income chargeable to tax in case of the assessee had escaped assessment and that such escapement was on account of failure on part of the assessee to disclose truly and fully all material facts. The Assessing Officer formed such a belief on the basis of such materials placed before him and upon perusal of such material. This is not a case where the Assessing Officer was reexamining the materials and the documents already on record filed by the assessee along with the return or subsequently, brought on record during the assessment proceedings. It is a case where entirely new set of documents and materials was placed for his consideration compiled in the form of report received from the investigation wing. Such material was perused by the Assessing Officer and upon examination thereof, he formed a belief that the petitioner company had received share application and share premium money from as many as 20 different investor companies who were found to be shell companies and indulging in giving accommodation entries. From our view point, the Assessing Officer had sufficient material at his command to form such a belief. Such materials did not form part of the original assessment proceedings and was placed before the Assessing Officer only after the assessment was completed. Since on the basis of such materials, Assessing Officer, as we have recorded, came to a reasonable belief that income chargeable to tax had escaped assessment, merely because these transactions were scrutinised by the Assessing Officer during the original assessment also would not preclude him from reopening the assessment. His scrutiny during the assessment will necessarily be on the basis of the disclosures made by the assessee.

9. With these foundational conclusions, we may deal with the contentions of the counsel for the petitioner :

10. The contention that there was no failure on part of the assessee to disclose truly and fully facts cannot be accepted. The Assessing Officer, as noted, received fresh material after the assessment was over, prima facie, suggesting that the assessee company had received bogus share application/premium money from number of shell companies.

11. Merely because the transactions in question were examined by the Assessing Officer during the original assessment would not make any difference. The scrutiny was on the basis of disclosures made and materials supplied by the assessee. Such material is found to be prima facie untrue and disclosures not truthful. Earlier scrutiny or examination on the basis

of such disclosures or materials would not debar a fresh assessment. Each individual case of this nature is bound to have slight difference in facts. Judgement of Delhi High Court in case of Allied Strips Ltd. (supra) does not suggest that merely because a particular issue was examined during the original assessment proceeding, the Assessing Officer would be debarred from resorting to reopening of the assessment, even if he had sufficient fresh materials at his command, to form a reasonable belief that the assessee had made incorrect disclosures or had not made full disclosures which would have a vital bearing on the assessment of his income. If that is the ratio, counsel for the petitioner wishes to cull out from such judgment, we record our respectful disagreement. In case of Yogendrakumar Gupta (supra), the Court rejected a petition challenging the notice of reopening which was issued beyond a period of four years from the end of relevant assessment year, in which also one of the grounds was that the issue was previously scrutinised during the assessment proceedings. The Court observed as under :

"16. Ostensibly, thus, there was disclosure and the occasion would not arise to term this as the assessee not having disclosed fully and truly all the material facts necessary for assessment. However, in essence, if the unsecured loans obtained from Basant Marketing Pvt. Ltd. from the material supplied by them, the DCIT, Kolkata reveals that the same was as a result of accommodation entry in the form of loans and advances from Basant Marketing Pvt. Ltd. to the tune of Rs. 8.71 crore, the case of the assessee would surely be covered under the said provision of law as it would not amount to full and true disclosure on the part of the assessee.

At this stage, the reasons recorded shall have to be regarded, which have been based on the information contained in the report of the DCIT, Kolkata, dated March 24, 2013, wherein it had been noticed that the assessee company obtained accommodation entry in the form of loans and advances from Basant Marketing Pvt. Ltd. and, therefore, the Assessing Officer based his reason to believe that the income chargeable to tax had escaped the assessment.

** **

17. In the post notice correspondence dated March 05, 2014, it has been stated by the Assessing Officer that Basant Marketing Pvt. Ltd. provided accommodation entry to various companies, where assessee company is one of them. Basant Marketing Pvt. Ltd. is a dummy company of one Shri Arun Dalmia and substantial material is found to base such reasons recorded during the search by CBI, Mumbai and, therefore, the Assessing Officer issued a notice to show cause as to why the said amount of Rs. 8.71 crore received from Basant Marketing Pvt. Ltd. should not be treated as cash credit under section 68 of the Act.

21. This Court has examined the belief of the Assessing Officer to a limited extent to inquiry as to whether there was sufficient material available on record for the Assessing Officer to form a requisite belief whether there was a live link existing of the material and the income chargeable to tax that escaped assessment. This does not appear to be the case where the Assessing Officer on vague or unspecific information initiated the proceedings of reassessment, without bothering to form his own belief in respect of such material. We need to notice that the Joint Director, CBI, Mumbai, intimated to the DIT (Investigation), Mumbai. A case is registered against Mr. Arun Dalmia, Harsh Dalmia and during the search at their residence and office premises, the substantial material indicated that 20 dummy companies of Mr. Arun Dalmia were engaged in money laundering and the income-tax evasion. The said entities included Basant Marketing Pvt. Ltd. also. From the analysis of details furnished and the beneficiaries reflected, which are spread across the country, the CIT, Koklata, suspected the accommodation entry related to the assessment year 2006-07 as well, this information has been provided to Director General of Income-tax, Kolkata, who in turn, communicated to the Chief Commissioner of Income-tax, Ahmedabad. Further revelation of investigation as could be noticed from the record examined (file) deserves no reflection in this petition. Insistence on

the part of the petitioner to provide any further material forming the part of investigation carried out against Dalmias also needs to meet with negation, as the law requires supply of information on which Assessing Officer recorded her satisfaction, without necessitating supply of any specific documents. The proceedings initiated under section 147 of the Act would not be rendered void on non-supply of such document for which confidentiality is claimed at this stage, following the decision of the Delhi High Court in case of Acorus Unitech Wireless (P.) Ltd. (supra). Assumption of jurisdiction on the part of the Assessing Officer is since based on fresh information, specific and reliable and otherwise sustainable under the law, challenge to reassessment proceedings warrant no interference."

12. In case of Jayant Security & Finance Ltd. v. Asstt. CIT [Special Civil Application No.18921/2017, order dated 12.2.2018], this Court observed as under :

> *"8. The question of change of opinion and failure on the part of the assessee to disclose truly and fully all material facts, in the present case are closely connected. Undoubtedly, as noted earlier, the Assessing Officer during the original assessment had examined the transactions. However, such examination would necessarily be on the basis of disclosures made by the assessee in the return filed and during the scrutiny assessment. If the Assessing Officer has information to form a reasonable opinion that prima facie the entire transaction itself was sham and bogus, as reference to such transaction during the original assessment and raising certain queries in this respect would not prevent him from reopening the assessment on the principle of change of opinion. As noted, the opinion would be formed on the basis of disclosures. When disclosures are found to be prima facie untrue, the opinion formed earlier would not prevent Assessing Officer from examining the issue. In the present case, as noted, Assessing Officer received additional information after the original assessment was over, on the basis of which he formed a belief that the entire transaction was a sham transaction. At this stage, where the Court is examining the validity of notice of reopening, it is not necessary that the Assessing Officer must have conclusive evidence to hold that invariably additions would be made in the income of the assessee. What is required is the reason to believe that income chargeable to tax as escaped assessment. Sufficiency of the materials in the hand of the Assessing Officer which enabled him to form such a belief would not be examined. A reference in this respect is made to a decision of the Supreme Court in the case of Asstt. Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers P. Limited, reported in [2007] 291 ITR 500."*

13. The next contention that the Assessing Officer did not demonstrate any material enabling him to form a belief that income chargeable to tax has escaped assessment is fallacious. The Assessing Officer recorded detailed reasons pointing out the material available which had a live link with formation of belief that the income chargeable to tax had escaped assessment. At this stage, as is often repeated, we would not go into sufficiency of such reasons. In this context, reference can be made to decision of Supreme Court in case of Raymond Woolen Mills Ltd. (supra). In case of Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500/161 Taxman 316 (SC), it was observed as under :

> *"The expression reason to believe in section 147 would mean cause or justification. If the Assessing Officer has cause or If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. What is required is reason to believe but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the*

escapement is not the concern at that stage. This is so because the formation of belief is within the realm of subjective satisfaction of the Assessing Officer."

14. Section 68 of the Act, as is well known, provides that 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 Assessing Officer, satisfactory, the sum so credited maybe charged to income-tax as the income of the assessee of that previous year. That the share application money received by the assessee from above-noted companies was only by nature of accommodation entries and in reality, it was the funds of the assessee which was being re-routed. Undoubtedly. Section 68 of the Act would have applicability. Proviso added by the Finance Act 2012 with effect from 1.4.2013, does not change this position. Proviso reads as under :

'68....

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

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

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

15. As per this proviso, where the assessee is a company and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, explanation offered by the assessee company shall be deemed to be not satisfactory, unless the person in whose name such credit is recorded in the books of the company also offers an explanation about the nature and source of sum so credited and such explanation in the opinion of the Assessing Officer has been found to be satisfactory. Essentially, this proviso eases the burden of proof on the Revenue while making addition under section 168 with respect to non genuine share application money of the companies. Even in absence of such proviso as was the case governing the periods with which we are concerned in the present case, if facts noted by the Assessing Officer and recorded in reasons are ultimately established, invocation of section 68 of the Act would be called for.

16. The contention that the Assessing Officer had merely and mechanically acted on the report of the investigation wing also cannot be accepted. We have reproduced the reasons recorded by the Assessing Officer and noted the gist of his reasons for resorting to reopening of the assessment. We have recorded that the Assessing Officer had perused the materials placed for his consideration and thereupon, upon examination of such materials formed a belief that income chargeable to tax had escaped assessment. In case of Pr. CIT v. Gokul Ceramics [2016] 241 Taxman 1/71 taxmann.com 341 (Gujarat), similar contention was raised by the counsel for the assessee contending that the Assessing Officer had acted mechanically on the investigation carried out by the Excise department and not formed his independent belief. Such a contention was rejected making the following observations :

"9. It can thus be seen that the entire material collected by the DGCEI during the search, which included incriminating documents and other such relevant materials, was alongwith report and show-cause notice placed at the disposal of the Assessing Officer. These materials prima facie suggested suppression of sale consideration of the tiles manufactured by the assessee to evade excise duty. On the basis of such material, the Assessing Officer also

formed a belief that income chargeable to tax had also escaped assessment. When thus the Assessing officer had such material available with him which he perused, considered, applied his mind and recorded the finding of belief that income chargeable to tax had escaped assessment, the re-opening could not and should not have been declared as invalid, on the ground that he proceeded on the show-cause notice issued by the Excise Department which had yet not culminated into final order. At this stage the Assessing Officer was not required to hold conclusively that additions invariably be made. He truly had to form a bona fide belief that income had escaped assessment. In this context, we may refer to various decisions cited by the counsel for the Revenue.

10. In case of Central Provinces Manganese Ore Co. Ltd. v. Income Tax Officer, Nagpur (supra) the Supreme Court noted that in case of the assessee which had an office in London, this Customs authority had come to know that the assessee had declared very low price in respect of the consignment of Manganese exported by them out of India. After due inquiries and investigations, the Customs authorities found that the assessee was systematically under-voicing the value of Manganese as compared with the prevailing market price. The Income Tax Officer on coming to know about the proceedings before the Customs Collector in this respect issued notice for reopening of the assessment. In the reasons that the Assessing Officer relied on the facts as found by the Customs Authorities that the assessee had under-voiced goods during export. Under such circumstances, upholding the validity of the notice for reopening, the Supreme Court held and observed as under:

"So far as the first condition is concerned, the Income Tax Officer, in his recorded reasons, has relied upon the fact as found by the Customs Authorities that the appellant had under invoiced the goods it exported. It is not doubt correct that the said finding may not be binding upon the income tax authorities but it can be a valid reason to believe that the chargeable income has been under assessed. The final outcome of the proceedings is not relevant. What is relevant is the existence of reasons to make the Income Tax Officer believe that there has been under assessment of the assessee's income for a particular year. We are satisfied that the first condition to invoke the jurisdiction of the Income Tax Officer under Section 147(a) of the Act was satisfied."

49. Learned counsel has also submitted that there is no mention, in the reasons recorded for reopening, as to who has conducted the investigation. That, in our humble understanding, is not material inasmuch as there is no dispute that the Assessing Officer had a detailed investigation report- which could only have been prepared by the investigation wing, extracts from which have been extensively reproduced in the reasons recorded for reopening the assessment, which specifically mentions names of a large number of companies involved at various layers of the money routing transactions, their bank names and, in many cases, even bank account numbers- and the names of the assessee as also one of the companies which has been allotted equity shares of the assessee company, at a huge premium, also figure in the lists of these companies. The information is specific and it has fairly comprehensive details. Whether it is from the investigation wing or any other credible source, it would not make any material difference anyway. The existence of this material reasonably indicates towards income escaping assessment inasmuch as there is clear material to reasonably indicate that the assessee is beneficiary of a sophisticated racket involved in routing unaccounted monies to those willing to buy these entries. At the stage of reopening of the assessment, it is not necessary to prove escapement of income to the hilt; a reasonable indication to that effect would suffice. As observed by Hon'ble Supreme Court, in the case of **ACIT Vs Rajesh**

Jhaveri Stock Brokers Pvt Ltd [(2007) 291 ITR 500 (SC)], "**At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief**". The answer to this question is essentially, in our humble understanding, in positive, as the Assessing Officer had credible information to point towards the assessee being a beneficiary of this financial manoeuvring. As we have seen above, if the Assessing Officer has information to form a reasonable opinion that prima facie the entire transaction itself was sham and bogus, as reference to such transaction during the original assessment and raising certain queries in this respect would not prevent him from reopening the assessment on the principle of change of opinion. As noted, the opinion would be formed on the basis of disclosures. When disclosures are found to be *prima facie* untrue, the opinion formed earlier would not prevent Assessing Officer from examining the issue. That is the settled legal position as was also held in case of **Phool Chand Bajrang Lal** *(supra)* and which has been elaborated upon earlier in this order. However, as we have held earlier, all this is entirely academic inasmuch as limited scope of rule 27 does not permit a new ground being raised before us, and, as for the ground decided against the assessee by the CIT(A)- which is what can be called into question by invoking rule 27, it is covered against the assessee by binding judicial precedents discussed earlier.

50. In view of the above discussions, as also bearing in mind entirety of the case, we vacate the relief granted by the learned CIT(A) and restore the impugned additions made by the Assessing Officer. As we do so, however, we once again reiterate that the onus is on the assessee to prove genuineness of the transaction to the satisfaction of a fact finding authority- something which he has miserably failed in, to justify the huge share premium received by the assessee- something which the material on record does not justify, and to demonstrate that the facts and circumstances of the transaction as whole must point towards the impugned transaction being a regular transaction in the normal course of business- something which is clearly missing. Quite to the contrary, the assessee has proceeded on the basis as if the onus is on the Assessing Officer to demonstrate that the share subscriptions in question are *malafide* and cooked up and that the assessee has introduced his own unaccounted money by way of these share subscriptions; that is certainly incorrect. The burden is thus on the assessee to prove the nature and source of credits in his books of accounts, to the satisfaction of the Assessing Officer. Everything thus hinges on the explanation given by the assessee and on how acceptable is the explanation so given by the assessee. As to how should this explanation be examined, we find guidance from Hon'ble Supreme Court in the case **Durga Prasad More** *(supra)*, to the effect that "**Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities**" and bear in mind the fact that, as observed by Hon'ble Supreme Court, rejecting the theory that it is for alleger to prove that the apparent and not real, "**This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities.....Similarly the observation.....that if it is alleged that these ……were obtained through fraudulent means, it is upon the alleger to prove that**

it is so, ignores the reality. The transaction ….. takes place in secret and direct evidence about such purchase would be rarely available". Of course, as Hon'ble Supreme Court has observed, in the case of Durga Prasad More *(supra),* that "**human minds may differ as to the reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law**", and it is in this light, and being alive to the immense faith put in this Tribunal by Hon'ble Courts above, that we have taken the above call.

51. In the result, the appeal is allowed. Pronounced in the open court today on the 21st day of September, 2021.

Sd/- Sd/-
Vikas Awasthy **Pramod Kumar**
(Judicial Member) (Vice President)
Mumbai, dated the 21st day of September, 2021

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai